



CITY of MEDINA

Board of Zoning Appeals

Special Meeting
July 8, 2015

Board of Zoning Appeals

Meeting Date: July 8, 2015

Meeting Time: 6:00 pm

Present: Bert Humpal, Kris Klink, Earl Harris (Alternate), Jim Bigam, Mark Pinskey, Jonathan Mendel, (Community Development Director), Sandy Davis (Administrative Assistant)

Absent: Mark Williams

Announcements: None

Old Business: None

1. Z15-18 865 W. Liberty Fechko Excavating, Inc. APPEAL

Burt Humpal, Chairman, called the meeting to order at 6:06 p.m. Mr. Humpal stated this is a special meeting for a continuation of Case #Z15-18. Mr. Humpal stated he would like to approve the minutes of the June 11th meeting at the July 9, 2015 regular meeting of the Board of Zoning Appeals. Mr. Humpal stated out of the best interest of everyone, he has suggested that the board hear the case from the beginning because two board members present this evening were not present for the June 11, 2015 meeting. Mr. Humpal stated in all fairness to everyone, he would like everyone to hear the same presentation tonight rather than trying to pick up mid-stream where the case left off. Greg Petersen, General Manager, Fechko Excavating, Inc., stated he has no problem with revisiting what was stated or presented to the board by the city at the last meeting. Mr. Petersen stated his recollection of the last meeting was that part of the presentation concluded and they do not expect there will be any additional information. Greg Huber, City Law Director, stated the city was not concluded with respect to the entire presentation with Jonathan Mendel. Mr. Huber asked if that is what Mr. Petersen is saying. Mr. Petersen stated they were called to the podium so he assumed that the presentation was concluded. Mr. Huber stated he was called to the podium with respect to the question of a conflict involving one of the board members. Mr. Huber stated the city was not done with what they were presenting. Mr. Huber stated he still needs to have testimony from Dan Gladish, Chief Building Official for the City of Medina, and there are employees from FireDex that would like to have some input in the record with respect to what has occurred and that is what the city is going to do. Mr. Petersen stated that was fine. Mr. Petersen asked if the meeting is being recorded and if minutes are being taken. Mr. Huber stated the meeting is being recorded and a Court Reporter is also

present to take down the testimony. Mr. Petersen asked for a copy of both the recording and also the minutes.

Mr. Humpal asked the Court Reporter to swear in anyone and everyone wishing to give testimony this evening including Mr. Mendel. The Court Reporter swore in all who were intending to give testimony.

Mr. Mendel began his presentation. Mr. Mendel stated this meeting is regarding Case #Z15-18, Fechko Excavating, Inc., 865 W. Liberty, Medina, Ohio. Mr. Mendel stated the subject is an appeal of the Planning Director's Administrative decision. Mr. Mendel stated the subject property under which the Administrative decision was made is an I-1 Industrial District zoning. Mr. Mendel stated the subject area is in the center of the block with State Road to the east, Progress Drive to the north, and West Liberty Street to the south. Mr. Mendel stated the site is part of a larger site owned by Fechko Excavating Inc. which houses their company offices at 865 W. Liberty Street.

Mr. Mendel stated in April of 2015, city staff discovered that the applicant had been operating a concrete recycling crushing operation on the land. Mr. Mendel stated the applicant had purchased the land immediately adjacent to the east of the applicant's offices at 865 W. Liberty Street. Mr. Mendel stated once this operation was discovered, staff consulted with the applicant and reviewed the Planning and Zoning Code and conducted a site visit when the concrete crushing was occurring. Mr. Mendel stated after performing the investigation, staff (himself) concluded that the concrete recycling/crushing operation is defined as "Manufacturing-Heavy" in Section 1105.097 of the Planning and Zoning Code.

Mr. Mendel stated the specific definition language from the zoning code is shown on page one of the staff report. Mr. Mendel stated the particular section of the definition that is most applicable is the land use that uses processes that ordinarily create noise, and in this case, as well as dust, which is equivalent to smoke as listed in the definition.

Mr. Mendel stated he determined that this definition applied during a site visit with a company representative of the application, to the concrete recycling/crushing facility while it was operating.

Mr. Mendel stated they experienced the operation from each direction available, including adjacent properties and also on the property itself. Mr. Mendel stated from the visit, he determined that the noise levels and dust levels coming from the operation were from an operation that is normally creating noise and dust as shown in the definition for Heavy Manufacturing.

Mr. Mendel stated as part of his staff report at the time, he added a suggestion that Board Members witness the operation for themselves in order to see the operation first hand rather than hearing about it second hand.

Mr. Mendel stated for an appeal of an administrative decision, there are four categories for review that the Board of Zoning Appeals must evaluate in determining whether the decision will stand or be reversed. Mr. Mendel stated the following:

1. *Was the order by the Zoning Official arbitrary or capricious:* Mr. Mendel stated his analysis of the recycling/crushing land use was not arbitrary or capricious because he conducted a logical and reasonable process for analyzing the land use in relation to the Planning and Zoning Code.

Mr. Mendel stated after reviewing the I-1 Zoning District permitted and conditionally permitted use tables, and the Heavy Manufacturing definition vs the Light Manufacturing definition, and witnessing the operation from possible vantage points immediately to the west, north, south, and south, he confirmed that the operation uses processes that ordinarily create noise, and upon further review, dust as well.

2. *Was based on an erroneous finding of a material fact:* Mr. Mendel stated the administrative decision was not based on an erroneous finding of a material fact. Mr. Mendel stated staff (himself) specifically witnessed and heard the operation use processes that ordinarily create noise and dust.
3. *Was based on erroneous interpretation of this Ordinance or zoning law:* Mr. Mendel stated the decision was not based on erroneous information. Mr. Mendel stated the applicant's land use is not explicitly listed as concrete recycling/crushing in either the permitted or conditionally permitted use table in the I-1 Zoning District.

Mr. Mendel stated since any use of land must be classified by the Planning and Zoning Code, there are the two manufacturing categories, Heavy and Light which are specifically intended to encompass land uses not specifically listed in the I-1 zoning district.

4. *Constituted an abuse of discretion:* Mr. Mendel stated the administrative decision did not constitute an abuse of discretion. Mr. Mendel stated the interpretive discretion provided by the Planning and Zoning Code was not abused in this case because he used a logical and reasonable method for analyzing the Planning and Zoning Code as it relates to the zoning categorization of the applicant's concrete recycling/crushing land use.

Mr. Mendel stated with that, the Board of Zoning Appeals must weigh the above factors for the requested appeal and determine whether to reverse staff administrative decision to define the applicant's concrete recycling land use as "Heavy Manufacturing" as defined in Section 1105.0987 of the Planning and Zoning Code.

For the record, Mr. Huber stated his name as Greg Huber, Law Director for the City of Medina. Mr. Huber stated he has some questions for Jonathan prior to Mr. Fechko's Attorney's questions. Mr. Huber stated he will ask these questions at this time.

Mr. Huber: Jonathan how is it that you came to be aware of the concrete crushing operation at the property that had been purchased by the Fechko business?

Mr. Mendel: Mr. Mendel stated he was made aware through the Engineering and Building Departments for the City of Medina. Mr. Mendel stated there was a complaint provided by an adjacent property owner, FireDex, regarding the operation and how they perceived it as affecting their operation.

Mr. Huber: Now Fechko has a business located right on Rt. 18, is that correct?

Mr. Mendel: yes

Mr. Huber: What is the address of the actual business?

Mr. Mendel: Their business address is 865 W. Liberty Street.

Mr. Huber: Where is the concrete crushing operation?

Mr. Mendel: It is on a separate, unaddressed parcel immediately to the east of the property addressed as 865 W. Liberty Street.

Mr. Huber: And prior to the complaint in April, are you aware of anybody within the City Administration who had the understanding that there would be an ongoing concrete crushing operation at that parcel?

Mr. Mendel: Prior to April of 2015, he did not.

Mr. Huber: When did Fechko acquire this parcel?

Mr. Mendel: Looking at the transfer information and through the Medina County Auditor's website, it appears the transfer happened at the end of December, 2012.

Mr. Huber: Can you describe for the panel exactly what this operation amounts to?

Mr. Mendel: Witnessing it in the field, scrap concrete is brought to the site in large chunks and loaded with a front end loader into a hopper of a crushing machine. Mr. Mendel stated the crushing operation happens within an enclosed portion of the rock crushing machine, and then it comes out on what appeared to be an exposed conveyor. Mr. Mendel stated it is then offloaded into a pile, an exposed, open pile and is now smaller aggregate that can be used for other purposes.

Mr. Huber: So the large chunks of concrete are brought in, fed into the machine, and the machine essentially makes stone aggregate?

Mr. Mendel: Yes

Mr. Huber: Are there large piles at the location of this machinery?

Mr. Mendel: There were large piles of scrap material and processed aggregate.

Mr. Huber: What is the overall zoning classification of this particular parcel where the crushing operation occurs?

Mr. Mendel: The zoning district is I-1, and after witnessing it, as he stated in the staff report, he would classify it as "Heavy Manufacturing"

Mr. Huber: What would be the zoning ramifications of classifying this operation as Heavy Manufacturing?

Mr. Mendel: Under the I-1 Zoning District, Heavy Manufacturing is listed as a Conditionally Permitted Use in the I-1 District and would require approval by the City of Medina Planning Commission for a Conditional Zoning Certificate to operate there plus that would be for the use and then the development of the land would require a Site Plan Approval for the improvements to the plan which must also be reviewed and approved by the City of Medina Planning Commission.

Mr. Huber: Have any of those processes occurred thus far at this time?

Mr. Mendel: Those processes have not occurred.

Mr. Huber: If in fact this is Heavy Manufacturing, the Planning Commission would then have to pick up this issue, review it, and determine what conditions to place upon the use, is that correct?

Mr. Mendel: Yes

Mr. Huber: Who was the adjoining property owners that contacted you to bring this to the Planning Department's attention?

Mr. Mendel: A company named FireDex, which is immediately adjacent to the north of the subject parcel in which the concrete recycling had been occurring and they have an address off of Progress Drive.

Mr. Huber: Can you tell the board who FireDex is and what business do they have?

Mr. Mendel: FireDex is a manufacturer of personal safety equipment such as coats and jackets for fire protection personnel. Mr. Mendel stated they have a fairly clean system

inside their facility to prevent any contamination of their product. Mr. Mendel stated their concerns were raised because they had been getting a lot of excess dust into their filtration system in their HVAC.

Mr. Huber: What is important about the question of excess dust at the FireDex location, if anything?

Mr. Mendel: My understanding is that part of the process for creating their product is a sensitive, computerized system that helps cut the material and manufacturing the material as he understands it. Mr. Mendel stated that is sensitive to excessive dust.

Mr. Huber: I am going to hand you what is marked as "Exhibit 1" and ask you to identify that.

Mr. Mendel: This is an image from Google Earth. Mr. Mendel stated it is an image of a circled area of the Fechko property which is the subject property and also a smaller circle encircling the FireDex property immediately to the north.

Mr. Huber: Now this (Exhibit 1) was placed on an overhead when you were at the last hearing, is that correct?

Mr. Mendel: Yes

Mr. Huber: Did you put the circles on this Exhibit to show the location of the properties in question?

Mr. Mendel: I do not recall putting the circles on the exhibit

Mr. Huber: Do those circle portray that the lower circle to the south as the concrete crushing operation?

Mr. Mendel: Yes

Mr. Huber: And the smaller circle is the FireDex operation?

Mr. Mendel: Yes

Mr. Huber: What is the zoning classification at the FireDex operation?

Mr. Mendel: That property is zoned I-1, Industrial and under the definition of the zoning code, that would be considered Light Manufacturing.

Mr. Huber: That would be for FireDex?

