

MINUTES OF AN ADJOURNED HEARING AS HELD BY THE
ZONING BOARD OF APPEALS OF THE
TOWN OF AURORA

March 16, 2023

CASE #1426-Hopkins Sorgi & McCarthy PLLC a/a/f
Edmond & Pamela Fischer
SBL #200.00-4-10.11 Boies Road, East Aurora, NY

The hearing was called to order by the Chairman Paul Ernst with the following Board members present:

Nancy Burkhardt
Mandy Carl
Rod Simeone
Davis Heussler

Others Present: Ray Wrazen, Zoning Board Alternate
Elizabeth Cassidy, Code Enforcement Officer (CEO)
Rich Miga, Assistant Code Enforcement Officer (ACEO)

Also Present: Brigid Maloney, Town Attorney
Joe McCann, Town Board Member
Tim Stroth, Planning Board Member

McCarthy Ryan McCarthy Attorney for Pam & Ed Fischer. I would like to briefly respond to the resent letter that the Board received. Requirements under SEQR for type I unlisted actions. The NY classifies the variance that we are requesting is a Type II action. The State has determined the environmental impact and they are exempt from environmental review under SEQR. NY Code 617.5, these actions have been determined not to have significant effect on the environment or otherwise precluded from environmental review. Construction or expansion of a single family, two family or three family residence on an approved lot including provision from necessary utility connections as provide. Maintenance or upgrade of drinking water, well, septic systems or both. Also granting an area variance for a single family two family or three family residence. Regarding the regulatory takings and that is an issue that we don't need to get an answer to. I attached to my letter NY Courts have approved similar situations that are less in total value in resulting of taking. We have several times discussed the five factors listed previously and I understand that all the board members may not agree on all the factors and that is fine. You don't have to. We can revisit any of those factors as the Board feels necessary but having looked at those factors and the Board making reasonable deliberation on them, which the Board has done. You satisfied

your obligations under the law. The other test or standard that the Board should consider according to 367B is the balancing test. Which is greater, the benefit to the Fischer's if the variance was granted or the actual detriment to the health safety and welfare of the Town. I have asked whether the variances being granted would significantly harm the health safety or welfare of the Town. I don't believe that is the case. Once the Board deliberates about the five factors and consider the balancing test of which party has been impacted more substantial. The Board then has broad discretion to decide reasonably what you believe is the right decision. That is the final question. What does the Board think? This is not a new issue this has come up in other Towns where changes to the code either do or don't take into consider existing lots of record or conforming or non-conforming lots of record. Some Town plan for it in the code and some Towns don't always catch it. Occasionally we have circumstances like this where it has a dramatic impact on individual property owners and that is the key role of the Zoning Board. We have satisfied our requirements under the law, and we brought discretion and determined it appropriate to grant them relief and approve the variances.

Heussler In order to measure financial damage to your clients, the belief of the market value of a buildable lot is about \$90,000.00?

McCarthy There is a range. There were 10 examples that I chose, and it was any lot under five acres sold or for sale in the town in the last calendar year, I provided those listings to you. I spoke with a very experienced licensed appraiser who is very familiar with both types of land and his opinion was without a doubt that denying the variance would reduce the value of the property 90%.

Burkhardt So \$10,000.00 for it?

McCarthy Some information that I provided also, the USDA does detail sale value, lease value, farm acreage by county nationwide every year. I want to say that it is \$3,150 an acre value. The yearly lease value was \$63.00 an acre.

Heussler Maybe the \$90,000.00 may be less if you could sell it, we asked you to go back and talk to some of the neighbors to see what you could enlist in terms of offers. Can you give me a dollar amount of what was offered?

McCarthy Our clients previously had an offer for \$90,000.00 cash from a builder and that was how they arrived at their figure. We made attempts to see if any of the neighbors were interested in purchasing the property for market value or anywhere near it.

Heussler Did they give you a number?

McCarthy No.

