

**Motion to Partially Grant  
Gernatt's Application for a Use Variance**

I'd like to make a motion that the Board grant Gernatt's Application for a Use Variance for the 159-acre parcel commonly known as the "Thomas parcel" and the 166-acre Gable parcel. I further move that we deny the Application as to the 87 acre "Gabel parcel." Thus, we would be granting the application in part and denying the application in part.

The basis for my motion under each of the criteria set forth in Section 115-39 (2) is as follows:

**A. Undue Hardship:**

Gernatt has demonstrated through competent financial evidence that it cannot realize a reasonable return on its investment without a variance. In reaching this conclusion, I only considered what Gernatt paid for the property, plus its closing costs and ignored additional expenditures referenced in Gernatt's application. As to the items I considered, the Applicant submitted an appraisal which demonstrates that the property is now worth less than what it paid for the property almost 17 years ago when mining was a permitted use.

Now I recognize that the Applicant's appraisal was going to be conservative, that is, I believe the Applicant placed the lowest value it could on the property at the present time. However, the desk review prepared by the Town's appraiser (Mr. Schultz) indicates that the 337 acres zoned agricultural is worth \$1,700 an acre, which is \$1,100 an acre which also is less than Gernatt paid for the land. So even the Town's appraiser acknowledges that on 337 acres Gernatt will suffer a loss of \$337,000 on the portion of the property zoned agricultural.

The Town criticized the Applicant's appraisal because it did not go through every use permitted under the zoning ordinance. This is not accurate, however, in that the Applicant's appraisal noted that development of the portions of the site zoned agricultural for residential development would be speculative in light of the fact that population in the Town is not growing and the limited new residential construction we have seen over the past several years in the Town.

I also considered the fact that the 1995 appraisal by Mr. Schultz indicated that—if mining were permitted—the property would be worth \$1.3 million. So logically, if mining were not permitted, it would be worth less than that. While I recognize that the 1995 appraisal is 12 years old, I also know as someone who owns agricultural land in this Town that we have

not seen appreciation of farmland in this Town over the last ten years. Indeed, Mr. Schultz in his desk review acknowledged that the value of the agricultural land is about \$1,700 an acre, less than what Gernatt paid for it when it could be mined at the time of purchase.

Of the land at issue here, 64 acres are zoned Business/Light Industrial and about another 6.5 acres are zoned Hamlet Residential. I don't think there is any disagreement on the value given by Gernatt's appraisal for the 6.5 acres zoned Hamlet Residential. Gernatt's appraisal estimated the value of the 64 acres zoned Business/Light Industrial at \$1,500 an acre. Gernatt's appraiser provided us an analysis which indicated that—even if the front 14 acres were sold in 2 acre parcels over a seven year period for \$25,000 a parcel—based on discounting the present value of these sales, this would still yield a value in the range of \$15,000 an acre. This seemed reasonable given the rate of industrial commercial development we have seen. Additionally, if we were to see an increase in industrial/business development, it would likely be closer to where Route 39 and Route 16 intersect which for a lot of commercial development would be a preferable location.

Despite the Applicant's position, I nonetheless think that there should be some appreciation of the sale price of the lots sold in later years on the theory that, once one or two parcels are sold, there might be some appreciation because subsequent buyers would find the remaining parcels more valuable. But even if we assumed 5% appreciation per year, which I think is high, the value of the front 14 acres would be about \$235,000. I thought the value given by Gernatt's appraiser of \$75,000 for the rear 50 acres was reasonable. Taking into account the time value of money, the present value of \$75,000 for these 50 acres seemed reasonable since these acres would likely be sold only after the frontage was sold. So, I came up with a value of \$310,000 for the portion of the site zoned business/light industrial.

Therefore, when I took the \$575,000 Mr. Schultz said the agricultural portions of the site were worth and added the value of the business/industrial property and the six acres zoned hamlet residential, the property is still worth less than what Gernatt paid for it 17 years ago.

I also looked at whether Gernatt could obtain a reasonable return if it leased the agricultural property. Based on the rents contained in the leases it has been able to negotiate, it would earn less than 5% annual return. In addition, it would take Gernatt more than ten years just to obtain a return of his capital. During the last public meeting, I thought Gernatt's accountant gave a good explanation on why this is not a reasonable return, since you could earn more than this amount simply by investing in treasury bills which you could sell in three days.

