



March 5, 2023

Via Hand Delivery and Email (smiller@townofaurora.com)

Town of Aurora Zoning Board of Appeals  
Aurora Municipal Center  
575 Oakwood Avenue  
East Aurora, NY 14052

**Re: Request for Area Variances**  
**Property: VL Boies Road, Town of Aurora, NY (SBL No. 200.00-4-10.11)**  
**Property Owners: Edmund A. Fischer, Jr. and Pamela V. Fischer**

Dear Zoning Board of Appeals:

Following our most recent appearance before the Zoning Board of Appeals, we made diligent efforts to pursue alternatives which would reduce the impact of recent changes to the Town Code on the applicant's right to develop their property, including numerous phone calls, emails, and letters to neighbors, and additional research into alternatives, without success.

Further, as time has passed, the Fischers' situation has become more dire. Their landlord has notified them that they must vacate their home by the end of the month. As we have discussed, the Fischers' right to develop or sell their property was absolutely vital to their financial security. Currently, they must relocate and are attempting to buy a new home, without either the use or economic benefit of the property they have owned for 28 years. The Fishers simply cannot afford to lose such a substantial portion of the value of their property as a result of the recent changes to the Town Code.

We are left with the conclusion that the variances requested are necessary to avoid the recent Town Code changes effecting a regulatory taking of our client's property, depriving the Fischers of any reasonable economic use of their property.

The Supreme Court has long held that when a zoning regulation prevents any economically viable use of private property, a regulatory taking has occurred in violation of the 5<sup>th</sup> and 14<sup>th</sup>

**HOPKINS SORGI & MCCARTHY PLLC**

Attorneys at Law

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Amendments of the Constitution. See Agins v. Tiburon, 447 U.S. 255, 260 (1980). In Lucas v. South Carolina Coastal Council, Justice Scalia held “As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation “does not substantially advance legitimate state interests or denies an owner economically viable use of his land.” Agins; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016, 112 S. Ct. 2886, 2893-2894, 120 L. Ed. 2d 798, 813, 1992 U.S. LEXIS 4537. NYS Department of State guidance to local governments states that “If... a court finds that, as a whole, the parcel cannot be viably developed because of the regulations, a regulatory taking probably will be found.” See New York State Department of State, Guidance for Local Governments. Further, when a regulatory taking is found, the municipality cannot avoid liability and must compensate the property owner for damages incurred. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); see also NYS DOS Guidance for Local Governments.

It should be noted that in recent years, Courts have made clear that the zoning restriction in question does not need to totally restrict an owner’s economic use of their property in order for a regulatory taking to be found. In Friedenburg v. New York State Department of Environmental Conservation, 3 A.D.3d 86, 767 N.Y.S.2d 451 (2003), the Court held that where the Tidal Wetlands Act made the property owner’s 2.5-acre waterfront parcel unbuildable, though the parcel retained some value, a regulatory taking requiring compensation had occurred and the DEC was liable for damages. In a similar case, Matter of New Cr. Bluebelt, 156 A.D.3d 163, 65 N.Y.S.3d 552 (2017), the Court held that where a zoning regulation resulted in the value of a property owner’s property being reduced by 88%, a regulatory taking had occurred which required the City of New York to compensate the property owner for damages.

Here, prior to recent changes to the Town Code, the Fischers’ property was a buildable lot. Following the Code revisions in question, the property is no longer buildable without the requested variances. It appeared the consensus at prior meetings was that denial of the Fischers’ application would

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dramatically reduce the value of their property. Further review of the facts substantiates that the difference in value of the Fishers' property as buildable lot or a non-buildable lot is stark.

At prior meetings, leasing or selling the property for farming was suggested as an alternative. However, neither is an economically viable use of the property. The USDA conducts detailed annual surveys of farmland values nationwide, and in 2022 it valued annual leases in Erie County at only \$63 per acre. [https://www.nass.usda.gov/Surveys/Guide to NASS Surveys/Cash Rents by County/](https://www.nass.usda.gov/Surveys/Guide%20to%20NASS%20Surveys/Cash%20Rents%20by%20County/). Such rates would not cover property taxes or insurance, let alone costs to prepare or lease the property.

The USDA also valued cropland for sale in New York in 2022 at \$3,150 per acre. Prices of residential lots currently for sale in the area, as well as prices of recent completed sales, demonstrate such parcels are exponentially more valuable than farmland (see attached examples including lots under 5 acres, for sale or sold in the past 12 months). The Fishers were previously offered \$90,000 for their property as a buildable lot and had begun the process of listing their property for sale with a realtor for that price. Based on the USDA data, limiting the use of the property to farmland would result in a nearly 95% loss in value. I also reviewed the facts of this case with a NYS Certified General Real Estate Appraiser who agreed that the impact of changing the highest and best use of the property to farmland would reduce the value of the property by over 90%. This overwhelming damage to the Fishers' property value clearly exceeds the threshold that Courts have deemed to be a regulatory taking, for which Towns are liable for damages.