- Heussler So we still don't know what the financial damage is. Forget the fact that it is not going to be farmed but it is worth something to the neighbors to keep it the way it is. Until you tell us what that is we don't know what they have been damaged. We know what they have been damaged considerably but we don't know exactly how much.
- McCarthy In my prior letter I provided some of the figures from the USDA.
- Heussler I want to know what the neighbors are offering.
- McCarthy No one made an actual offer. I was able to reach one neighbor that said that they were not interested in it. We have had some back-and-forth discussions with neighbors that were previously involved with the meetings, and we were told directly on several occasions that there was no interest in buying the property until the situation arose and I think people saw opportunity to take advantage of the situation. I have copies of one neighbor Attorney specifically stating that the neighbors weren't interested in buying the property. The neighbor spoke at a previous meeting stating that they weren't interested in purchasing the property. Two of the neighbors I have not been able to have a conversation with. I sent numerous certified mail which I have copies of the delivery receipts.
- Ernst If you look at the whole plan there is only one person that could take advantage of that property and it is the neighbors upfront. The other properties are large to increase it doesn't do much for the properties. I think the only one if you go back to the original layout for the house in front, I think it would help their property. It is a matter of finances how much is it going to increase its value not to \$100,000.00 for that property and it is only going to increase the value \$50,000.00. That is a tough one.
- Simeone As you face the property the adjacent property to the right is undeveloped and those people might benefit because if they bought it theoretically they could split that into two lots.
- McCarthy That would not be enough additional frontage.
- Simeone They might require a frontage variance but that is adding to that 20'-40' plus the additional they could have done that. You are right the most beneficial person would be the existing house to the left.
- McCarthy Those neighbors purchased the property from the applicants, 14-15 years ago aware of the intention. If the variances are denied once the monetary damage to the property is at 90% the figures I provided on USDA figures, consultation of a licensed appraiser indicate reduced value of the property approximately 94%.
- Carl Do you have a copy of that report from that appraiser or a copy of the offer from the builder?

- McCarthy The appraisers report if we need to do that, I tried to get that from him he said that it would be 6-8 weeks and it would cost about \$3,000.00. I'd like to assume that it is not necessary. In my opinion after reviewing the information that I provided speaking to the appraiser I am confident that if it came to it would be available.
- Carl The comparisons that you provided to us I think are very speculative. One was not in the Town of Aurora; it was in Colden. Five of the seven are for sale they are not sold so they are not historical values. Only two were sold and those two are properties that have sufficient frontage so none of these comparable you gave us are flag lots with insufficient frontage which would be the thing to show what the value of this property actually is.
- Heussler That is a big difference.
- Carl I tried to find it and I couldn't find it and it is probably because there is nothing recent because it is not permitted. Before flag lots with skinny frontages were permitted they were always worth a lot less per square foot than those that had the road frontage. I don't think it is fair to give currently for sale not even sold comparable as a reported value when it doesn't even account for the difference that this is a flag lot and it is a substantially different type of lot than those presented.
- McCarthy I understand the difficulty of being precise on the value and for that reason that is why I went to an expert. That is why I spoke to a licensed appraiser. He told me that he could prepare as much documentation as you need but he is confident that it would reduce the value by 90%.
- Carl 90% of what did he give you a value?
- McCarthy The cases on this one consideration is; what is the percentage of value lost because of the zoning change?
- Carl You keep saying 90% are we talking about 90% of \$20,000.00? That's even subjective his opinion is \$90,000.00. I just don't think that in the best case of the world that this property is ever worth anything near \$90,000.00 when you have lots that aren't going to have a neighbor in the front yard, not going to have a skinny driveway.
- McCarthy What he is doing as an Appraiser is trying to determine the impact is looking at the relative value of property based on the highest and best use at the time. Based on the size of land, layout and where. A lot of variables. If we are talking about dollar comparisons that is not an equitable way of doing it because someone with a more valuable property it's going to have the potential for dollar amount damages so it's not equable to people or properties like a twenty acre estate that is a half or a million dollars and it is reduced by 50 % to them is that substantial?