As to renting the 64 acres zoned business industrial, while there is one lease for Tim Horton's, this property is located at the intersection of Route 39 and 16. Given the limited commercial development along Route 16 where the property is located, and the fact that you would be trying to lease 16 acres, it simply is too speculative in my opinion to believe that there would be a large enough demand to lease vacant industrial/business property in the Town so as to enable anyone to rent 64 acres.

The Town also asked that we consider whether Gernatt was able to realize a return based on the gravel it extracted while the various legal challenges were working their way through the Court. Now in looking at this I did include their expenses in getting the NYDEC permit, and in developing the site for mining, but I did not consider the legal fees. Again, Gernatt presented us with an analysis that they lost money on this investment. Thus, I do not view the Town's argument as persuasive and I go back to the basic point that Gernatt lost money by reason of its purchase of the parcels which it intended to use for gravel mining.

**B. Hardship Not Self Created:**

At the last meeting Mr. Seeger agreed that the first time Gernatt was on notice that the Town might eliminate mining as a permitted use was in October of 1991 when the Town enacted a special use permit ordinance which only applied to existing mines in the Town. The documents submitted by Gernatt establish that it purchased two parcels in December of 1989 and the third parcel on November 1, 1990, so it seems to me this lays to rest the question of whether the hardship was self-created. Clearly, even the Town's attorney on this matter, Mr. Seeger, acknowledges that Gernatt was not given notice before October, 1991.

On the issue of Gernatt having failed to apply for a permit under the Town's old special use permit ordinance, a Court has already ruled that the Town was not enforcing the ordinance and could not have required Gernatt to apply for a special use permit. Therefore, I have been informed by counsel that this is binding on the Town. Given this, I believe this issue does not provide any basis for arguing the hardship was self created.

**C. The Hardship Is Unique:**

On this issue, we have been advised by our counsel that while typically this factor does look at the physical characteristics of the property, in circumstances such as this we can consider whether the Applicant is in a unique position because of some actions taken by the Town. Here I agree with the Applicant that the hardship is unique since I know of no other person

who acquired property for the purpose of mining when it was a permitted use, who thereafter faced a situation where the mining was disallowed as a permitted use. I also note that the Town did not eliminate mining as a permitted use until the NYDEC permitting process was almost completed, so it seems to me that this does meet the requirement that the hardship is unique. Additionally, I would note that this is not a circumstance where Gernatt waited around for years after the zoning change to declare its intent to purchase the property for mining. In fact, it appears that the Town only elected to eliminate mining after Gernatt had purchased the property and began the NYDEC permitting process.

**D. The Variance Will Not Alter the Essential Character of the Community:**

I believe we discussed this factor at length during our discussion of our SEQRA determination. Again, I just want to point out that, given the determinations in the Town's zoning ordinance as to the permitted uses in business/industrial districts, and given that these districts can be adjacent to agricultural and residential districts and that there is a solid waste landfill less than a mile from the site, I believe the essential character of the community will not be altered. We must keep in mind that our evaluation cannot only consider the current situation but also the other permitted uses that potentially could be implemented in the future. When I add to this that the NYDEC permit requires the construction of a berm and other buffers, which will eliminate the affects of the visual, dust and noise impacts on adjoining property owners, I do not see that the variance will alter the essential character of the neighborhood. I should also mention that a determination based on this factor would open up the possibility that Gernatt could assert a takings claim and subject the Town to further litigation.

Even though I believe Gernatt has satisfied all of the requirements under the statute, I also recognize that we have to grant the minimum variance necessary to alleviate the hardship. Gernatt submitted an economic model which indicated that it would take Gernatt almost eight years to begin earning any return, and more than 30 years to begin earning returns over 5%. I have concerns about granting a variance for 400 acres based on these economic projections since these projections are—to a large extent—simply guesses about things such as the price of gravel in the future, demand and costs. Obviously things can change dramatically over the next 30 years which could result in Gernatt either overestimating or underestimating its return.

I also recognize that if Gernatt is going to alleviate its hardship and gain some return on the property, it will have to make significant additional investments in the equipment and site preparation. Therefore, I believe the most prudent course for us to take is to grant a variance for the two parcels where Gernatt's mining plan indicates they intend to begin to mine. Then, after 20 or 30 years, if Gernatt can demonstrate that it still has not earned a reasonable return, then they can come back and make an application to

whatever Zoning Board is in place for a variance on the third parcel. They would have to make showings at that time of course and the showings presumably would be based on fact rather than the projections we are looking at.