When the Board applies its final balancing test in this case, we ask the Board to consider the enormous benefit to the applicant if the request is granted. This is not a case of a resident seeking a variance for the location of their shed, or to keep more chickens than the Code allows. Particularly in light of the Fishers' financial and living situations, the benefit to the applicant here is life altering- the Fishers simply cannot afford to lose nearly all the value of their property due to this change in the Code.

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New York has long recognized the necessity for the ZBA to act as a "safety valve" to prevent the disproportionate negative impacts of zoning regulations on individual property owners (NYS Division of Local Government Services, 2005 (citing Otto v. Steinhilber, 282 N.Y. 71 (1939))). We humbly ask the Board to exercise your power as the "safety valve" in this case to prevent an unjust and financially catastrophic result for the Fishers. Thank you.

Sincerely,

HOPKINS SORGI & MCCARTHY PLLC

A handwritten signature in blue ink, appearing to read "Ryan McCarthy". The signature is fluid and cursive, with a large loop at the end.

Ryan P. McCarthy, Esq.

Enc.

cc: Edmund A. Fischer, Jr. and Pamela V. Fischer





For Sale

**\$85,000** 0.96 Acres

0 Old Glenwood Rd, West Falls, NY 14170

**Lot/land**

Contact an agent

[Overview](#) [Facts and features](#) [Price and tax history](#) [Monthly cost](#) [Nearby schools](#) [Similar](#)



Residential, unimproved land

No data

No data

No data

3% buyers agency fee

## Overview

Listing by: **Cox Realty 716-777-6034**

Andrea Cox 716-777-6034

Vacant wooded lot, ready to make yours! Location, Location! West Falls has it all. Forget the hustle and bustle of the suburbs and relax in the quiet of the woods. Just 13 min from East Aurora shops, 15 min to Ski Slopes, 30 min to Downtown Buffalo, 45 min to Ellicottville, 50 n to Niagara Falls! You can't go wrong. This property backs to the future Erie Cattaraugus Rail

[Show more](#)



Sold ▾



1.7 Acres

VI Emery Road St, East Aurora, NY 14052

**Sold: \$75,000** | Sold on 03/23/22

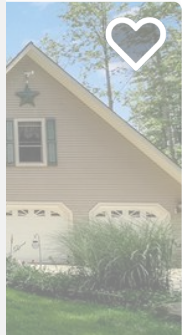
Zestimate®: None ?

Est. refi payment: \$483/mo

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Newest ▾



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Zillow Group Marketplace, Inc. NMLS #1303160

### Home value

We don't have enough information



For Sale ▼

**\$119,499** 1.9 Acres

1224 Grover Rd, East Aurora, NY 14052

East Aurora

♥ **Lot/land** | Zestimate®: None ?

Contact an agent

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- [Monthly cost](#)
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- Unimproved land
- No data
- No data
- No data
- 2.5% buyers agency fee

**\$699,000**

2 bds | 2 ba |  
18 Millstone L  
MLS ID #B145700C

## Overview

Listing by: **eXp Realty 888-276-0630**  
Donald Zappia 716-622-1323

A rare find in East Aurora 2 acres ready to build, everything approved, and Perk tested. Brir home design and start building Survey Attached

**62 days** on Zillow | **279** views | **10** saves



**\$279,999**

4 bds | 2 ba |  
971 Center St  
MLS ID #B145705C



For Sale

**\$129,000** 4.3 Acres

1179 Luther Rd, East Aurora, NY 14052

**Lot/land** | Zestimate®: None

Contact an agent

[Overview](#) [Facts and features](#) [Home value](#) [Price and tax history](#) [Monthly cost](#) [Nearby schools](#)



Residential, unimproved land

No data

No data

No data

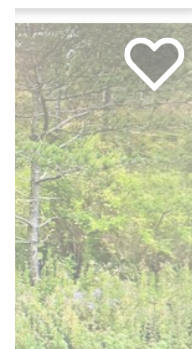
3% [buyers agency fee](#)

## Overview

### GAS LINE EASEMENT

Listing by: **CENTURY 21 Gold Standard 716-652-0232**  
Christopher Welch 716-706-8779

Beautifully wooded 4+ acre buildable lot being split off of a larger 10 acre parcel. Lightly wooded just minutes to the village of East Aurora. Private and serene with 175 ft of frontage. Generally marked with reflectors at road. Lot lines are approximate and can be adjusted to suit purchase.