To someone whose property is worth \$60,000.00 and is reduced by \$50,000.00 is that proportionate? It has a more substantial impact and that is exactly what this case is. The NY City case the zoning regulation was changed to restrict most of you could go is two buildable lots.

Carl Is that the one you submitted to me.

McCarthy Yes the wetlands one. They looked at it by percentage of values. They discussed different types of calculations to use when determining when regulatory taking is taking place. I hope we don't get to that. That is what they use and that is what the court says 88% reduction in value was the taking. I don't want to put anybody in the position of trying to determine the reduction.

Burkhardt I don't think that is really appropriate. Case law does not align with what we have going on here. This is case law is for the wetland regulation and the reduction of value by 88% reading through this I don't think again similar to the comps that were pulled it is definitely trying to align things that really don't really line up with what we are looking at for this. The fact that this is a wetland regulation right here is something that goes to a federal level and that is beyond what we have happening with this. Making it a wetland regulation therefore prohibits so many other things from occurring on it because there are further regulations that are brought in. You then you waterfowl, migratory concerns, you have so many more things to look at then just the fact that you can't build a house on it, so I don't think that case law is really just to apply.

McCarthy I understand what you are saying but in my opinion it's not exactly the same but it is similar, but I think the key point in that case is demonstrated because there was an argument made because the property has to be totally devoted to occur.

Carl The other case law said that even at serious diminution is not.

McCarthy The houses are older and less.

Burkhardt I wish I had more time to dissolve this. I appreciate the research that was done here but I am trying to break this down.

McCarthy Maybe what might be best to have an answer to this question is that this is not even one of the factors that we are discussing. We don't need to dwell on this. Maybe the best thing to do is to be on track and focus on you can enter opinions on the five factors. If you want to discuss them any further you can certainly do that. If you are comfortable that we discuss those five factors and satisfied those requirements there, if you are comfortable that you that you have made a reasonable deliberation on the balancing test benefit the applicant versus the detriment to the health, safety, and welfare of the community. If you have looked at the five factors considered, thank you. The Board broad discretion to make a reasonable determination that is end of story. It is within your legal power to

decide what the right outcome of this is. What is the right solution for these folks. I think it is pretty clear, they had a lot for decades that they could build a house on. The code changed.

Carl In 2017 that was six years ago that this became an unbuildable lot.

McCarthy They owned it since the 80's. I understand that is for consideration too but then they would have been doing this and in the same position several years ago. My point previously is that many towns take that into consideration when they cast changes to the code like this to exclude non-conforming lots of record because of these circumstances. A handful of people will be disproportionately harmed by the changes. That is exactly the role that the Board is for if you feel it's appropriate to act as that safety valve because they changed the code disproportionately harmed our applicants, that is why you are here. I don't want to get bogged down in the dollars of the discussions of the other question that is not really the question to look at. Are you comfortable that we discussed the five factors are you comfortable that we waived benefit versus detriment do what you think is right. The Board has discretion.

Simeone Let me understand does the property owner have any contingent interested parties in purchasing now or are you just trying to determine if it is approved then you are going to seek a developer?

McCarthy No the applicants were advised to take the property off the market. We discussed it briefly at a previous meeting but there is a serious concern, and I would not advise it if a client asked me to buy it. I would not advise them to buy it until the variances are obtained because that raises the big question about self-created hardship.

Simeone I understand that but is there a contingent buyer if this is approved?

McCarthy Currently no.

Simeone So if approved you would have to put it on the market and see what comes?

McCarthy Correct. The original plan was that they would build their home here and potentially retire there. Now materials costs alone are through the roof, and it is not feasible for them at this time likely to do that.

Simeone So the original intent of Fischer's was to perhaps build a lifetime household there? They do not want to build a residence there is that correct?

McCarthy It is not financially possible.

Simeone They have to find a new buyer?