Mr. Mendel: For FireDex

Mr. Huber: Why do you say that?

Mr. Mendel: Because it is an operation that does not ordinarily create noise or dust since it is wholly enclosed within the building that is currently there.

Mr. Huber: So I assume that "Exhibit 1" was the document you created to essentially show the location of FireDex in relation to the concrete operation, is that correct?

Mr. Mendel: Yes

Mr. Humpal requested that Exhibit 1 be circulated to the Board.

Mr. Huber: Did you receive any complaints from any other adjacent property owners with respect to the concrete crushing operation?

Mr. Mendel: I did receive input from a property immediately to the west of the concrete recycling, LowBrow Customs, which is located at 860 Progress Drive. Mr. Mendel stated the comments were that the operation witnessed by Tyler Malinky, the business owner, and his employees, have seen that it did generate dust when in operation and the wind bringing up large steady dust clouds when blowing from that location. Mr. Mendel stated they are stating that the operation does create dust while it is operating.

Mr. Huber: Did he contact you essentially to register a complaint or was it just information?

Mr. Mendel: It was generated from an initial meeting that we had discussed with him looking to do a small addition to his site. Mr. Mendel stated at that time he asked Mr. Malinky the question if they had any concerns. Mr. Mendel stated that was not an official record so on June 11, 2015, I sent him an e-mail asking if he would like to either come and provide testimony at the June 11, 2015 BZA meeting for this case. Mr. Mendel stated he was not able to so he sent me an e-mail. Mr. Mendel stated yesterday, June 7, 2015, I sent another e-mail to Mr. Malinky asking him if he would like to come to this meeting, July 8, 2015 and Mr. Malinky stated he would not attend but the comments from June 11th can stand and continue to be his position. Mr. Mendel stated it was not necessarily a complaint but more of just a statement of fact.

Mr. Huber: Did you inquire and determine as to approximately when this concrete operation actually started up from the folks at Fechko?

Mr. Mendel: During the initial discussions at the end of April about when it had occurred and how long and frequency, it was indicated by Greg Petersen, a representative from Fechko that they had been doing it on some scale at their 865 West Liberty site and then from aerial photograph evidence from Google Earth from June of 2014, I witnessed it. Mr. Mendel stated it was clear on the aerial photograph that the operation had moved onto the subject parcel immediately to the east and off of the 865 West Liberty property.

Mr. Huber: Did you verify with Mr. Petersen this concrete crushing actually moved from the original business location over to the adjacent parcel?

Mr. Mendel: In my discussions with Mr. Petersen, he did say that they had been doing it since 2009 at the 865 West Liberty site which preceded them owning the subject parcel immediately to the east and then sometime between December of 2012 and June of 2014, the operation moved to the subject parcel.

Mr. Huber: Jonathan, when did the City of Medina adopt its current zoning code?

Mr. Mendel: It became effective in July of 2014.

Mr. Huber: Was there any permit or additional use granted with respect to this operation under the old zoning code as it existed before we adopted the current version?

Mr. Mendel: I found no evidence of a Conditional Zoning Permit or just zoning permit to allow it at the 865 W. Liberty site or the subject parcel.

Mr. Huber: Under our old code, prior to the current code, would we be required to classify this use and ask for a Conditional Use Permit from the user?

Mr. Mendel: I would have classified it as a Conditional Use under the previous zoning code and it would have had to go through the Conditional Zoning Review process.

Mr. Huber: So this particular use would require administrative review, even under the old code?

Mr. Mendel: Yes

Mr. Huber: So up to this point in time, there really has been no actual review by the city, Planning Commission, or Board of Zoning Appeals with respect to this use at all, is that correct?

Mr. Mendel: Correct

Mr. Huber: Now my understanding is that as things progressed with the concrete crushing operation, a driveway or a temporary drive, was installed by Fechko that comes off of Progress Drive. Is that correct?

Mr. Mendel: Yes

Mr. Huber: Have you seen that?

Mr. Mendel: I have witnessed that and seen it in the field going from the north end of their operation on the subject parcel to the Progress Drive right-of-way.

Mr. Huber: Now on this overhead exhibit, can you draw where this temporary drive runs so that the panel has a clear idea as to what it is and where it comes from.

Mr. Mendel: Mr. Mendel marked the exhibit with what he perceives to be the location of the temporary drive. Mr. Mendel stated it approximately comes from the northwest corner of the larger portion of the parcel along a panhandle that runs north to the Progress Drive right-of-way.

Mr. Huber: What material is the temporary drive constructed of?

Mr. Mendel: It is constructed of a larger sized aggregate gravel.

Mr. Huber: It runs right alongside of the FireDex building to the west of the FireDex building, is that correct?

Mr. Mendel: It runs along the west perimeter of FireDex's property. FireDex's building is 70 to 100 feet east of the property.

Mr. Huber: Now along the west wall of the FireDex property, are there air intakes?

Mr. Mendel: There are several air intakes that draw air into their HVA system.

Mr. Huber: And as a part of your investigation, what is the purpose of the air intakes on the FireDex property?

Mr. Mendel: My understanding is that is part of the fresh air intake into the system and then it had a filter system to filter out any debris in the air to manage their internal HVA system.

Mr. Huber: Are you aware of Fechko coming to the City of Medina to ask permission to install a temporary driveway?

Mr. Mendel: There was no formal approval by the City of Medina for the temporary driveway.

Mr. Huber: Do you know approximately when the temporary drive was put in?

Mr. Mendel: My understanding, it was late fall of 2014.

Mr. Huber: Prior to late fall of 2014, how were the Fechko folks gaining access to the concrete crushing operation?

Mr. Mendel: I would presume that it would be coming from the south through their 865 W. Liberty property immediately to the east.

Mr. Huber: Were you able to learn why it was that the temporary drive was put in at all?

Mr. Mendel: I think it was just as part of the greater volume that may have been coming to this recycling site, given the city's Lake Road project that was contracted with Fechko.

Mr. Huber: Now if you have a driveway installed off of Progress Drive, does our City Ordinances require a curb cut?

Mr. Mendel: It does require a curb cut permit through the Engineering Department.

Mr. Huber: Did Fechko apply for a permit for a curb cut?

Mr. Mendel: My understanding is that they did not.

Mr. Huber: Was Fechko running heavy trucks across the City of Medina's curb without the curb cut?

Mr. Mendel: Yes

Mr. Huber: Do you have personal knowledge as to whether that activity caused damage to the curb?

Mr. Mendel: I do. On June 11th, Justin Benko, my assistant and I went out and took pictures of the site and have pictures of the damaged curb on Progress Drive which I have here in my hand. Mr. Humpal asked that the pictures be shared with the Board.

Mr. Huber: Do you have knowledge as to whether the use of the temporary drive would be heavy truck traffic, was it in and of itself, causing any difficulty for the FireDex people?

Mr. Mendel: Information provided from FireDex representatives is that the truck traffic was creating excessive dust that was being pulled into their HVA system.

Mr. Huber: Did you receive any information from the FireDex folks presenting to you evidence of the dust issue in their facility?

Mr. Mendel: Yes. There was an e-mail sent through Kimberly Rice, City of Medina Economic Development Director, showing evidence of the filters after three weeks, street damage, and information about the trucks as they went along this gravel driveway.

Mr. Huber: Now I handed you what is marked as "Exhibit 2". Are these photographs and information provided to you by the folks from FireDex?

Mr. Mendel: These pictures are the ones I received from FireDex.

Mr. Humpal asked if the bottom picture is not the FireDex property, but looks like the Osborne Concrete property?

Mr. Mendel: Yes, it is.

Mr. Huber: Jonathan, did you talk to the folks at Fechko about the temporary drive and ask them what that was there for and why they are not applying for a curb cut or advising as to how that is being utilized?

Mr. Mendel: I did ask Greg Petersen, representative from Fechko. It appeared that they were working under the presumption that they could install it as part of a waste site for the Lake Road project that was contracted with them for the Lake Road reconstruction project.

Mr. Huber: Now this is a contract that the City of Medina has with Fechko for Lake Road reconstruction, is that right?

Mr. Mendel: Yes

Mr. Huber: Now even if the city has a contract with respect to that project, would not a temporary drive require a permit for the curb cut if in fact that use is necessary?

Mr. Mendel: Yes, even though a contract can be issued, that still would require zoning approval of any improvements to the property and compliance with the curb cut permitting process.

Mr. Huber: What are the problems that you perceive with respect to the concrete crushing operation as it is affecting the people who have complained?

Mr. Mendel: I believe that the gravel driveway that is running from Progress Drive certainly can create a dust concern. Having witnessed it in the field, the construction of it was leveled off, the soil that was removed to level the drive was piled to the east of the drive, closer to the Fechko property and was not seeded but was exposed dirt. The proximity of the concrete recycling actual facility and the stock piles of waste material and created aggregate could create dust that could be blow to the north onto the property. I think remedies would be removal of the driveway along the Progress Drive and movement of the concrete recycling as far to the south and west of the subject property as possible to gain and plus some vertical landscape screening along the north and east property lines of the subject property to mitigate through vertical and horizontal screening as much as possible the negative impacts.

Mr. Huber: Have you talk to the FireDex folks about those possible solutions?

Mr. Mendel: I have not.

Mr. Huber: Is the concrete crushing operation in any way enclosed with a structure or building or anything along that line.

Mr. Mendel: It is not.

Mr. Huber: So it is completely out in the field?

Mr. Mendel: It is out in the open.

Mr. Huber: What is the prevailing wind in this area of Ohio?

Mr. Mendel: My understanding is it is from the west and southwest.

Mr. Huber: Given the fact that FireDex is located to the north of this operation they would probably be subject to a prevailing wind problem?

Mr. Mendel: Certainly from the southwest and certainly from the west given the temporary drive coming off Progress Drive.

Mr. Huber: What exactly is the difference between Heavy Manufacturing and Light Manufacturing in our code?

Mr. Mendel: The difference is a binary difference. Heavy Manufacturing is determined as "operation or use of land that has processes that ordinarily create noise, smoke, hazard, smoke". The Light Manufacturing is kind of the opposite of that in that it is a use of land that does not ordinarily create noise, smoke, dust, or hazard.

Mr. Huber: How big a chunk of concrete can this machine handle in terms of its hopper?

Mr. Mendel: I do not know.

Mr. Huber: A rough approximation?

Mr. Mendel: I would say probably 4 x 3 or 5 x 3 chunks.

Mr. Huber: So those are pretty large pieces of concrete to be loaded onto this machine and crushed?

Mr. Mendel: That's my understanding.

Mr. Huber: In your opinion, would a machine like this create a potential safety hazard, given the way it is operated?

Mr. Mendel: I don't believe that it could create a safety hazard, more as a potentially negative impact from noise or dust/smoke emanating from the operation which can easily blow into adjacent properties.

Mr. Huber: Did you actually hear the noise that this operation makes?

Mr. Mendel: I did on my visit accompanied by Greg Petersen with Fechko Excavating, I did witness and hear it create noise that was above ambient noise.

Mr. Huber: Can you hear this noise when you are off the property?

Mr. Mendel: I could hear it from the residential properties immediately to the east. It was the loudest from there because of the lesser sound attenuation created by the particular nature of the site at the time that I visited.

Mr. Huber: How far away were you when you made those observations?

Mr. Mendel: Approximately 200 feet. Having seen it from, being adjacent to it very close within, let's say 100 feet when I was on the site with Mr. Petersen, it made ordinarily created noise. When we witnessed it from the north, there was a stockpile of scrap material and that kind of helped attenuate the sound but then when we witnessed it from the east, at the residential property, there was no screen to attenuate the noise and it came ordinarily and distinct from the operation.

Mr. Huber: This is the noise from the grinding operation as it is grinding up the concrete?