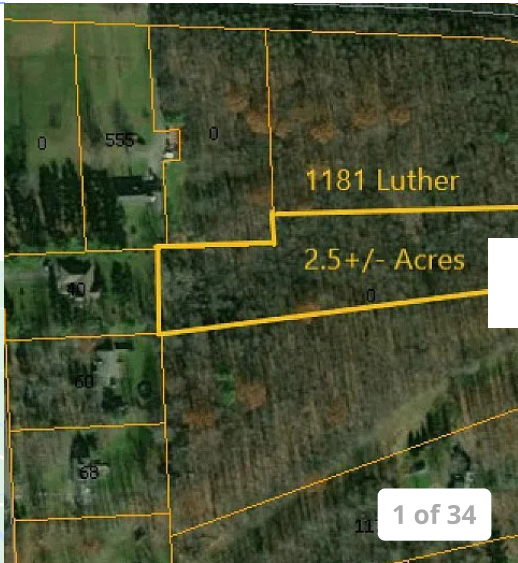




Sold



S



2.54 Acres

1181 Luther Rd, East Aurora, NY 14052

: Newest

**Sold: \$115,000** | Sold on 11/03/22 | Zestimate®: None

Est. refi payment: \$741/mo

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Home value Owner tools Home



### Tap into your home's equity

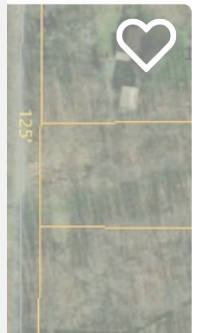
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Zillow Group Marketplace, Inc. NMLS #1303160

## Home value

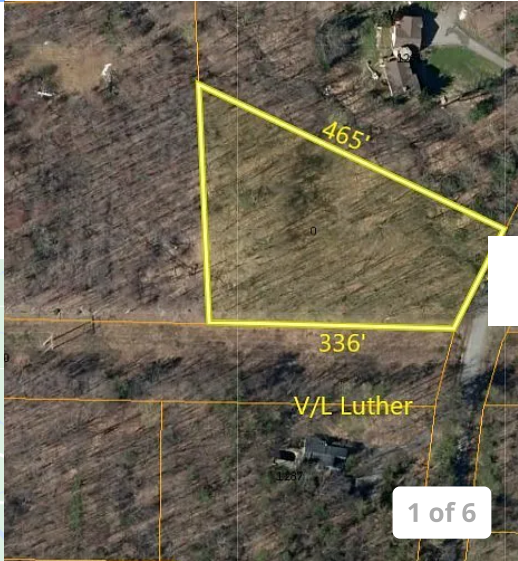
We don't have enough information







Sold



2.5 Acres

Luther Rd, East Aurora, NY 14052

: Newest

**Sold: \$150,000** | Sold on

10/05/22 | Zestimate®: None

Est. refi payment: \$1,119/mo

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Home value Owner tools Home



### Tap into your home's equity

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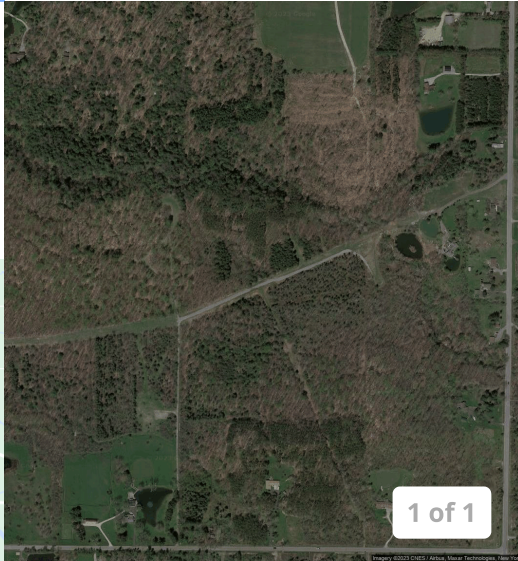
## Home value

We don't have enough information to calculate





Sold



3 Acres

9810 Blanchard Rd, Colden, NY 14170

: Newest

**Sold: \$80,000** | Sold on 07/22/22

Zestimate®: None

Est. refi payment: \$516/mo

[Refinance your loan](#)

Home value Owner tools Home



### Tap into your home's equity

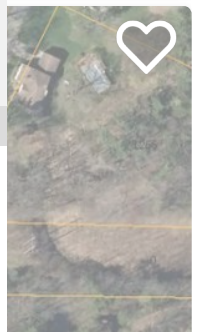
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Zillow Group Marketplace, Inc. NMLS #1303160

## Home value

We don't have enough information





For Sale

**\$129,000** 4.3 Acres

1179 Luther Rd, East Aurora, NY 14052

**Lot/land** | Zestimate®: None

Contact an agent

[Overview](#) [Facts and features](#) [Home value](#) [Price and tax history](#) [Monthly cost](#) [Nearby schools](#)



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3% [buyers agency fee](#)

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ig Galaxy S2:  
highest video