- McCarthy I mentioned briefly that they need to buy a house.
- Ernst If it gets through our board and the variance is approved you are not done. You will need to get the ODA so you will have to go to the Town Board, and they will submit it to the Planning Board and then it will go back to the Town Board.
- McCarthy Yes they would have to deal with the ODA requirements or a buyer can do that.
- Ernst One thing with the SEQR this is a Type II application and we are keeping it there. We do need to make a change with number five; is this proposed action 5B consistent with the adopted comprehensive plan? There is no comprehensive plan, so the answer would be n/a not yes.
- Simeone At the last meeting we asked the petitioner and counsel to address the one point of is there an alternative and that action would be to contact adjacent property owners and that appears to be completed without any tangible results.
- Ernst Is there anyone else that would like to speak?
- O'Toole Brigit O'Toole, Attorney for the Aronica's. The reason why the SEQR issue is not really completed is SEQR has to contemplate the entire project not just the variances. This project does need to go back to the Town Board for approval it does make it an unlisted action not a Type II action. It is subject to SEQR and the Board does need to comply with the requirements of SEQR.
- Ernst We disagree with that but that is OK.
- O'Toole Understand, in terms of the discussion about the regulatory taking, I just want to point out that it was the applicants Attorney that raised this issue. The reason I set forth the case law that you so adequately notice is not a point and this issue, it is a three-year statute of limitations the regulations changed six years ago. The time for the applicants to bring any type of regulatory taking claim was three years ago. They are very difficult to prove. In terms of the concerns with the environment still needs to be taken into account as one of the balancing factors. Three are concerns about bald eagles that Mr. Aronica talked about back in November or December and also there are issues about water because of the top of the hill and you add an improved structure with an unknown size that we don't know yet, it is going to add impermeable surface where currently the water can infiltrate into the ground. That can cause water onto the adjacent property, and they already know that there is water in the area. Regarding the effort to make an offer to the adjacent property owners and offer was made back in January by email from the applicant's counsel saying that we were not going to accept the \$90,000.00 but we were open and would like to purchase the property and heard nothing back.

Heussler That is what I am curious about. I think the \$90,000.00 figure is ridiculous. Looking at these comps, the one on Emery of similar size and sold but that was a lot that was easily assessable. This is a flag lot, so I am guessing the value of this is well less than the \$90,000.00 and probably less than the \$75,000.00 so now I am wondering what the Aronica's are willing to pay.

O'Toole They hadn't settled on terms of a number yet and I expected some type of communication from the applicant and there was none. That was back in the beginning of January and now we are in the middle of March. They have not had much effort to try to negotiate with the Aronica's. This flag lot was part of the parcel that was originally contracted to buy. It was carved out at the last minute, and they felt like they didn't have a choice but to let it be carved out. Of course, they are interested in the property but not at \$90,000.00.

Ernst Did they have the right of first refusal?

O'Toole Yes definitely.

Aronica Robert Aronica, 1848 Boies Road. Yes and it was contacted by Attorney Hilton, and we reached out because they said an offer was in. The Attorney did not respond. When we got the communication from James Hilton it said that you have right of first refusal and we would like you to have the opportunity to match so we called the legal office to give us the copy of the Bonafede offer and there was dead silence, no response, nothing.

Ernst How long ago was this?

Aronica That was probably 3-4 years ago. Over the years we reached out to the Fischers, and we mentioned between \$10,000.00 and \$12,000.00. They responded that they were not interested and that they were selling the property. I thought we had a right of first refusal, nothing. Three years later we got a call and she said that she had sold it. I asked for a copy because she told us that she sold it in previous years. This has been an up and down kind of thing.

Heussler The offer a couple years ago was \$10,000-\$12,000.00?

Aronica Yes.

Carl When you purchased the house in 2009 your Attorney said that late in the closing process at some point they decided that they wanted to keep the one and a half acres. Was there a price adjustment?

Aronica \$1,000.00 take it or leave it.

Carl To you for the loss of that one and a half acres?

Aronica Yes, take it or leave it.

Ernst Is the right of first refusal a document or just hear say?