Mr. Mendel: Yes.

Mr. Huber: Would you categorize this as annoying?

Mr. Mendel: I would characterize it as annoying if I had to be next to it for an extended period of time.

Mr. Huber: Loud?

Mr. Mendel: Loud enough to be annoying.

Mr. Huber: Does this operation create smoke and dust or fumes?

Mr. Mendel: Yes

Mr. Huber: And apparently the FireDex people are reporting that this smoke and dust actually is drifting off the property and affecting them?

Mr. Mendel: That is my understanding from the pictures that they provided and just my on-site discussions with them when I've been at their site.

Mr. Huber: You have a definitive opinion that this is a Heavy Manufacturing operation?

Mr. Mendel: Yes, it is clearly Heavy Manufacturing as defined in our zoning code.

Mr. Huber: And what is the basis for your opinion?

Mr. Mendel: The witnessing it in person when accompanied by Mr. Petersen, Fechko representative, that it was a use of land that ordinarily created noise and dust and fumes.

Mr. Huber: Have you explained your opinion and talked with the folks at Fechko about how you are looking at this situation?

Mr. Mendel: I have, I provided to them in writing with, in my opinion, sufficient delineation of my method of coming to that conclusion.

Mr. Huber: And to your knowledge do the folks at Fechko agree with your observation?

Mr. Mendel: They do not.

Mr. Huber: In your conversation with those folks, what is the source of the conflict as you understand it and what is the basis for that?

Mr. Mendel: My understanding is that they believe that it is not an operation that is creating excessive noise or excessive dust. The definition in the code doesn't use excessive, it just says it ordinarily creates noise. The processing of the waste concrete into new aggregate product is an operation that ordinarily generates noise and dust.

Mr. Huber: In your estimation, is there any way a large industrial concrete grinding operation that grinds slabs of concrete and makes it into aggregate cannot create dust or smoke to your knowledge?

Mr. Mendel: The only way that I could see that would be done is through mechanical attenuation by basically enclosing it in a building.

Mr. Huber: I appreciate you answering the questions that I had and the Attorney for Fechko probably has some questions.

Mr. Humpal asked as a matter of procedure do you want to do that or if there is other witnesses on behalf of the city, present them first.

Mr. Huber asked Mr. Petersen how he would like to proceed.

Mr. Petersen stated if the city is going to call witnesses to provide evidence that will allow you to evaluate the determination, we think we should do that now, that way we do not have to do that twice.

Mr. Huber called Dan Gladish, City of Medina Chief Building Official, to the podium. Mr. Gladish introduced himself.

Mr. Huber: Dan how did you become involved in looking at the issues presented with respect to the concrete grinding operation which is on the property adjacent to the Fechko business?

Mr. Gladish: On April 25, 2015, I received a phone call from FireDex, a John Karban, Director of Operations, who requested that I visit the site. Mr. Karban had a concern about the health, safety, and welfare of his employees and the possible contamination of his production line.

Mr. Huber: What was the basis for his concern?

Mr. Gladish: Dust concern.

Mr. Huber: And he told you that when he first talked with you?

Mr. Gladish: Yes. And then he requested that I visit the site to witness the concern in person, which I did immediately.

Mr. Huber: What did you do?

Mr. Gladish: I met with John Karban, their Maintenance Director and the Business Owner. We walked the site and tried to determine where the dust was coming into the facility. They have an air cleaning process which is units that hang from the ceiling, air purifiers. He wanted me to witness the filters on the inside how after two or three weeks, they were plugged with dust.

Mr. Huber: How many air intakes are there on the west side of that building?

Mr. Gladish: I'm going to say there are four large intakes and then there is a few HVAC units that also have fresh air intakes also so there are at least six.

Mr. Huber: From your own observations, how important is air circulation and clean air circulation to the FireDex Business?

Mr. Gladish: It is a wide open warehouse and there is probably 80 to 100 employees in there that are right in the flow of the air coming in through the west side of the facility and then draw out through the roof.

Mr. Huber: What observations, when you went to the FireDex facility, did you make?

Mr. Gladish: The Fechko operation was not in operation so I just walked around the site with the FireDex personnel and went inside and made a determination that there was an excessive amount of dust inside the facility.

Mr. Huber: Exactly what did you see?

Mr. Gladish: I seen the plugged filters and then some of the dust and stuff that was on top of the disconnect switches and stuff.

Mr. Huber: Any other observations that you made?

Mr. Gladish: No.

Mr. Huber: What additional steps did you take to look into this matter?

Mr. Gladish: I reached out to Fechko and asked if they would visit and meet with the FireDex people to discuss their concern. I also made several other site visits there within that week.

Mr. Huber: I am going to hand you what is marked as "Exhibit 3". Can you identify these photographs? I'll indicate for the record that these photographs are dated April 29, 2015.

Mr. Gladish: These are photos that I took on April 29, 2015. These photos were taken from the east side of the Fechko operation from the apartment complex. The photos show the concrete crushing operation in progress as they are loading the material into the hopper.

Mr. Huber: Based upon going out to look at the concrete crushing operation while it's occurring, did you make any observations with respect to noise?

Mr. Gladish: Yes.

Mr. Huber: What were your observations?

Mr. Gladish: A loud noise from the crushing machine itself, the hopper, and also, there was an excavator that was breaking into chunks that the reinforcement steel would not go through the hopper.

Mr. Huber: Based upon your investigation, did you form an opinion as to whether the concrete crushing operation creates smoke and dust or fumes?

Mr. Gladish: Yeah, it is clear by the photos, and this was a mild day I would like to say, but it was clear by the photos that there was a dust cloud around that hopper and around the loader that was approximately 8 to 10 feet in diameter.

Mr. Huber: Did you find evidence of the dust traveling off the property that is utilized by the folks at Fechko?

Mr. Gladish: No because it was a mild day, most of it was just around the machinery.

Mr. Huber: What about with respect to what you observed at the FireDex factory?

Mr. Gladish: When I was at the FireDex factory there was no operation, there was no crushing going on so there was no dust cloud at all.

Mr. Huber: My question is, did you form an opinion as to whether a problem is being caused, and what is the basis for that?

Mr. Gladish: Yes I did, on the basis of the construction drive that runs along the west side of FireDex which is adjacent to all their fresh air intake and then also the crushing operation just to the south of the FireDex process.

Mr. Huber: What is it doing?

Mr. Gladish: Creating dust and the wind is drawing the dust over to the FireDex property and is being drawn into their ventilation equipment.

Mr. Huber: Ok. I don't have any further questions.

Mr. Humpal asked Mr. Gladish to circulate the photos of Exhibit 3 and allow Fechko to also observe the Exhibit.

Mr. Huber: The only other request that I have is that the individuals from FireDex who are adjacent property owners be permitted to speak to the board.

Mr. Humpal stated that is appropriate, again the order should we have Fechko make their presentation first and then call FireDex?

Mr. Huber: No I think we will put on our side first and then have Fechko want to have their side heard.

Mr. Humpal stated that is appropriate. Mr. Humpal asked if anyone from FireDex would like to come forward and comment. Mr. Humpal asked if they do to please come up and introduce themselves.

John Armstrong, FireDex, Engineering Maintenance, addressed the board.

Mr. Huber: I think at this time, if you would, outline for the Board what issues you folks have run across and how it had affected the employees, your operations, maintenance, and a comparison of what is what before the concrete started as compared to what you have been dealing with this summer, it is probably what the board would like to hear from you.

Mr. Armstrong: On the air filtration photos that are circulating, I had stated to I think Jonathan and the Development Director, that we have done extensive air quality testing because I have to deal with a lot of instrumentation and there is a lot of sensitive electrical equipment. Mr. Armstrong determined that it would be good idea to put in a

filtration system which I had spec'd out with a company and didn't necessarily account for the inundation for the crystalline silica and the like. Mr. Armstrong stated it is significantly, I mean these are, I track all this stuff so I've got monometers on the filtration systems which I had installed when we had them design and I can track that there was a significant increase as soon as their operation started up.

Mr. Huber: Increase in what?

Mr. Armstrong: There is a significant increase in the amount of restriction in the filtration system meaning that it's trying a lot harder to filter out a lot more impurities. We also did some air quality testing prior to that, like fourth quarter of last year, with the OCEA and OCEA representative to our BWC just to establish a baseline prior to my installation of the air handlers which would have been in January, first quarter of this year. As far as the dust, I mean, it's significant. On days when they're operating, with our basically our windows open, the air handlers cannot keep up with it. There is no dust mitigation going on from what I can see.

Mr. Huber: Now my understanding is that if you have an operation like this for an EPA permit, you have to have water tanks available to try to tamp down dust. Do you see those water tanks in use, have you looked?

Mr. Armstrong, That is correct. I am familiar with some best practices for aggregate storage and handling and I don't see any dust mitigation being performed in the drive next to the building, nor do I see it visually from our property. There is a quite large stock, pile. I am not sure what the setback requirement is for stockpiling but it a pretty giant wall of smashed concrete to the south of our property.

Mr. Huber: What is it that you folks make or manufacture or do at FireDex?

Mr. Armstrong: We manufacture firefighting apparel, basically equipment from helmets, to gloves, to the turnout gear that the firefighters wear when they go into the fire, brush fires safety equipment.

Mr. Huber: Why does dust cause any adverse effect with respect to what you folks do?

Mr. Armstrong: Well, for one thing, the equipment that is used to manufacture the apparel, primarily, is affected, as well as the potentially the material itself which is expensive, probably one of the most expensive materials that are out on the market today. Consequently, it's designed to resist fire and having crystalline silica all over stuff they we are packaging and sending to Fire Departments probably isn't a good thing.

Mr. Huber: Is that what you are finding the dust is composed of, Crystalline silica?

Mr. Armstrong: Yes

Mr. Huber: How do you know that?

Mr. Armstrong: It is a byproduct of concrete recycling.

Mr. Huber: How long has this problem been occurring for you?

Mr. Armstrong: It pretty much started up this spring.

Mr. Huber: Now my understanding is that the concrete crushing had been going on for some time prior to the spring, is that accurate with respect to your own observations?

Mr. Armstrong: No.

Mr. Huber: Has this affected machinery that you use at the factory?

Mr. Armstrong: Absolutely.

Mr. Huber: How so?

Mr. Armstrong: Um, from the turnover rate of the filtration, the filters that are used to clean the air. We have experienced a significant increase in downtime of our cutting machines. I think it is a contributing factor. We track all this stuff so it's sort of easy to look back and see that we were starting to have some problem and a lot of it probably has to do with, and this is speculation on my part, but I would say that one thing started around the time of the other.

Mr. Huber: Have you attempted to contact the EPA to register a complaint with respect to the permit that is required.

Mr. Armstrong: I have not.

Mr. Huber: Why have you not done that?

Mr. Armstrong: I think we basically inquired with the city because it sort of flew into the face of reality with us that this was going on right up to the property line of our building and we had already scratched our head. We didn't really know what was going on and bulldozers were moving stuff besides the building and then all of a sudden there's semi-truck after semi-truck dumping loads of broken street with loaders picking things up and smashing things. It was like overnight, sort of World War III going on in our backyard.

Mr. Huber: How many dump truck loads of material were you witnessing?

Mr. Armstrong: Per day?

Mr. Huber: Yes

Mr. Armstrong: I think it depended. I think it was, there were times that they would have several lined up on the street. I can't say what the frequency of their traffic was but it was significant.

Mr. Huber: Did you folks go over to Fechko and attempt to explain what was occurring and find out what's up, communicate your dissatisfaction and all?

Mr. Armstrong: I did not.

Mr. Huber: Why is that?

Mr. Armstrong: I guess that I just thought if somebody was going to do that, that they probably wouldn't be reasonable.

