

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

July 17, 2014

The hearing was called to order by Acting Chairman Donald Aubrecht, with the following Board members present:

James Whitcomb
Albert Salter
Donald Aubrecht
Rod Simeone, Alternate

Others Present: William Kramer, Code Enforcement Officer
Absent: Wayne Nowocin
Davis Heussler

**CASE #1207 – Frank Chinnici aaf Legacy Polo Grounds, (Farrier Lane, Registry Lane,
Martingale Court, East Aurora, NY**

This hearing is a continuation of the hearing held on June 19, 2014. Attorney Sean Hopkins accompanied Mr. Chinnici. Mr. Ronald Bennett, Town Attorney, was in attendance representing the Town. Mr. Simeone is a voting member of tonight's Board in the absence of Mr. Nowocin. Mr. Whitcomb stated that Mr. Aubrecht would be chairing this hearing since he had not been at prior hearings on this case, but noted he would be voting.

Aubrecht - This request is a variance to adjust the mix of units, doubles and singles, from the original count. We'll start with Mr. Chinnici and Mr. Hopkins.

Hopkins - Good evening, my name is Sean Hopkins and I'm from the law firm of Hopkins & Sorgi. I'm here with Mr. Chinnici regarding the area variance for Polo Grounds. There have been previous meetings and presentations. For purposes of tonight's presentation I want to focus on additional information we have and summarize our position. We have additional information from the request received at a previous meeting. First, is a plan that would show the build-out of this project if the relief is granted by the Zoning Board of Appeals. What this shows is a maximum of 22 single family homes. If we build 22 single family homes...as you know the approved density is 47 units...in order to stay inside the buildable area per the Town Board we would be capped at 46 units. 22 single family homes is what we're asking for. When the Town Board originally approved this project in 2007, it was 13 single family homes based on the allowable calculation contained in the zoning code. The Town Board did agree to give us two more additional single family units last year and we appreciate that. We are now coming back

again asking for up to 22 single family homes. The other additional information that we have, is, what the position is of the existing residents in the Polo Grounds. We have submitted a petition from 31 of the 33 property owners, representing 94% of the property owners, indicating they are supportive of the requested area variance. Some of those residents are here this evening. Third, there was some considerable discussion at previous meetings about the pending lawsuit. Before we filed the variance application with this Board, we commenced a lawsuit, an Article 78 proceeding, challenging an interpretation relative to the allowable allocation. There was nothing about the density. It was whether or not we could build more single family homes than what the layout was that was approved by the Town Board in 2007. We have now withdrawn that lawsuit. Mr. Bennett and myself have both signed this stipulation in light of the fact that we're here and we think this variance has merits; we have withdrawn that in a gesture of good faith. That is now off the table. The lawsuit is gone. I will be filing that Stipulation of Discontinuance at the Erie County Clerk's office and providing Mr. Bennett with a copy. In terms of the decision that we're asking you to make this evening, you all know very well that your decisions are governed by Town Law 267(B)(3)(b). The same statute that governs all ZBA's. That law requires the ZBA to balance the benefits that will be received by Mr. Chinnici and weigh those benefits against any resulting detriments to the health, safety and welfare of the community. In our variance application, as well as the previous hearings, we have provided information relative to the benefits. There is now additional demand for single family units as opposed to two-family units. It would have been impossible for Mr. Chinnici to envision what the precise demand or demand for single family vs. two-family would have been in 2007. He has two people under contract that are patiently waiting for single family homes.

Mr. Hopkins spoke at length about what they believe are the benefits of their proposal.

Hopkins - The maximum density remains the same. The maximum of 47 units. In fact, there is a reduction to 46 units if Frank follows through and builds 22 single family homes. The layout we're showing you shows that that will work. We're not going outside the original buildable area per the Town Board's decision in 2007. On the other hand, if you take the benefits and weigh those against resulting detriments. This comes down to the central theme of our position which is we don't see any detriments to the requested area variance. If anyone on this Board believes there are detriments, we welcome your thoughts and would like to discuss them. But, really, there are no detriments. In terms of density – the same or less; open space – precisely the same; square footage on the overall site – exactly the same; road location and length – exactly the same; all infrastructure – exactly the same; total number of residents – exactly the same; traffic impacts – exactly the same. And then property tax revenue – will be the same or may be slightly higher since typically a single family home may be assessed at a higher value. This highlights the fact that we really don't see any detriments. Town Law section 267(B)(3)(b)

requires you to look at five different criteria. (Mr. Hopkins then went through all five criteria.) When we came up with that original layout that was approved by the Town Board in 2007, Frank thought that allocation was probably going to work. The market has changed. The demand for single family units is greater. We want to satisfy the demand for both single and double family units.