McCarthy The only document that we could find was the contract of sale for the property. I brought a copy with me. I have reference that the purchasers wanted the right to purchase the additional lot retained. That language was in the original contract signed and that was not a last-minute change that was negotiated at the beginning and clearly documented. It appears that it is the only reference written and the way the real estate closing contract works if that most of the terms do not survive closing. When we do a closing there is a purchase option involving an option agreement written up a memorandum of that option recorded at the County so it's on record and preserves your right. It is clear that it was negotiated at the beginning of the purchase, but it is also, in my opinion, that the language was not sufficient to withstand legal. Without a document to preserve that after closing it ceases to be. It was contemplated. It was asked for by the Aronica's at the time they put an offer in on the house. Whether it is oversight or didn't come to fruition, nothing became of it. This has been a back-and-forth discussion from the day the contract was signed to buy the house in 2009. Directly between he neighbors multiple times. We had different accounts of how those discussions went and we have had some limited discussions. I agree with Ms. O'Toole saying that in the last letter that I received from them that he did not respond back. Through me that was the third communication that I made. The first one being a letter from their office saying that they are not interested. I had a phone communication that they are not interest.

Ernst Let's cut to the chase, what is your client looking to do? They want that property to buy some day or parkland.

O'Toole It would be left vacant as it is now.

Ernst They want it left vacant of property that they don't own.

O'Toole I thought the question is if they purchased it what they would do with it.

Ernst No what would they like to happen to that property.

O'Toole Of course they don't want anything on it but that isn't relevant to the factors here. It's whether or not the Town undertook a code revision in 2019. You eliminated flag lots so that is why we are here.

Ernst The under lying thing is what they are trying to get out of this. They don't want that property sold and a house built on it.

O'Toole At this time yes.

- Ernst What is the argument though they bought the house and property knowing full well that a house was going to be built back there whether it was Fischer's or somebody else.
- O'Toole No that is for dispute.
- Ernst If they were pulling out what appeared to be flag off of the property I would have to come to that conclusion. They were doing it for a reason.
- O'Toole It is my understanding that they were given the reason that the property owner wanted to go up there and watch the sunset.
- Ernst If you want control you should buy it.
- Carl They strong armed him, they gave him a \$1,000.00 price adjustment. Fischer's investment in this is \$1,000.00 and they gave them that price adjustment to secure this one and a half acres. Their initial investment is \$1,000.00 and they are claiming that they are being dramatically by regulation changes that are seven years old. I think part of my problem with this I don't think that it is our responsibility is to help them maximize the financial benefit out of the property. I do think we have to consider the zoning codes overall purpose and you can't undermine the Town Boards efforts to advert adverse effects from future development and their desire to maintain the rural character of the Town by eliminating these lots six years ago.
- Ernst I agree but I will say that this lot here being back so far and being in the woods you would never know that someone was back there.
- McCarthy The owner of the property should have more control over their property then the neighbor. We are discussing environmental impacts and claims of bald eagles on the neighbor's property.
- Carl Not even on my radar. SEQR stuff isn't either. None of that is sitting with me. Whether or not he wants to have tents on it or nothing. What Aronica's desire for it is not the problem. For me the problem is that the Town changed the codes to specially address this time of involvement a long time ago and I don't think that it is our job to undermine the Town Board.
- McCarthy My opinion is that this happens, and it is not uncommon.
- Carl Any examples?
- McCarthy I can think of my partner Sean Hopkins had to deal with the same situation in Amherst and that one was resolved because Amherst is one the other municipalities that did not when they revised their code make accommodations for non-conforming lots of record. Only once had this type of application been

denied and he had to go to the appellate division to get that overturned. Different facts but generally speaking it is not unheard of for this issue to come up. Some Towns account for it, and some don't.

Ernst I'm against flag lots but the ones that exist and you have to look at it. We have had a couple that have been turned done.

Heussler Looking at the five variances to me there is one that is nonnegotiable, they want to eliminate the two bump outs for the fire department. If we were to approve this I would not approve the removal of the bump outs. Next, issue of financial submission, they are looking for \$90,000.00 and they are not going to get it. It might be worth 2/3 or maybe half but they are not really sure. If they go make to the Aronica's and sweeten the \$10,000.00-\$12,000.00 pot to make this go away it might be the best you are going to do.