Mr. Huber: What is it that you expect the City of Medina to do with respect to this problem given the fact that this whole area is an industrially zoned area?

Mr. Armstrong: I guess that is up to the City of Medina. I would hope that we don't end up with, I mean I've seen examples of what happens in a crushing operation and to imagine that behind our building is terrifying. It would significantly diminish the use of our property and I would hope that the city would not let that happen, not only to us but to the surrounding properties.

Mr. Huber: Do you consider the uses that the business at Fechko has put their property to with respect to this concrete crushing operation to be a nuisance to you?

Mr. Armstrong: Absolutely.

Mr. Huber: Why do you say that?

Mr. Armstrong: We had actually planned a building expansion and have two proposals on actual blue prints and there was a picture with a stake on the rear of our property which is pretty much not going to happen at this point because we are not going to want to have an expansion right up against a thirty foot high pile of concrete and it could get worse than thirty feet if it's not, I don't know what the stockpiling regulations are in the City of Medina, but I can tell you that Tri-County Concrete in Twinsburg have one that is probably fifty feet high. So if left unregulated, who knows what can happen. It is a money making operation. They can actually bring in concrete outside of the project of Lake Road and say that contractors can bring concrete in and they can recycle it and sell it at a discounted rate as opposed to #57 aggregates. So, I can see it, just based on what happened, getting out of hand.

Mr. Huber: In your opinion, as a representative of FireDex, is the business that Fechko is operating on their property adversely affecting your business?

Mr. Armstrong: It is.

Mr. Huber: Why do you say that?

Mr. Armstrong: Because we don't want to expand our building. Actually our plans were to have our marketing building off the back of our building. It doesn't look too good to bring in perspective clients and professionals and have them look out the window and see a fifty foot high stockpile of concrete and loaders dropping things and dump trucks in and out all day, as well as having to probably pay for their car wash before they drop their rental car off and go to the airport because the amount of dust that gets on the vehicles do, in a large part to the prevailing winds, is significant over an eight hour period.

Mr. Huber: Are you talking about the vehicles parked outside your building?

Mr. Armstrong: In our parking lot, correct.

Mr. Huber: So in your observation, has the Fechko business operation affected the individuals who work at FireDex?

Mr. Armstrong: Has it affected us?

Mr. Huber: Yes, can you tell us how?

Mr. Armstrong: Yes, probably their cars are being affected, as far as the amount of crystalline silica, the byproduct of recycling concrete that they are inhaling. I guess we could do more air quality studies with the BWC and put some monitors on them. I guess what my take is, I don't understand how this can be happening in this proximity to our building as well as residential area to the east. It looks like 30 yards away there is apartments. I wouldn't want to recommend that we expand our building any further than what it is based on what is going to be going on behind us.

Mr. Huber: In your opinion do you think that there are things that might help the situation with respect to moving things, distance, barriers, trees or bushes that could be put in between your business and the crushing operation that would be of assistance? Or is that not going to matter.

Mr. Armstrong: No I am not saying that there can't be mitigation on Fechko's part that they can't make an operation that doesn't produce the volume of dust that they are producing but by nature, a recycling operation is going to be dusty. It's just the nature of what they are doing.

Mr. Huber: How often are you experiencing dust problems in a given week?

Mr. Armstrong: Well, we are open five days out of the week and I would say that the cars in the parking lot are, on the days that they have their operation, with the trucks offloading and the loaders moving, it looks like they dump the slabs of concrete then they pick it up with the loader and they make the pile higher and then they have another one

that is taking it to the hopper. I know the decibel levels for OSHA is usually a loud sound over a long period of time but there is some significantly loud sounds coming from back there.

Mr. Huber: My question was how often, roughly, in a given week, are you experiencing the dust problem?

Mr. Armstrong: Five days a week when they are operating.

Mr. Huber: How often have they been operating in the last couple months?

Mr. Armstrong: They haven't been operating at all in the last couple months I don't think.

Mr. Huber: Do you have any warning or heads up as to when the operation is going to fire up and you gotta watch out and when you're ok?

Mr. Armstrong: I don't.

Mr. Huber: Have you had any communication at all from Fechko?

Mr. Armstrong: I have not.

Mr. Huber: Has anybody else in your business had any communication from Fechko?

Mr. Armstrong: I can't say. I can only speak for myself.

Mr. Huber: So this operation just went in, started up, got pretty aggravating and your problem is your problem, too bad.

Mr. Armstrong: Essentially.

Mr. Huber: Given that situation, wouldn't it make sense to call Fechko, have a meeting to try and talk about what we can do to fix this?

Mr. Armstrong: Um, like I said, based on what I saw happen, I didn't feel that would be reasonable.

Mr. Huber: Why do you say that?

Mr. Armstrong: Because I think what they did was a little unreasonable.

Mr. Huber: Why do you say that?

Mr. Armstrong: Because they really didn't take into regard anyone surrounding their property.

Mr. Huber: Is there anything else that you wanted to tell the Board that I haven't asked?

Mr. Armstrong: That pretty much covers it.

Mr. Huber: Ok, I don't have any further questions.

Mr. Humpal asked if the city has anything further to present.

Mr. Huber stated he is not sure if the other gentleman wanted to speak or anybody else.

John Karban with FireDex spoke. Mr. Karban stated he does not have much more to present than my esteemed colleague but I can speak on behalf of our employees. Mr. Humpal asked Mr. Karban what his position is at FireDex. Mr. Karban stated he is the Director of Operations. Mr. Karban stated the question was brought to Jonathan earlier about why was the complaint registered and Mr. Mendel talked about our sensitive equipment. Mr. Karban stated they have 100 associates in that building that he needs to protect. Mr. Karban stated he needs to try and attract more associates. Mr. Karban stated when that operation is running, the dust is affecting our employees and it is getting all over our equipment.

Mr. Huber: You say getting all over your equipment, what do you mean by that?

Mr. Karban: You can run your finger across our sensitive cutting equipment and pick up the concrete dust very easily.

Mr. Huber: What is the sensitive cutting equipment that you folks use?

Mr. Karban: We have CAD and CAM operated CNC cutting equipment that cuts the fabric to make the firefighter clothing.

Mr. Huber: Do you find the dust to be a problem with respect to using that equipment?

Mr. Karban: It's sensitive equipment so, yes, it's a factor that could affect it. But again, the other thing is the 100 associates that are in the building that are breathing the by-products of the crushing operation.

Mr. Huber: Where do you bring in your air for that fresh air in the building?

Mr. Karban: We have the four air intakes on the west side of the building. I believe we have two on the other side of the building. Air is brought into the building, it's cleaned through our air filters systems that John talked about then exhausted through the roof.

Mr. Huber: Are you having a problem even with the air filtering system?

Mr. Karban: Yes, it's working harder because the filters are getting clogged with concrete dust.

Mr. Huber: Did you have anything else that you wanted to present?

Mr. Karban: I did contact Fechko twice after Mr. Gladish came to see me. I talked to Greg Petersen and told him that dust was flying into our building. He responded and shut the operation down and said when the winds are prevailing out of the south, they will not run. The next day I came in and winds were out of the south and dust was flying in the building so my complaint to them went unnoticed.

Mr. Huber: Was there any improvement at all after your complaint?

Mr. Karban: Not until the operation was stopped and the device was moved from the site of where our building is.

Mr. Huber: Is there anything else?

Mr. Karban: No, thank you.

Mr. Humpal asked if there was anything else on the city's part.

Sherry Abell spoke. Mrs. Abell stated her husband, Carl Abell owns the Stop'N'Go store and petroleum facility on Rt. 18. Mrs. Abell stated she and her husband own the property next to it from the Stop'N'Go running west down to the railroads property. Mrs. Abell stated it is pretty much across from Fechko.

Mrs. Abell stated she certainly understands that Fechko, a good company, has received a contract from the City of Medina for Lake Road. Mrs. Abell stated she also owns the Elm Farm property on Lake and Lafayette so she is well aware of what is going on and the problems we have over there.

Mrs. Abell stated her questions is, and bear with me, I am not trying to give the city a hard time, but why did they even allow this to go the distance in the first place? Because from everything I've heard now, they never got permits, never got conditions, never got anything when there are so many properties available to rent, buy, or lease on the South Lake Road, which is Manufacturing Heavy, that they could have had a crushing facility there temporarily while they are dealing with this contract. Mrs. Abell stated it is her opinion, also that the prevailing winds, having lived in Medina since 1968, we also get a lot of wind out of the north and the northwest. Mrs. Abell stated so therefore, it comes across to the south side of Rt. 18. Mrs. Abell stated the west side of Medina, all the business has been on the north and east side and now south side of Medina. Mrs. Abell stated we also want the west side gateway coming into Medina to look nice. Mrs. Abell stated we don't need dust clouds, we don't need piles of concrete, and we certainly don't need the distraction of all the noise and the problems. Mrs. Abell stated eventually she would like to sell her land. Mrs. Abell stated if Fechko wants to buy it, terrific. Mrs.

Abell stated she is happy to sell it to them, but obviously, her property is zoned Light Manufacturing there which is the way it is set up and the way it should continue to be. Mrs. Abell stated in her opinion, they should not be doing this operation. Mrs. Abell stated there are residential apartments and other property owners are there that the noise and dust levels are a problem. Mrs. Abell stated she hates to say this, but if the piles of concrete continue to build up over there, you all here know, we are going to start getting vermin going into those piles to habit. Mrs. Abell stated it is just a fact, anytime you get that kind of stuff, you have animals trying to find places to live. Mrs. Abell stated in her opinion, it is adversely affecting the operations that she has or may have on the other side of the street in the future, and the fact that if they want to build a building and enclose their operation like they do in other states, terrific. Mrs. Abell stated she does not think they are willing to do that, but in the meantime, they are causing a lot of problems for the city and for the neighbors.

Mr. Humpal asked Mr. Huber if he had any questions. Mr. Huber stated no.

Mr. Humpal asked Mr. Mendel if there was anything else from the city. Mr. Mendel responded he has nothing further.

Greg Petersen: There were some statements made before and frankly, I am not sure they are relevant to the meeting because, I think we all understand, at least the board should understand, what their task is. I would ask that there are some statements made that I am curious to know what their background is as far as education and I'd like it on the record they made some statements about air pollution and things like that. Is that out of line to ask that of someone who provides testimony?

Mr. Humpal: I don't know that it's out of line. Why don't you do your presentation and then you can ask those questions, certainly, and we will seek answers.

Present was Steven Beranek, Attorney for Fechko Excavating.

Mr. Beranek: We do have a little presentation that we want to present, I guess, our side of the story. But before we do that, there are some questions that I would like to ask Mr. Mendel based on his testimony and I would also, I guess, I guess I'd like to object to what seems to be a lot of completely irrelevant information, accusations, and testimony being given here today. We are here, I thought, to discuss and to determine, whether the letter that Mr. Mendel wrote, and the determination that he made that this operation is to be classified as Heavy Manufacturing because it ordinarily produces noise. That's what the determination is, that is what we appealed. Dust isn't mentioned in it and I'll get into that but we have had probably an hours' worth of testimony about something which is not even part of this appeal. I would like to object.

Mr. Humpal: I think the board understands that ultimately, the only thing we determine or would vote on eventually, is the definition of whether this is Heavy Manufacturing or Light. I think we know that's our question.

Mr. Beranek: Ok, well then I guess the question that I then have to put forth is why we are having all kinds of witnesses and testimony concerning something that's irrelevant.

Mr. Huber: Well it's not irrelevant because the definition of Heavy Manufacturing includes "does this process create smoke, noise, fumes, odor, glare (dust is typically a subsidiary of smoke as it is defined in zoning law) and if the Board of Zoning Appeals is going to hear about does this process create these things, then testimony from people who have actually been out there and have registered a complaint is relevant. They know what's happening and the record now reflects what they are saying happened and it does involve testimony that establishes that this manufacturing process does create smoke, dust, noise, fumes and potential safety hazards. Actually, it's kind of hard to figure out how a concrete crushing business would not create those things but that's my point of view.