Aubrecht – I have a detail question from looking at the layout. In doing a comparison to what I think has been constructed so far, (referring to a submitted drawing) the red indicates an 8” sanitary sewer line. Then to the west of that is a 10” water line, which is indicated by the blue line. Should we be concerned about how close the foundations may be to that infrastructure construction and to where the sidewalk is indicated?

Chinnici - When the engineer did this particular layout he didn't spend a lot of time trying to fit it in precisely with respect to the existing utilities. They (houses) were simply placed on the map to make sure there was sufficient separation between the units to show that they would work. We have all the latitude we need to move around a little bit. For example, this building would likely slide back a little bit and to the right as to avoid that line. The worse case scenario is that some of those lines could actually be moved.

Aubrecht – What kind of a distance would you expect to maintain between the water line and the basement?

Chinnici – Whatever our engineers recommend.

Hopkins – You don't want a building over the water line.

Chinnici – We have the ultimate ability to flip the building so that just the driveway would be over the water line.

Salter – Mr. Hopkins, you initially started off saying 46 units then you went to 47 units.

Hopkins – The original density that was approved by the Town Board in 2007, based on the clustering calculation, was 47 units. So pursuant to the request that this Board made last month, Frank went back to his drawing board and came up with a layout that would show what he would like in terms of an allocation of single family homes and two-family homes. What that layout confirmed is that if the project consists of 22 single family homes, it is going to result in a reduction in the overall density by one. We would be down to 46 total units.

Chinnici – That is happening because in our original plan this area here (pointing to an area on exhibit 22) that had five houses along this north side of the circle. But we are only showing four

there now. The reason was because if we were to build all singles there it would be a really tight fit. So then if it went that way we would lose that one unit for the time and go down to 46. If we went with a paired unit in there, we could probably make it work. At the end of the day it was really a choice that we made if we wanted to do singles up here. There's really not enough room to do five single houses there.

Salter – My other question is...the two houses or three houses that are up there...the plan I have shows four and I grant that this plan is older.

Chinnici – This is another example where we were trying to show how we could get that last unit in there. Ideally that is what we would like, but in keeping with the discussion from the prior context of discussion, we tried to keep that within that building envelope.

Hopkins – That would be outside what was the original buildable area. That's why we're not showing it.

Salter – Can you get the 47 units in without using that area?

Hopkins – No. If we take that out, it's 46 units.

Salter – So you are proposing to go with 46?

Hopkins – 46 if there are 22 single family homes. Keep in mind, if it's a different allocation it still could wind up being 47, because then you could make it fit.

Chinnici – If we work with 22 singles plus 12 doubles. If we did 13 doubles that would be 26 units and that would leave only 21 singles to get to 47 and that we could probably fit.

Whitcomb – Before this Board you have to decide what horse you're riding.

Chinnici – The horse we're riding is we want a maximum of 22 single family home permits.

Hopkins – We would agree to a condition that if it's 22 singles that the maximum density would be 46 instead of 47.

Chinnici – We don't know what people are going to want in the future. We don't want to have to come back and do this again.

Salter – When you have single homes you have essentially required more allowable land than if you have a double home, is that correct?

Chinnici – If you were building according to standard subdivision criteria. The whole point of the clustering ordinance was to calculate the density you could get under standard subdivision requirements, take that maximum density and put them in a smaller area and aggregate the green space. Even though we are asking for an area variance from 560,000 sq.ft. to 596,000 sq.ft., that's a formula calculation, but we are not impacting any more dirt under this scenario than under the prior scenario.

Hopkins – The infrastructure stays exactly the same.

Chinnici – It's an area variance in name only because it's based on the formula used to calculate density under that current zoning ordinance for a standard Residential 2 subdivision. That's why there's this bit of controversy, at least on our end, is that once you get to a maximum density it shouldn't matter whether it's a single or a double.

Aubrecht – I'd like to give others an opportunity to speak.

Simeone – How many existing homes are there now?

Chinnici – We have 29 homes that are sold and closed and that are occupied. We currently have four homes under construction and we have permits for two more. So we have three two-family homes that are permitted, but are not complete. That would bring us to 34 total units. Then we have two contracts for single units that would bring us to 36 total. The two singles (contracted) haven't been able to get a building permit and that's why we're here.

Simeone – Of the 29 sold, how many are singles?

Chinnici – We have 15 singles.

Salter – Why can't you get a building permit?

Hopkins – Because we've met the threshold of 15 single units.

Chinnici – Even though there is a chart that we've been held to, there are combinations that would allow us to go to 16 single units, but the Town Board took the position that they wouldn't allow us to go past 15.

Simeone – So if there are 15 singles in the 29 number, then there are 7 doubles.

Hopkins – Correct.

Simone – What are the four under construction?

Hopkins – Two two-family homes (4 units).

Whitcomb – Have there actually been a denial of the two permits under contract?