Simeone Can you address this letter from Attorney Cook dated December 12, 2022, in that is addressed to Attorney McCarthy it says thank you for your offer, my clients are not interested to accept this offer and are currently not interests in purchasing this property. They at that time flat out declined purchasing the property. Can you address the offer that was made?

O'Toole This was the \$90,000.00 offer. I do not recall if the denial was before or after the \$90,000.00 offer.

Simeone So you don't know if this offer from Attorney McCarthy was for the \$90,000.00 or some other offer?

O'Toole I don't know.

McCarthy We did go back after that previous meeting to try to reopen discussion with the starting point being the price that the realtor and present that here is our offer we are at the same place let us know a counteroffer and we will let you know what you think. The idea that after making the offer getting the declination in writing, following up with a phone call and getting a declination by phone we should then just proceed by throwing out lower and lower numbers negotiating against ourselves. I don't feel that is a reasonable way to approach it.

Simeone You offered to sell the property on December 12th, 2022, for \$90,000.00 and they declined and did not counter?

McCarthy Yes I made several attempts.

O'Toole There was a letter that came in from Mr. McCarthy either the last week of December or early January because that is what caused me to respond. It came in after the code went out on the 21st. That is what I was responding to. I was aware that this had happened. The letter came via email to Ms. Cook saying, I know this

is a formality that you already declined but I have to ask you again. I responded that they would not accept the \$90,000.00 but would consider a more reasonable offer.

Simeone They did not counter?

O'Toole No.

Simeone So wanted him to say that he was only kidding for \$90,000.00 I really want \$80,000.00? That was your position?

O'Toole Yes.

Carl You did not propose a counteroffer?

O'Toole There was no conversation.

McCarthy It seems clear that negotiations not moving forward are clearly beneficial to one side of the equation.

Carl No it is part of what we wanted as seeking alternatives and if they are being stonewalled how are they supposed to be filtering it.

O'Toole I wouldn't say they are being stonewalled but this Board say that the \$90,000.00 was being unreasonable and to come back with another \$90,000.00 offer is stonewalling itself. I don't think the applicant made a big effort to engage in negotiation.

Burkhardt But again the last communication from your firm to HSM was in January 2023 was "we do want to negotiate but please bring back a different number"? There was no number brought forward.

O'Toole There was acknowledgement.

McCarthy I would never engage in a negotiation after I made three offers and not gotten a counteroffer. You don't negotiate against yourself. Do we just throw out lower and lower numbers until they are ready to talk. We were turned down in person, in front of the Board and turned down in writing and on the phone.

Ernst The point is this, we were asking you to go back and try to negotiate. I think there was some that tried to happen, and it went nowhere. Regardless of who was right and who was wrong it went nowhere so I think the end of the issue.

O'Toole If I could finish my public comment. The balancing factors of the five factors way out favor to deny the variance. The Town Board had the opportunity to carve out pre-existing non-conforming lots and they chose not to do that. It is not

appropriate to now grant very substantial variances which will have an impact on the adjacent property, and it will change the nature and character of the neighborhood by putting houses behind houses something the Town Board sought to eliminate. The are significant different number wise when you do math. It will have an adverse impact on the physical and environmental conditions in the neighborhood. We already talked about drainage. To the extent that the difficulty was self-created the applicants don't actually intend to build on the lot they are doing this for a sometime prospective buyer where this is clearly a self-created hardship. You can argue that this is self-created for the applicant and the code changed six years ago and they took no action to do anything. It was decades that they owned the property and they waited until now. I am sympathetic to their financial condition but that has no bearings.

Ernst If they knew this six years ago why didn't they do something about it then?

McCarthy It didn't appear until they considered their plans for the property. For a portion of the time there was a moratorium in place, when they started discussing when they contacted a realtor to talk about their options. The realtor listed and looking into the issue was brought up. We spoke briefly just before the moratorium.

Ernst When they made the change to the code from that time to when did they find out about the change in the code?

McCarthy I wouldn't be able to answer that.