Mr. Beranek: That's your opinion Mr. Huber. What we are dealing with today is the determination made by the Planning Director. The Planning Director's letter doesn't say anything, whatsoever, about dust, nor does he attempt to equate dust with smoke. Smoke is one thing, dust is another, they have completely different definitions and dust is not included in the definition of Heavy Manufacturing. I guess I would just like to put on the record my objection to all of that as being irrelevant to this determination that we are here for today.

Mr. Beranek: With that having been said, let me just follow up with you Mr. Mendel on that particular point. You would agree with me, would you not, that the determination that you made and the letter that you sent to Fechko Excavating with that determination concludes that the crushing operation is Heavy Manufacturing because it is a process which ordinarily creates noise, correct?

Mr. Mendel: Correct

Mr. Beranek: That determination says nothing about dust, correct?

Mr. Mendel: My letter did not.

Mr. Beranek: Nor does it say anything about smoke, correct:

Mr. Mendel: The letter did not.

Mr. Beranek: So the determination was that it ordinarily creates noise, right? Now you came out and met with Greg Petersen on one occasion?

Mr. Mendel: Yes

Mr. Beranek: Greg Petersen is the General Manager of Fechko Excavating to your knowledge?

Mr. Mendel: Yes

Mr. Beranek: And during that one time that you met with him, you witnessed the operation for about 10 minutes, is that correct?

Mr. Mendel: More than that, I would say it was probably 20 to 25 minutes.

Mr. Beranek: So 20 to 25 minutes spent looking at the operation. Subsequent to that, did you go back to Fechko Excavating and attempt to learn more about the crushing operation?

Mr. Mendel: No, that was the only site visit while the operation was being conducted.

Mr. Beranek: And yet you, it seems, did extensive investigation concerning the complaints at FireDex, is that right?

Mr. Mendel: Just what was provided to me by Dan Gladish, the Building Official, who is in my department, the Community Development Department.

Mr. Beranek: And that included pictures?

Mr. Mendel: There was pictures that were provided by FireDex.

Mr. Beranek: And did you instruct Mr. Gladish to go out to FireDex?

Mr. Mendel: I did not, he did it of his own responsibility as the Building Official.

Mr. Beranek: To your knowledge, did any city official come to Fechko and inquire with us, concerning the crushing operations.

Mr. Mendel: We had a meeting at the end of April with Fred Himmelreich in the Engineering Department, Patrick Patton, City Engineer, Dan Gladish, Building Official, Greg Petersen, General Manager at Fechko and myself to discuss what was going on. This was after the complaints had been provided to Mr. Gladish and after that, then I coordinated with Mr. Petersen to do a site visit while the operation was occurring.

Mr. Beranek: So out of all of that, you did all of that investigation and at no point did you determine that the operation produced smoke, did you?

Mr. Mendel: No

Mr. Beranek: You have been employed in your current position since how long?

Mr. Mendel: Since the end of October, 2013.

Mr. Beranek: So you were involved in the revisions to the existing zoning code?

Mr. Mendel: Yes, the end parts of it. I was not involved in the vast bulk of it that had proceeded me which had been managed by Greg Hannan, the previous Community Development Director.

Mr. Beranek: So you are familiar with the old code apparently, based upon your testimony today, correct?

Mr. Mendel: I am.

Mr. Beranek: And you are therefore, familiar that in the old code, when the definition of Heavy Manufacturing does indeed include dust, does it not?

Mr. Mendel: It does.

Mr. Beranek: And that category was expressly taken out of the new code, right?

Mr. Mendel: I have not evidence that it was expressly removed, but it is not in the current definition.

Mr. Beranek: It has smoke, hazards, noise, things of that nature, but dust in the old code did not make it into the new code that we are here about today, right?

Mr. Mendel: It did not.

Mr. Beranek: Now, you mentioned, also, that you had some communications with the owner of LowBrow.

Mr. Mendel: Tyler Malinky, yes.

Mr. Beranek: Now it's true, isn't it that he did not come to you concerning the crusher, correct?

Mr. Mendel: He did not, we asked him.

Mr. Beranek: You in fact went to him and solicited comments from him.

Mr. Mendel: Asked if he had any comments that he wanted to provide.

Mr. Beranek: And he did not, I'm taking your word just so that we're clear, he did not complain about the crusher.

Mr. Mendel: He, in his e-mail from June 11th, did mention that it was creating dust that was being witnessed and seemed to be affecting himself and his employees in his e-mail.

Mr. Beranek: Are you saying that his e-mail indicated problems with his employees?

Mr. Mendel: The e-mail says that he was, that himself and his employees witnessed the dust coming from the operation.

Mr. Beranek: Alright, just so that we're clear. He says that it was witnessed, not that it was affecting his employees, right?

Mr. Mendel: Let me look at it for one second. (Mr. Mendel located the e-mail) He stated that "the experience of myself and my employees is that it generates a lot of dust both when in operation and when idle as the wind always brings up large steady dust clouds when blowing from that direction". That is verbatim.

Mr. Beranek: And he also, in further solicitation or further confession from you, indicated that he has not personally noticed any noise coming from the operation, correct?

Mr. Mendel: Correct.

Mr. Beranek: I really don't want to dwell on this because I think it's irrelevant but I do think we need to address it a little bit because there was a lot of testimony here today about this driveway. Do you know why that driveway was installed?

Mr. Mendel: My understanding is that it was installed to be an access drive for vehicles coming from Progress Drive to bring the raw scrap concrete material to the crushing operation.

Mr. Beranek: Are you aware of any legal requirements that Fechko has with regard to the installation of a temporary drive for a waste site?

Mr. Mendel: A driveway requires a curb cut permit issued by the Engineering Department and any improvement for a use of land requires, at a minimum, site plan review approval by the Planning Commission.

Mr. Beranek: My question wasn't very specific. I was talking about EPA requirements.

Mr. Mendel: I can't address that because that's not under my jurisdiction.

Mr. Beranek: Are you testifying here today that all waste sites in the City of Medina require permits?

Mr. Mendel: Theoretically, they would require approval of (I have not analyzed it in depth) but it would require, most likely, theoretically, a Conditional Use Approval.

Mr. Beranek: So then if that is the position then the city has in the past, no doubt, enforced that with regard to all waste sites within the City of Medina, correct?

Mr. Mendel: I can't say for certain.

Mr. Beranek: In fact, they don't do that on a regular basis, do they?

Mr. Mendel: Many of the waste sites that we have are long standing industrial sites that I cannot find record of approvals or denials on those operations. Some of them precede many iterations of the zoning code.

Mr. Beranek: Yet for this particular application, you deem it necessary or you deem it a requirement that the city require Fechko to have a permit.

Mr. Mendel: Yes.

Mr. Beranek: This point that you made and I don't want to forget, you describe the sound that you hear from the crusher as "annoying", correct?

Mr. Mendel: It could be, yes.

Mr. Beranek: And is that part of the reason why you determined that this is Heavy Manufacturing?

Mr. Mendel: No because that is not a standard in the definition. The definition of one of the categories is that it ordinarily creates noise. There is no modification, there is no adjective to that statement, and it is an operation that ordinarily creates noise at a minimum.

Mr. Beranek: Now the definition also contains within it, the requirement that the processes be using processes which for assembly, fabrication, or processing of goods and materials, correct?

Mr. Mendel: Yes

Mr. Beranek: So you would agree with me that in order for a particular operation to fall under this definition, it would require the processing of goods and materials, right?

Mr. Mendel: Yes, and I would consider scrap concrete as a good and a material that is being processed into another good and material.

Mr. Beranek: So just so that we are clear, you would consider that.

Mr. Mendel: Yes, and I don't believe we have a definition in the zoning code of good or material so it's a definition of how I define those myself.

Mr. Beranek: You would agree with me that somebody else might define it differently.

Mr. Mendel: They do, someone else could, but it is under the zoning code and under my position with the city, it is my determination that applies.

Mr. Beranek: You have no idea, do you, how often that Fechko actually performs the crushing operation at that site, do you?

Mr. Mendel: I do not know for certain, the times and from my understanding, from talking with Greg Petersen and talking with other people that have witnessed it, that it's infrequent. It is not continuous, it's not seven days a week, it's not five days a week, it's when there is material to be crushed.

Mr. Beranek: And this particular operation that we have been talking about here today, is it your understanding that it is a by-product of the contract that Fechko has with the city for Lake Road?

Mr. Mendel: From my understanding, it's a product of Fechko's operation of what they do in relation to that operation but it is not there because of the operation. It is a land use that exists, and could exist regardless if Fechko had the Lake Road reconstruction project. And it does exist and it requires zoning approval.

Mr. Beranek: Ok, I guess my question really is that is it your understanding that the truck loads of concrete that the gentleman from FireDex was discussing, is coming from that Lake Road project?

Mr. Mendel: That is my understanding from a conversation with Greg Petersen and just understanding that the proximity of the Lake Road project to Fechko's property is close and convenient and it's certainly at a larger scale than what may have been coming there previously.

Mr. Beranek: And in fact, well you don't know what was coming in there previously do you?

Mr. Mendel: Just from the testimony, the information provided that it has been going on, on some basis at the Fechko properties since 2009.

Mr. Beranek: Well the problems that FireDex was talking about, would you agree that they roughly corresponded with the commencement of the Lake Road project?

Mr. Mendel: Yes.

Mr. Beranek: And are you aware of the city receiving any benefit from Fechko crushing the concrete at its site.

Mr. Mendel: I can't address that. It's simply that it's a use of land that doesn't have the appropriate approvals for the zoning code.

Greg Petersen, General Manager with Fechko Excavating addressed the board. Mr. Petersen stated he is not an attorney so don't expect a big production.

Mr. Petersen: Just a couple things that I made some notes of Jonathan, about some of the things you said and I just want to clarify. This is written in your report so I believe that when you are addressing the things that the board is charged with reviewing and your position on those, such as "was the decision arbitrary or capricious", you provided in your staff report that your position, and I am assuming the city's position, as you represent the city in this particular issue, correct?

Mr. Mendel: Yes

Mr. Petersen: And you described it, and I'll just read it verbatim "staff analysis of the concrete recycling/crushing land use was not arbitrary or capricious because staff conducted a logical and reasonable process for analyzing land use in relation to the Planning and Zoning Code". That's accurate right?

Mr. Huber: I'm going to object here, we have an attorney for Fechko questioning our witness and if you have questions, that's fine but you don't get two guys questioning our witness.

Mr. Petersen: Why not, you had multiple people come up and talk on the City's behalf. I would also say that I remained quiet while you were talking sir.

Mr. Huber: If you want to offer testimony, you can offer testimony but you don't get to question our witness.

Mr. Petersen: Why not, why can't I? Is this a court of law? Why can't I ask questions? Everyone else got their chance to speak.

Mr. Huber: You can testify.

Mr. Petersen: I can do whatever I want sir. I can come up here and speak. Are you telling me that the city's position is that I am not going to have my opportunity to speak like everybody else has?

Mr. Huber: You can speak, but you don't get to ask him questions. He (Attorney for Fechko) can ask questions.

Mr. Beranek: What if he was invited by the Chairman of the Board so it is his determination. There are no rules apparently as to how these meetings are to proceed because I asked for them.

Mr. Humpal: I think they were provided to you.

Mr. Beranek: There are no rules, I was not provided any rules as far as the procedure as to how these meetings are conducted.

Mr. Humpal: There is procedure in the City Code.