Chinnici – One denial

Whitcomb – Mr. Kramer, is that denial in the record? I haven't seen it in the record I have.

Kramer – It's been discussed. It was brought up at the last meeting.

Whitcomb – I have jurisdictional problems here. Without a denial in the file by the Building Department, I don't know that we have jurisdiction...

Kramer – We have not denied the (building permit) application, but it's my understanding that they can still appeal.

Whitcomb – Is that denial in the file?

Hopkins – You're hearing from the building inspector....we weren't going to demand a written explanation because he's following the chart.

Whitcomb – Technically speaking, that's required before you come before us, before we have jurisdiction. You have to have a denial of a building permit based upon an ordinance in order for the ZBA to have jurisdiction. There has to be an appeal from something. That needs to be in the file. I'd like to hear from the Town. I've got to hear an explanation as to why what you propose is not acceptable to the Town. I need to understand the Town's position.

Bennett – Ronald Bennett, Town Attorney. I don't want to spend too much time because we have put in the record the position of the Town. It starts by every time there's a variance requested it is contrary to some law or some ordinance. In this particular case, the Town dealt with this some five years and tried to develop it so that it maintained the rural character of the Town. We start by stating the law – we explained this last time, so I won't get into too much detail. Section 278 of the Town Law permits a different type of subdivision. With Cluster Development the intent was to be able to approve a plan that would put dwellings, not necessarily on individual lots, but in a cluster development. The intent of 278 is in order to landscape, in order to preserve the natural and scenic qualities of open land. The density factor was a main consideration of the Town Board, as is the law and what is now in our code. The law says the purpose of the cluster development shall be to enable and encourage flexibility in the design and development of the land in such a manner as to preserve the natural and scenic qualities of the land. The Town has steadfastly maintained its density and the Town Board

reflects that in its action in the approval of this development. A cluster development shall result in a permitted number of dwelling units which shall in no case exceed the number which would be permitted if the land was subdivided into lots conforming to the minimum lot size density requirements of the local law. In this case, after much ado, we came up with and the developer showed us where they could have development. Of the whole development there was 560,000 sq.ft. It wasn't our determination, it was the determination of the developer. We already put in the record the combination (of singles and doubles) that was developed by the developer and presented. The density factor here, by law, says 16,000 sq.ft. for a single and 20,000 sq.ft. for a double. This is based upon the existence of sewer and water. Initially the Town Board approved 13 singles and 17 doubles which equaled 47 units. 47 units was a density factor of 560,000 sq.ft. which was the maximum which the developer told us and presented and was approved for the building of this development. They presented a chart that showed what would be within that 560,000 sq.ft. requirement. The Town is steadfast in its desire to maintain the density that is required by law. The law says "shall", not may. To the Town Board, this request is an undesirable change. You would create a precedent if this request were to be granted. Could this be achieved by some other method? It could be by staying within the law. He came up with the 560,000 sq.ft. when he developed this. Is it substantial? If it violates and is not in conformity with the NYS Town Law 278 and the Town of Aurora Cluster Development code, then, yes, it is substantial because it is going over what we permit. How much is much? Where do we stop? The adverse affect is on the overall town. You are going to set a precedent when you say one no longer has to comply or follow the density that was approved by the Town Board in the development. The difficulty is self-created. I understand that the developer tries to project how many singles, how many doubles. The market can change. The one thing that never changes is the density. It's the position of the Town that if we are going to follow the law and we're going to have this town as we want it, then the density is a major factor in any kind of development within the Town. Open areas are what we want. That is why we have substantial subdivision laws that provide for density factors. When we take that law and apply it to cluster development for the benefit of a developer, we understand the overall structure of the water and the growth, is much more economical than if it were a subdivision such as the Reed Hill subdivision. It's the position of the Town that it followed the law and did what it had to do.

Simeone – It's my understanding that the lawsuit has been withdrawn by the petitioner?

Bennett – That's correct. It was a main concern that I had in presenting to this Board that there was a pending case and most times you can't proceed until a lawsuit is resolved.