Fischer P Pam Fischer, 69 Kelly Court, Lancaster, NY. We did not know about the change in the code because we moved out of East Aurora. We were saving the property for when we retired. Personally, we thought about building a house but the way everything was we decided not to. We got a realtor and she found out about the moratorium.

Ernst When would you guess that time frame was. How many years have passed?

Fischer P We found out when the first moratorium was on, and they were going to extend it. We when to the Town Board and talked to them asking them to reconsider that because we were going to try to get variances. I don't know what year that was. It was a couple of years ago.

Simeone You were obviously aware of the sale of the house that you lived in at the time at the time and split the property into two. Can you tell us that the purchaser (Aronica's) were well aware that you intended at that time?

Fischer P Yes we had discussed it. Mr. Aronica said are you going to be our neighbor's and we said that it is a possibility.

Simeone At that time you were aware that it was possible for you to build a house or sell it and have someone build a house because the code had not changed at that time.

Fischer P Yes and we went to the building department to ask about frontage and at that time is was 15' so we decided on keeping 20'. If we had known at that time we would have kept more, there is a lot of property there. Our lawyer at the time Mr. Hilton said that we offered \$75,000.00 to them and the Lawyer said that he never heard anything from them.

Burkhardt When was that?

Fischer P I don't have the letter with me.

Burkhardt Time frame, years?

Fischer P Years ago.

Burkhardt \$75,000.00 to now \$90,000.00

McCarthy I did contact Andrew Hilton and he did recall the situation and said what Ms. Fischer was saying. He did try to go back to find whatever correspondence he had and provide a copy which I think I provided in a previous set of documents.

Simeone Was it before the 2017 change?

Fischer P I think it was. I am not positive.

Burkhardt The timing seems a little suspect now especially now that you are stating that your clients didn't know about the change in our code that would have prevented from building, the fact that you only found out about this two years ago when you put your property up on the market. The fact that this letter for \$75,000.00 was sent one month after the change to our code; it seems the timing seems a little suspect right there. Just a random \$75,000.00 offer was put out there after the flag lot.

McCarthy There is various bits and pieces of documents from years. The contract from 2009 that was signed by everyone is pretty clear that at the time it was discussed at the time the offer was made. He didn't have any other documentation, but he said that they tried to reach out to them previously and he doesn't have this file anymore because it was over seven years old as long as he retains his files, so he got rid of it. He didn't have documents prior to that other than the contract which I was able to get a copy of. This was the only thing that I could find that was older than seven years, but it was contemplated at the time. It was obvious that the property was retained in 2009 when the house was sold it was clear that piece was retained as a building lot.

Ernst Is there anyone else that would like to speak on this matter? (No Response). The hearing is closed.

Discussion:

Simeone Just to clear up and this environmental stuff, is the building department aware of any adverse environmental condition on the property?

Cassidy Nothing that I am aware of.

Carl There is national wetlands, and it is two lots away.

Heussler I have sympathy for the financial condition, but I am opposed to flag lots in general and there are substantial variances here. I am not quite sure still what the financial loss is going to be.

Ernst I think it has to go away we can't put our finger on it. I am of the same feeling on this, I can't put my arms around the timeline of it. In my opinion we need to look at every flag lot separately it can't be broad across the flag lots. There are some there that are probably ok. It has to go to the Planning Board and there are other hurdles that may stop it so all we are doing is advancing a variance.

Carl The problem is there are many variances and all of them 50%-100% departure from the Town code. It is pretty substantial, and I am really struggling with that.

Ernst Because they changed the code, right?

Carl I am also struggling with the fact that there is no actual proposed development so how you completely weigh the impact of it without knowing really what it is.

Ernst The Planning Board will be able to do that.

Carl Fair enough.

Burkhart The Town did make this decision back in 2017 and they did not include an allowance in here for a reason and that is because at the time the Board did not want to see us look like Elma and have that development down that on stretch of Girdle Road. I think there was reason and I very much feel for the applicants and for what it is that they have going on. I am looking at this on a specific case-by-case basis and this is very significant in the nature of what is being asked.