Mr. Petersen: Does it speak to whether I can ask Mr. Mendel questions or not?

Mr. Humpal: Out of courtesy, I don't mind if you ask.

Mr. Petersen: If the purpose of this is to make a right determination, I would think no one would mind. I think we can all agree on that right?

Mr. Humpal: Go ahead.

Mr. Petersen: Thank you. Your staff report said that staff did an analysis of the concrete and recycling/crushing land use and stated that it wasn't arbitrary or capricious because staff conducted a logical and reasonable process for analyzing the land use in relation to the Planning and Zoning Code, correct?

Mr. Mendel: Yes

Mr. Petersen: Can you give me, in detail, what that process was?

Mr. Humpal: I thought he already did that as part of his testimony.

Mr. Petersen: Ok, was the only part of that process a site visit?

Mr. Mendel: No, as the rest of the paragraph under bullet A, I reviewed the zoning district's permitted and conditionally permitted uses, reviewed the definitions for heavy and light manufacturing in the zoning code and then witnessed the operation from as many vantage points as possible and used that process to make the determination that it was to be defined as Heavy Manufacturing. In that paragraph is where I describe my process.

Mr. Humpal: We as a board understand or at least heard what his process is and I don't know if we need to revisit that necessarily.

Mr. Petersen: Did you talk, since the beginning of this process back in April, did you have any discussions with Pat Patton or the Assistant City Engineer about Fechko bringing that material from its construction site over to the site that is off Progress or W. Liberty, whichever you prefer to call it?

Mr. Mendel: Prior to the meeting that we had at the end of April that you had attended, I was not aware that this operation was occurring on the property.

Mr. Petersen: And then after that meeting that you and I both attended, did you have regular conversations about this issue?

Mr. Mendel: Just in the discussion of reviewing the question about curb cuts or questions that were raised by you through e-mail regarding the various points of the issue.

Mr. Petersen: I'm just going back through a couple things that I made notes on so I might jump around a little bit. You had mentioned that you looked back at prior records, zoning records, for the existence of a zoning certificate that Fechko might have received from the City of Medina in relation to either the parcel 865 W. Liberty or the other parcel and you stated that you couldn't find one at all right?

Mr. Mendel: There is no evidence of a record of approval for the concrete recycling.

Mr. Petersen: How far back did you look?

Mr. Mendel: I looked back through the inception, the construction of the 865 property which I think runs back to 2002 or 2003. I also looked at aerial photograph evidence that I have available to me through the Medina County Highway Engineer's Office, or Google Earth which is pretty much the same aerial photography.

Mr. Petersen: Anything related to Fechko or Touchstone, or any potential owner of that property?

Mr. Mendel: No, there was no evidence of any approvals.

Mr. Petersen: And who owns those properties now?

Mr. Mendel: Touchstone Properties or Touchstone LLC owns the subject property and I believe Touchstone also owns the 865 W. Liberty property.

Mr. Petersen: Alright, you kept records on Fechko and just as a point, Touchstone does own those properties.

Mr. Mendel: Well in the argument provided with the application for this appeal, Fechko's attorney provided that the two are the same.

Mr. Humpal: Should be considered the same.

Mr. Mendel: So I have just considered them the same.

Mr. Petersen: I was just wondering if you looked for both names and looked through when you were researching the zoning stuff.

Mr. Mendel: A lot of the information we have is either through parcel numbers or approximate addresses. Usually, if a parcel doesn't have a specific address, it has a kind of a street frontage placeholder or the specific business or an address. I was looking back through 865 W. Liberty through 2012 and then there was nothing from basically the beginning of 2013 to the present for the subject parcel.

Mr. Petersen: One thing I wanted to ask was every once in a while we will hear you say parcel and then another time we will hear you say site. Is there a difference, in your opinion, between a parcel and site?

Mr. Mendel: No. They are synonymous terms. A parcel is a more of a legal term for a delineated piece of property for ownership purposes and a site is can incorporate multiple parcels or it can be one parcel.

Mr. Petersen: So you are saying a site could be multiple parcels.

Mr. Mendel: It could.

Mr. Petersen: But there couldn't be multiple sites on one parcel. The point I'm making is a site can encompass multiple parcels.

Mr. Humpal: I understand your point but I don't think it has a bearing on where we are at unless you have an explanation for that.

Mr. Petersen: I think we can get there. I was just curious as to what the city thought.

Mr. Humpal called a five minute break in order for Mr. Beranek to set up a Power Point presentation.

Mr. Humpal resumed the hearing after five minutes.

Mr. Petersen: We provided some aerial images of the property. The lines that are drawn on there are the property lines as they exist today, not necessarily as they existed when the photo was taken. So this first image is pretty much an undeveloped site. The image is from April 19, 1994. To the best I can tell, it doesn't seem that the site has been disturb, it looks vegetated, and this is as far back as I could find an aerial image. This is October 11, 2000. Despite the fact that Touchstone nor Fechko owned the northern most parcel or the northeastern parcel, they didn't own it at this time. It was clear to us that based on the images that some use of the property was going on for that portion of the site.

The next slide is December of 2003, this is shortly after Fechko acquired a permit to install the building which was done on 2002 on the southwesterly portion of the site or the southwesterly parcel that Touchstone now owns. Shortly, close to the end of 2002, Fechko transferred this to Touchstone.

The next slide is May of 2010 aerial photo. Right around the end of 2009, Fechko applied for and received a PTIO from the Ohio EPA to crush and establish a portable crusher. It was a permit to install and operate a portable crusher. That was shortly before this image. March of 2009, we received that permit, and in this photo of 2010, you can see evidence that there was crushing going on the site. It may be difficult for you to see. Mr. Petersen pointed out a pile of processed material on the photo.

The next photo is April of 2012 aerial image and again, we see evidence of the crushing material there, even at this point, which would suggest that there was at least some additional continued crushing operation going on.

At the end of 2012, December, was when Touchstone purchased the northeast portion of the site.

The next photo is the most recent photo I could find and it is just for reference. It is from June 14, 2014. It obviously shows further use of the site and shows the crushing operation. I think this is probably, maybe similar to the one that Jonathan had as an exhibit, I don't know if it's the same.

Mr. Mendel: It would be the same one.

Mr. Pinsky: You mentioned that it was a portable crusher, so the crusher that is in existence is still a portable crusher right? It is not a permanent crusher?

Mr. Petersen: Yes, that is correct.

Mr. Beranek: There was some testimony about Mr. Mendel as far as his presumption as to how we accessed this site prior to the installation of a temporary drive which would have been here. As you can see from this picture, Mr. Mendel's presumption is incorrect. In fact, we utilized, for the most part, this driveway, as you can see, that area is worn away. Now I know Mr. Mendel has already brought this up as far as what your requirements are with regard to this appeal and I'm sure the board are aware of those. There are two points that I want to make to frame the rest of my discussion. It is our contention that this decision must be reverse for two reasons. 1) It was based on an erroneous finding of material fact; and 2) that the decision was arbitrary and capricious and in fact as we go forward, you will see that the way the code is written, with all due respect to Mr. Mendel, his decision could not have been anything but arbitrary.

This slide basically re-emphasizes the determination made by Mr. Mendel and re-emphasizes the fact, as I regressed before, that his determination as Heavy Manufacturing because the land use is for the purchase of the processing materials using processes that ordinarily create noise. There is no mention of any dust or an attempt to equate dust with smoke in that letter.

As I mentioned with Mr. Mendel, and this kind of begins the discussion, the code says under the definition "facility fabrication of processing of goods and materials". Words mean things in statutes. These are laws created by which we are supposed to know what we are allowed to do and not allowed to do. When you say "the processing of goods and materials", that does not mean "goods or materials". It has to be both. That is the way that it is written. If we are going to enforce things, we have to enforce them the way they are written. As Mr. Mendel testified, that was his opinion that the concrete would satisfy

both the goods and materials aspect of that but somebody else could have a different decision.

Mr. Humpal: At some point we are probably going to ask you then to define then what to you, goods mean as opposed to materials. I think the board needs to understand that.

Mr. Beranek: Certainly, in fact, I don't bring it with me but what I did in that regard is I looked up those definitions. If you look them up you will see that Goods most often refers to wears or finished goods or something in their finished state. Materials are the things which go into making those goods. They are two distinct categories as evidences by the fact that two distinct words are used here. I would submit to you that the concrete that we are recycling which will then go back to be used as backfill or some other capacity would constitute materials but certainly not goods.

Mr. Humpal: In your opinion it has to be both?

Mr. Beranek: Well, I'm reading the statute sir and the statute says "goods and" it does not say "goods or", it was revised last year.

Mr. Humpal: What would you assume the intent of the statute is?

Mr. Beranek: Well I am not sure what the intent of the statute is sir because I'm not a mind reader. I'm looking at what it says.

Mr. Humpal: And I wonder then if we don't have to determine that.

Mr. Beranek: Pardon me?

Mr. Humpal: I wonder if we as a board don't have to determine that definition for our own purpose.

Mr. Beranek: Well I guess you probably would but I don't see how you could determine it anything other than what it plainly says.

Mr. Pinskey: For me it would be the intent and spirit relative to the combination of those terms inside of that paragraph that would make sense to me versus the pure definition of each individual word. I'm just suggesting that.

Mr. Beranek: Well and I understand that. I am not saying that is completely without some merit to it sir, but what I would also suggest to you is that the ordinances, statutes, and laws of this great land of ours are written in some part to let the citizens know what they can and cannot do. A citizen needs to look at that and be able to determine what they can and cannot do. If it is not clear, then the ordinance fails. How can you penalize the people who didn't write the statute if they abide by what it says and then have a contrary intent. In other words if I'm looking at the prospect of what we're doing and say "well

we don't fall under that because we're not processing goods and materials", then how can you then go back and say "well we all know what they meant".

Here is a picture of the crusher. We have, based on our experience, a knowledge of these types of operations. We have some statements there as far as what it does. I think for the board, other than just some background, there are a couple things that are relevant. Number one is that it is portable, meaning that it comes and goes at various points. What is most significant, I think, is the last bullet point on this slide. Where it says in the last 79 weeks since the beginning of 2014, that crusher has been on our site for only seven of those weeks. That's not even nine percent of the time. And yet here we are, the city trying to regulate something which occurs less than 10% of the time. I will go back, if you remember, part of the definition of Heavy Manufacturing is that it ordinarily creates or produces smoke. Now since this operation is there so infrequently, my position is that under the definition of ordinarily producing whatever is deemed offensive doesn't apply here because it is not a five day week, 52 weeks out of the year. It is very sporadic.

This slide emphasizes what I just said but indicates our position with regard to the investigation that was done by the city as far as Fechko is concerned. We did an extensive public documents request and received over 1,000 pages from the city in regards to this issue and from the review of those documents, whereas we saw evidence that there was a considerable investigation with regards to the concerns of FireDex, there was little to none done on the part of the city to educate itself as to how a crusher operates and what Fechko's position was and what Fechko's concerns were.

You asked about a definition before. We provided a couple definitions for you. One of the criteria for which you have to judge this determination by Mr. Mendel was whether or not this was arbitrary. Now, my position is that the code itself is arbitrary. The code uses the word noise, the processes that ordinarily produce noise. Well if you look up the definition of noise, it is not equal sound, in fact it has some connotation of unpleasantness to it. So noise does not equal sound. The code again says "produces noise".

Mr. Mendel a short while ago indicated it was his opinion that this sound was annoying. That illustrates the arbitrary nature of this in a nutshell. Other people may not find this annoying. The sound of a crying baby is annoying to some people, to other people, it's just a natural part of life. Whether or not the sound equates to noise is in the ear of the beholder.

We have in the testimony that there is a residential neighborhood immediately to the east of this operation yet there are no complaints from that area as to the noise and in fact, as you've heard here today, really there haven't been any complaints about the sound or the noise per se, it is all about dust which has nothing to do with any of this. Sure it can be heard, but that does not mean it equates to noise or would be a violation of anything.

Now Mr. Mendel testified that he doesn't believe that this is arbitrary because he used what he believes to be a rational basis. This slide illustrates my point in terms of what we

have here in our existing code is something which is completely left to the discretion of the enforcing official, in this case, Mr. Mendel. It is completely up to his discretion as to whether something which creates sound equals noise because no definition, as you've heard, there is no qualification, no limitation, nothing whatsoever to describe it. If it did, if there were some sort of parameters put on it, then we could say, well you can't have a decimal level of a certain amount at the property line. Then we as citizens could look at that and say, oh, ok, we'll measure it. Then we can go for compliance, not whether Mr. Mendel happens on this particular day to believe that this is noise.

We did a little survey in terms of some of the codes of surrounding cities. You will find those codes, as it is shown right here, cases where there is a definitive noise definition, what is permitted and what is not permitted. That is an example of something which is of a code which we as citizens could look at and say, oh, ok, we know whether or not we are in violation of that and also something which the city can then look definitively and say "here is the meter, here is where we are, you are not in compliance".

The code as written presents the enforcing official with complete and utter discretion as to what constitutes a violation or what constitutes Heavy Manufacturing. You also notice in the definition of Heavy Manufacturing, there is not even the most basic requirement that the sound be external to the use. Quite frankly, under the definition as written, any operation that produces any noise and apparently from whatever distance whoever is looking at it wants to determine, whether it be ten feet or half a mile, any operation that produces any noise constitutes Heavy Manufacturing. Which means that if you go to FireDex and if you hear anything from their machines that produces noise, therefore that is Heavy Manufacturing, under the way that this code is written and being applied to us. That plus the noise, plus ordinarily, plus go down the line with that definition. There is nothing in that code that you can point to and definitively say, 'yes that is heavy manufacturing, no that is not heavy manufacturing". Quite frankly, and it is a little beyond this, I would even argue that it is unconstitutional because it violates the equal protection clause. There is a requirement in the law that laws be capable of being understood by the people to which they apply. It's called the Void for Vagueness doctrine. This definition, it is our conclusion, is so vague and is subject to so much discretion on the part of Mr. Mendel and how he is feeling that day or who is in there next week. There could be heavy manufacturing one day, light manufacturing another day. And because of that, because of the inherent arbitrariness of the code as written, his decision therefore, is arbitrary, and therefore the board should reverse his decision that this is heavy manufacturing because it produces noise.

Mr. Humpal asked for other comments.

John Karban from FireDex stated with respect to the word ordinary, I have not seen a crusher this close to our property until April of this year so the seven divided by seven is inconsequential. If you look at seven divided by twenty four weeks this year, the percentage is quite different so ordinarily seven out of seventy nine doesn't mean anything to me. The other thing is if you look at the mountain that is behind our building, you see what is coming down the road when the crusher operates again. It's not just

ordinary. With respect to noise, if you stand in our building and hear the slabs of concrete falling out of the trucks, the ground shakes. That's heavy.

Mr. Humpal opened the floor for the board to ask questions.

Mr. Humpal stated he is curious to know since Mr. Beranek presented us with a chart of decimal chart of various cities, have you ran a decimal test of your own production and do you have results that you would care to share with us?

Mr. Petersen: I'm happy to tell you what they are but I don't have the information with me. You guys asked the question before about whether Mr. Karban and I have been in contact. We have. He called me twice and in particular on the second time he called me, the first time I thought this is an isolated incident, we will shut the operation down and make FireDex happy and we are not going to have any other problems. And we haven't had any problems until now since that isolated incident.

Mr. Humpal: I wish you would answer my decimal questions.

Mr. Petersen: Ok, the second time I went out there with a meter, granted it was an application on a phone to measure decimals and I also went over to Mr. Karban's properties and I ran my finger across the fixtures, there was no dust. I got pictures of the cars. We did measure the decimals.

Mr. Humpal: What was the result please?

Mr. Peterson: 65 at the property line.

Mr. Humpal: Out of curiosity, and I think I know the answer, are your employees required to wear ear protection and masks for dust?

Mr. Petersen: Yes, all the personal protection equipment required.

Mr. Humpal: That is particular to this operation.

Mr. Pinskey: And the reason, and don't let me put words in your mouth, but the reason why you had to get a permit from the state to operate the operation and the crusher was because of review of safety concerns regarding that operation?

Mr. Petersen: The EPA permit specifically is in reference to air pollution so it specifically addresses the concerns about dust and that is why we had to get the permit which we have had since 2009 and we continue to be in compliance with both the reporting and as far as the operation itself.

Mr. Humpal: Have you had site inspections by the EPA that measured the dust release?

Mr. Petersen: I know we have had inspections and we've gone through them before from the EPA. I do not know what the process is if there is a problem. I certainly think we would have known about it.

Mr. Harris: I noticed here that you said seven weeks out of seventy nine weeks. How many hours per day during that seven weeks, roughly.

Mr. Petersen: On average, I would say eight.

Mr. Harris: Jonathan, were there any other formal complaints? In other words, the residential area, other people in the area, any formal complaints.

Mr. Mendel: The only unilaterally provided one without me asking for it, was from FireDex.

Mr. Harris: And from FireDex, what is the normal replacement of your filters prior to this?

Mr. Karban: We installed replacements in, I think, March and three weeks later they were clogged right when the grinding operation started.

Mr. Harris: I don't know if this is appropriate to ask and if you don't want to answer it, what is the cost of the replacement of those filters?

Mr. Karban: Several hundred dollars.

Mr. Harris: And there is how many?

Mr. Karban: There's four air filtration units that all each cost seven thousand dollars.

Mr. Harris: No, No, but the replacement of the filters, the approximate cost each time you have to replace it.

Mr. Karban: (response not audible)

Mr. Harris: Did you measure any downtime relative to this dust, and I know the dust is not necessarily but, have you measured any downtime in your equipment or operation? And I heard people speak about their cars. Has there been any reported damage to anyone's cars based on this dust or is it just a cleaning matter, needing to wash your car?

Mr. Karban: It's a matter of cleaning in terms of the dust, crystallite silica is a carcinogen and fumes. Our employees know that and they complain about it frequently when the grinding is happening.

Mr. Harris: Has anybody had to seek any type of healthcare assistance and is there any documentation to that?

Mr. Karban: We've had complaints of respiratory problems.

Mr. Harris: But not to a point where anybody, that you know of?

Mr. Karban: No.

Mr. Humpal: Other questions from the board?

Mr. Pinsky: I know it's running late and I appreciate all the testimony that we've seen so far but I have a question for staff and I have a couple of statements to make. On one of the exhibits, there was a photograph of the curb which was damaged as well as extensive damage to the road. I don't know to what extent or how much of the road has been damaged but it looks like it has been severely damaged. In a Heavy Manufacturing vs a Light Manufacturing environment, is there any characteristics of the roads that are taken into consideration? In other words, does Heavy Manufacturing build up the roads to handle that kind of traffic that Heavy Manufacturing would bring on or not necessarily?

Mr. Mendel: I can't say for certain but my understanding is that it's designed with the intent of the kind of traffic that is intended for it. Street curbs are not intended to be driven over so those can be damaged easily and it is shown in the pictures from June 11th that I provided that there is damage to the curb where the vehicles are going over the curb to access the drive.

Mr. Pinsky: Yes, that was clearly shown on there. So depending upon which way our judgement goes this evening, the Fechko organization would be responsible for the cost involved in the curb correct?

Mr. Mendel: Yes.

Mr. Pinsky: How about the road replacement that I saw directly in front of that curb?

Mr. Mendel: I can't really address what those costs would be. That would be for Mr. Huber or the City Engineer, Patrick Patton, to discuss. That is not my decision.

Mr. Pinsky: Ok. So just a couple of statements. This has really been hard I think for myself and the rest of the board this evening because we have two fine organizations in front of us and I firmly believe that, being in this job for five years plus, that zoning code doesn't necessarily put four walls around what we are attempting to do with that code. There is always going to be a couple of stones that we could turn over and even some skeletons underneath those stones at times. But I think the zoning code was put there for a purpose and that was to protect people, to protect property, and to protect businesses. And that's the way I've always viewed zoning code. It's for the protection of people, property and businesses. So I think it's important for you to understand that our decisions are based primarily in those environments and we have to use discretion in

some cases. Its zoning code and again I think that not necessarily all the dotted "I's" may be there and all the crossed "t's" may be there. I think staff has to use discretion at times. What was difficult for me is that I believe that the definition of, certainly the definition of Heavy Manufacturing could require a little bit more work to substantiate that but I think we all get the idea by reading that simple little paragraph about Heavy Manufacturing, what Heavy Manufacturing really is. I mean whether it is dust or dirt, the problem is when you have a crushing operation, it emits a certain amount of dust, noise, and dirt. The only way we know whether or not it's problematic is to go and investigate the site and at our discretion, we come back and say "wow, this is really bad" and we can see whether or not it's impacting nearby. And another thing that I take note of in these kinds of debates, is whether or not other businesses in proximity or other homes in proximity have problems with what is going on. We have to take that into serious consideration at times. Our job is, we are really business friendly and we really like to protect our businesses at all costs so keep that in mind depending upon whichever way our judgement goes this evening.

Mr. Humpal: Other comments from the board?

Mr. Bigam: Yes, I'd just like to say several things that I noted. One was, first of all, how many people does it take to operate the crushing operation back there at a time when it's in operation?

Mr. Petersen: Two.

Mr. Bigam: And what are their jobs during that process?

Mr. Petersen: One is running the front loader and (not audible)

Mr. Bigam: I had an opportunity to view the photos and I see what appears to be a water truck. Is that a water truck?

Mr. Karban: The water truck is there and is part of the crushing operation. It keeps the dust down.

Mr. Bigam: Well is it there just to sit there to be part of the operation or are they to spray water while the dust is?

(Response not audible on recording)

Mr. Bigam: There's a set-up and a sprayer already set-up to where it just runs all the time?

Mr. Karban: Yes.

Mr. Bigam: I'm sorry, I didn't notice it running in those photos. You know it appears the city was denied the right to review when this operation was started because it seems like

all of a sudden the crushing moved from the known address to the parcel that was purchased later and then operated there without giving the city notice of an operating moving that certainly, you had to know, was going to cause a lot of issues as far as noise and dust and how close it is, whether they complain or not, how close it is to those apartments. Let alone, it appears as though that side temporary road is getting a heck of a lot more use down through there. There was some implication that it was the city's contract for Lake Road that caused all that aggregate to then come through Fechko through that route and that there may have been prior knowledge by the city that they were going to do that.

Mr. Petersen: We purposely didn't address a lot of these things that were brought up because in our opinion, what you are charged to do here is evaluate information. I will tell you that we did submit to the City of Medina for use of the site to take that material there, through the Engineering department, and the site was approved by the Engineering department.

Mr. Bigam: Was the site known as where it is now or was the site known as at the address?

Mr. Petersen: Well, that's one of the reasons that I asked Mr. Mendel was his opinion on what is a site versus a parcel. At the time, that parcel that he's talking about, there was no address so I submitted to the City Engineering Department, probably, half a dozen times in the last six months about a site that I did get approved for a waste site and never once have I gone through zoning approval. They have always approved it. They don't have legacy drives, they weren't pre-existing sites, and there was no difference with this one. This was probably the sixth or seventh one that I've submitted to the City of Medina and never in my wildest dreams did I think, ok why do I have to reference a parcel versus a site address. So now that the city seems to have a problem with this operation, they have made a point of saying "well you've got approval for 865 W. Liberty Street, but you didn't get approval for the other part of the site which is a separate parcel".