Ernst Is there anything else.

Simeone In summary, the Fischers had a large piece of property that they built a house on it and split it and at the time it was legal to build a house there. Subsequent time

changed their mind on this and the biggest thing that the Town of Aurora moved the goal post. Whether they knew about it or not the point is they could not have done anything about it at the time in 2017 when they changed it. We asked the petitioner to seek alternatives, they have done that. It looks like they have gone above and beyond the call of duty to try to find an appropriate buyer, either the owner they sold to or the adjacent property. Put yourself in their position and you bought that property and split you then the Town says no you can't do it without this variance, the land becomes useless, it's a boat anchor. I agree with the Chairman, one house and the thing you said is that you would have a stipulation that you would have approximate 100' of wooded land that you would leave untouched and build behind that. There are all kinds of barriers that the adjacent property won't even know that there is a house back there.

Carl Just because they had it at one time and now they don't doesn't mean that the rezoning created the regulatory taking. He is saying that there is newer case law saying that there is more recent. I don't know if I understand that clearly.

Simeone It isn't but the dotted line is that considering all the factors that have occurred in 2009 we still have the authority to grant or deny the variance. That is what it comes down to. We can talk until hell freezes over and we are going to have to decide. Which factors weigh more, is the Town going to be irreparably harmed by one more single-family residence behind 100' of trees on a flag lot?

Carl Maybe not by one but maybe this one.

Simeone Each case is different each case is singular and separately decided.

Carl I think I still disagree.

Burkhardt Going back, I know that the Planning Board and this is very much not where we are at yet but the whole idea that there is an argument of these trees that are going to be maintained. Just looking at the carving out of the land I don't see there being a tree barrier directly them. There is a carve out of the trees in which the house would be nestled right in the middle and so you can see the house from the road. You will be able to see all of this development, it will be very much inline with when you picture a flag lot where you see a house and then you see a house behind it.

Ernst If they take trees out thought and plunk it more towards the property line.

Burkhardt Right that is we are not there yet without a house or plans.

EVERYONE STARTED TALKING OVER EACH OTHER

Ernst The property line is parallel with Boies and that is their front yard. They would have to be back 7,500 feet; they are into the woods.

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- Burkhardt It was hard because when we went to visit nothing was leafed out yet. It is ultimately going to be exactly what a flag lot is.
- Simeone With other cases is w approve this the clock starts to get a building permit. The would entail getting the Planning Board and the Town approval, then finding a buyer and then submitting a building permit within one year. Short of that it becomes void.
- Ernst I was thinking about that. It is a tough hurdle.
- Simeone It's a fighting chance. It's a high mark for them.
- Ernst If this is approved tonight it gets ahead of the sunset law?
- Simeone If we approve it, I think we should adhere to the one-year approved building permit.
- Heussler We could make it two years.

MINUTES OF AN ADJOURNED HEARING AS HELD BY THE
ZONING BOARD OF APPEALS OF THE
TOWN OF AURORA

March 16, 2023

CASE #1426-Hopkins Sorgi & McCarthy PLLC a/a/f
Edmond & Pamela Fischer
SBL #200.00-4-10.11 Boies Road, East Aurora, NY

Decision:

After due deliberation by the members of the Zoning Board of Appeals of the Town of Aurora, County of Erie and State of New York, the following motion was made by Rod Simeone and seconded by Paul Ernst to grant the following variances at SBL #200.00-4-10.11 Boies Road, East Aurora, NY: (1) lot size variance of 1.50 acres (2) frontage (flag pole) variance of 55 feet (3) variance to exclude vehicle bypass bump outs (4) front yard setback variance of 100 feet with the following conditions: obtain a building permit within two calendar years from date of this decision and maintain as much wooded property as possible. These variances are granted in accordance with the testimony and exhibits presented.

Upon a vote being taken:

Ernst	Aye
Simeone	Aye
Carl	Nay
Burkhardt	Nay
Heussler	Nay

Upon a vote being taken: AYES-Two NAYS-Three Motion denied.