Mr. Bigam: Correct. I think a lot of that lends itself to the fact that the road is now being used a lot more, the temporary road on the backside because as you testified to, the crushing operation was mainly at the 865 address all those years and used the road before but now you are doing more crushing because you are gaining more material.

Mr. Petersen: I would tell you sir, and with all honesty, the first suggestion that the City of Medina gave us to try and remedy this situation, without taking into account how it would affect us, was to take it down the road to Osborne. Which is literally three properties over. "Take it down to Osborne and crush it there". So three properties over they would say "hey this is going to alleviate everything" but unfortunately if we take that material to Osborne, it is no longer our material. So if we performed that operation without objects from the city or anybody else three properties away from where we are doing it right now, we would be traveling the same route to get there and on top of that, there's hundreds of concrete trucks coming through per day. That road is made for that.

Mr. Bigam: Well I think that's exactly right, the road is made for that but also, my point being, that it appears as though there is more traffic down that back alley way, that cut, going past FireDex causing more traffic, more noise, more dust.

Mr. Karban: (Some of his response was not audible)...the driveway 30 feet away, that's the driveway we used before. We didn't use the parking lot. We don't want a bunch of truck running around those buildings.

Mr. Bigam: Around your buildings up there?

Mr. Karban: Right. If you are concerned about businesses, think about how many businesses are there. There is a lot of employees in those two buildings.

Mr. Bigam: So you were concerned about those businesses so that is why you moved it to the back.

Mr. Karban: Yes.

Mr. Petersen: And the pavement for those buildings is not rated for heavy traffic.

Mr. Bigam: No, so you moved it to the back.

Mr. Petersen: Right next to the drive that we've always used. We didn't move anywhere, we moved it 30 feet over.

Mr. Bigam: And caused more traffic.

Mr. Humpal: I did notice when the crusher was on the Osborne property, there was a roadway being used at that property that didn't have a curb cut also.

Mr. Petersen: Yes, that's right.

Mr. Humpal: Right near or next to a catch basin.

Mr. Petersen: Right.

Mr. Bigam: My closing comment is it disappoints me somewhat, certainly when a business doesn't use due regard, this is just a general statement, and the concerns of the neighborhood, with noise, sounds, smoke, dust, whatever you want to call it. When you know you are going to create more because you are changing a pattern for your work, to have some consideration for those around you. You did for the ones around your business but not for the route that you took.

Mr. Karban: That's true, that's true.

Mr. Petersen: I told you that representative of FireDex and contacted me to communicate. Each time I (not audible)... and each time I placed a follow-up call back to them which I was unable to get through to the party that had requested (not audible). I think I made multiple return calls back, left messages, and I made two site visits to his office to request to speak with him about what was going on. Not one time did he return those calls, and in fact the only time I heard from him was when (not audible). When I tried to approach him about mitigating any potential problems for keeping the peace, I never once got a return call.

Mr. Bigam: Ok, thank you.

Mr. Humpal: My difficulty with the definition of Heavy Manufacturing is a difficulty no matter what site the machine is located on. It can be moving anywhere in the city, perhaps not anywhere within a residential district. So that even though we are focusing on the damage to FireDex, my concern is wherever you take it, we have the same definition and what affect does it have on whatever property you move it to.

Mr. Petersen: We've had it in the city for quite some time and this is the first complaint you are getting.

Mr. Humpal: I understand, but once the complaint is present, we have to deal with it.

Mr. Beranek: If I may also, keep this in mind, we have been operating this for several years without complaints from anyone about noise, about dust, about anything. We have an EPA permit with which we are compliant.

Mr. Humpal: Which has nothing to do with noise or dust.

Mr. Beranek: Yes it does. And this was, you just heard Mr. Fechko saying, that this originated as a result of a construction project that we were doing that we had to put in a temporary driveway, but we got approval from the city as far as the Engineering Department, and was a temporary use. This all started, and if I may, what is similarly offensive to me in this whole process, is that there was never any coming to us and saying, "look, let's get with FireDex and work this out". It was FireDex has a complaint, that complaint supersedes everything, we will jump into action as evidenced by the fact that within three hours of an e-mail from FireDex, there was a cease and desist order without authorization because they complained.

There wasn't anyone coming to Fechko and saying "Hey Fechko, can you maybe add some more water to this, could we maybe do something to try and alleviate these concerns?". No, we have one company using dust in the machinery of the city against another company. We, as Greg said, tried to address this, we weren't able to. And as far as the Heavy Manufacturing and your concerns, the city could did not require a zoning permit for other contractor's waste sites. This is an Ad hoc application of the zoning against us because of the complaint of one of our neighbors. Which we tried to address.

That's what this is about. Because they don't like to see a thirty foot pile of concrete which will eventually dissipate, out their window.

Mr. Karban: May I address that please?

Mr. Humpal: Yes.

Mr. Karban: It's not the thirty foot pile of concrete that's offensive to me. What I have to concern myself with is making garments for firefighters, not dealing with wetting methods for concrete crushing. That is for the city and the zoning and you guys to work out. I've got to make clothing for firefighters. I have to protect my employees. That's it. So it's not the offensive thirty foot, sixty foot pile of concrete, it's the crystalline silica that 100 people are breathing in, even seven weeks out of the year.

Mr. Harris: I'd like to make a few statements. I think, sitting here listening to all of this, as a business man myself, I certainly think both sides, there could have been some areas that both sides could have done. I think a couple things that concern me are the argument that it was never a problem before so we should just let it go now isn't a viable argument to me. Once you are knowledgeable of something, I think you are tasked with facing it. I guess my question to you, are you in the mindset that the crushing operation is not Heavy Industrial operation, because I have a hard time digesting that.

Mr. Karban: Well, I think it's real simple. Your task and the city's task, the city passes ordinances, those ordinances contain words which have definitions and meanings. Then there are enforcement mechanisms within the city that are tasked with enforcing those. How can you enforce, you have to enforce it as written, not as you would like them to be written because otherwise they have no meaning what so ever. We might as well throw it out and just say, "Whatever you guys think at the end of the day is right". There has to be some accountability.

Mr. Harris: I guess what I'm asking you though sir, is are you telling this board that your operation is not a Heavy Industrial Use?

Mr. Karban: As the code with which you are charged to enforce is written, it cannot be Heavy Manufacturing. So the quick easy solution, just to be honest with you, is to rewrite it. That's the solution. But you can't charge us with the way it's written now.

Mr. Petersen: The only thing I would like to say is I'm going to take offense if you guys do anything other than what you are supposed to do here which is rule on whether this administrative decision was arbitrary or capricious.

Mr. Humpal: And we will.

Mr. Harris: His decision was that you are a Heavy Industrial operation right? And that's what we're tasked to judge and I guess what I'm trying to get my arms around is, and I think you make a very strong argument, but I agree with my esteemed colleague on the

board, I believe our job is to measure the true intent of the code, not words. For what's best for the city.

Mr. Humpal: Only because I don't know of any code anywhere that can be written in such detail that covers every possible circumstance that could ever occur.

Mr. Beranek: You know what, you're right. In any contract, any ordinance, anything written, any lawyer will tell you, it is impossible to write something which is not capable of some sort of grey area. The problem here is, this is nothing but grey area. We've given you several examples of codes which don't have a grey area. They say, at the adjacent property line, if it measures this, then it is in violation. Even the old code was better because the old code had some different qualifications but that stuff was all taken out and it was taken out for a reason. Whatever that reason was, apparently they decided when they rewrote the code that it was not necessary.

Mr. Huber: Well, I'm going to weigh in here. Didn't the City of Medina get in zoning disagreements before, I can tell you we had Walter & Haverfield look at this language, I've looked at this language. It will withstand the void for vagueness challenge. It's reasonably common sense enough that you gentlemen can make a call. I think within the realm of common sense, from our side of the aisle, we obviously know that this is a Heavy Manufacturing type of situation. The word "ordinarily" actually modifies the word processes, it's not the number of days in the year. So when that processes is running, it ordinarily does what we all know in a concrete crushing operation does. And we all know and we've already heard this operation, and this is the problem the city has, we've got John Fechko who runs Fechko's business and they do great work. We hire them. You guys hand these fellas a set of prints and ask them to do the job, you can pretty well count on them getting it done from A to Z in good fashion and they withstand the nonsense from the unions that come out with whatever from their non-union shop. These guys do good work. We also have a problem because we have a great business, FireDex, right next door and they have a problem and it is in front of us right now. And we have to try and fix it so that there can be co-existence. Really if you want to send this out to its logical conclusion, FireDex could sue Fechko for nuisance and we could have civil claims because of the silica, not saying that should happen but it can continue if we don't try and fix it so we need to place some limits on what's occurring and try to balance the situation because we have two businesses right next to one another. One of them is really upset because of the silica. That's why we're here.

Mr. Humpal: Questions from the board?

Mr. Klink: I just have another comment. On the definitions, Mr. Huber brought it up about ordinarily, yeah, it ordinarily for 92% of the time when it's not operating, there is no noise or smoke but there is 100% of the time that it's operating there's noise. In my mind, that's the difference in ordinarily. And the other definition about goods and materials, what I observed when I was out there was the materials were the slabs of concrete in my mind and what came out at the other end was a good. There must have

been more value in that aggregate coming out or the process wouldn't be done. So I think there are materials and goods, both, being addressed in the operation.

Mr. Beranek: Well I understand that but really what you're having here is the processing of one of the waste materials into another material. At least that's the way that I see it. The problem here, and I don't like to argue semantics, really, although I've been doing a lot of that, but the problem here is that the way that it's written is way too discretionary. It is, by its nature, 100% discretionary. And you can't have that. If it's that discretionary, then it is by nature arbitrary and is subject to Mr. Mendel's opinion as to what it is. I think on that basis, you need to reverse it and go back and fix the definitions. Mr. Huber and I can disagree as far as the sufficiency of that definition but, I think that if you look at it from the citizen's standpoint in reading it, I think it might look a little different.

Mr. Humpal: One last comment.

Mr. Karban: How do you drop a concrete in excess of 1,000 pounds from ten feet and not have it make noise. Is that like if there's a tree in the forest and nobody is around to hear it, does it make a noise? It's not a philosophical question. These slabs weigh in excess of 1,000 pounds and they are being dropped out of dump truck beds from in excess of ten feet. It makes noise, a pretty big noise.

Mr. Humpal: Board, other questions? Are we ready for a motion to either affirm or not affirm the definition of this process as Heavy Manufacturing?

Mr. Mendel informed the board Chairman that whoever makes a motion, that motion should have a finding in terms of the four categories for the review by the board just as we do with the review criteria for variances or land use variances. Just so that it is on the record as to why a motion was made and the votes for it.

Mr. Pinskey made a motion based on whether or not an appeal should be granted and the zoning official order is to be reversed. Mr. Pinskey made a motion to deny the appeal and that the zoning official order that has been put forth is not to be reversed for the following reasons:

1. Because the staff analysis concluded this is not an arbitrary or capricious finding
2. The finding was not based on erroneous material fact
3. The finding was not based on an erroneous interpretation of the ordinance or zoning law
4. It did not constitute an abuse of discretion in any way

The motion was seconded by Mr. Harris.

Vote:

Klink Y

Harris Y

Humpal Y

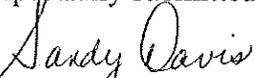
Bigam Y

Pinskey Y

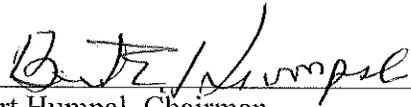
Motion to Deny the Appeal is Approved 5-0

Having no further business, the meeting was adjourned.

Respectfully submitted,



Sandy Davis



Bert Humpal, Chairman