Friess – Susan Friess, Town Board member. I have a couple of items that I'd like to make clear. There have been so many gyrations of this request going back between the Town Board and the Zoning Board and different plot plans. There are a whole bunch of differences in each plan that has come before the various boards and that is why a lot of the confusion comes up. We haven't all been looking at the same thing. It's my understanding that when the application/request came to the ZBA initially it was based on the request that they would stay within the density of 47 units and that they were requesting an area variance so the footage went up from 560,000 buildable sq.ft. to whatever number was needed to get the extra units in. Fundamentally, I disagree with those two premises. First, I don't believe the ZBA can make up buildable space and change the fact of the case and say, yes, it really is 560,000 sq.ft., but we're going to allow you to have more. It's either buildable space or it's not. Second, I disagree with is the density of 47. The density calculation comes from this chart which came from the developer. It takes your buildable space and then determines based on 16,000 sq.ft. for a single and 20,000 for a double, how many units you can build. The result of the initial calculation was 47 when he chose 13 single and 17 double. To now say he wants additional units and is staying under the 47 is an incorrect statement. As I see it, in front of you is a request to build two more single units than he can by code. This chart says he can build 20 single units and 12 doubles. The request is for 22 singles and 12 doubles as I see it. The 47 does not make sense to me and you can't just make up area and say you have 600,000 sq.ft. to use. I'm asking that the development be kept within the envelope. He needs a variance because the code says, by the chart, he can only do 20 singles and 12 doubles. That's for you to determine how it impacts the Town based on the criteria put forth by law.

Aubrecht – To this point in time, setting aside the current request, everything that has been built has been built per the original agreement except for one lot, correct?

Friess – No, per the original agreement it was 13 singles and 17 doubles. The Town Board later allowed them to move up the chart to 15 singles and 16 doubles. The Town Board can only stay within the law, so we could not give the developer what he is asking for here because it is not within the law.

Hopkins – The reason we were able to go up to 15 single units is because it would not cross the 560,000 sq.ft.

Aubrecht – The agreed to constructible area was maintained except for the one unit.

Hopkins – That's why we're giving up the one unit if we build out the rest as singles because it would go outside the buildable area.

Chinnici – This business about whether we have 560,000 sq.ft, 600,000 sq.ft.; it is a formula. The land area impacted, the space in which homes will be built will be absolutely identical if we build it in singles versus doubles.

Whitcomb – I disagree with you. The density has changed.

Aubrecht – Up until this point in time everything is per agreement...

Hopkins – Per the chart.

Aubrecht – The density has been maintained as per the agreement, per the chart, by law.

Hopkins – More importantly, it's not about the density, it's about the allocation.

Aubrecht – If you took the density over the total site, your argument would be 46 is maintaining the same density, same buildable area. The point I would make, is the question before us, is that the density within the remaining area to be constructed that's where the density is being increased. It is. Square footage per area of land is being increased and in this sense, your basis of your variance request is to say that the 560,000 should be increased to a certain larger number and I think what you're really asking for is that the 16,000 sq.ft. and the 20,000 sq.ft that is the basis for calculating the constructible area and number of units, you're asking that those numbers be smaller. And that's where the density becomes greater.

Friess – They are asking for two more units than is allowed by the chart which is the code. It's based on the fact that they are asking to go against the chart and need a variance to add two more single units.

Aubrecht – I believe the ask is for two more singles.

Chinnici – In practicable terms, that is exactly correct. I agree that right now we can go up to a maximum of 20 single family homes and we're asking to go to 22.

Hopkins – The chart gives you your maximum number of units. The maximum square footage in the as-of-right plan is 560,000. Under our proposal, which would be a maximum of 22 single units and 12 doubles, would require 591,000 sq.ft. Based on the chart we are 31,000 sq.ft. over, which is 5.1%. It's a semantic argument.

Aubrecht – Your ask is based upon where you started before you began any construction. There is construction in place that is fully compliant. Your ask should be as going forward from this point in time and not going back to the beginning.

Hopkins – We're not asking the Town Board to go back and change the chart. We agree with the chart. We still haven't heard what the detriments are. We're not asking for bigger footprints or smaller green space.

Friess – Someone asked why the Town Board denied additional units. The plan the Town Board received and looked at had development outside of the buildable envelope which would have a negative effect on a neighboring property. It was not the same as what you are looking at. I hope that if you do approve this variance, that the units stay within the buildable envelope approved by the Town Board.

Hopkins – The 46 units respect that plan. We're in agreement with that.

Aubrecht – Does anyone else would like to address the Board with regard to this request?

The following persons appeared and spoke in favor of the variance:

Ray Peters, Farrier Lane, E. Aurora
Arlene Daniel, Farrier Lane, E. Aurora
Anthony Daniel, Farrier Lane, E. Aurora
Joseph Gerbasi, Martingale Court, E. Aurora

Chinnici – We've responded to every request before the various boards.

Hopkins – We're actually willing to reduce the density.

Simeone – Just a general question to the residents...the petition that we saw said 47 units and they are asking for 46...are you all aware of that?

Chinnici – If we build 46 units then the common charge is split 46 ways, instead of 47, so that will be a consideration....(could not hear the rest of Mr. C's statement)

Whitcomb – If we approve it at 46 that is what it is. Let's make it clear. You have one proposal before this Board and that's the proposal you're going to go on. If you're going to change it then we're going to table this and we'll have you come back next month and give us something we actually can vote on.

Chinnici – I think we've already stated there is a combination of singles and doubles which will result in the allowed 47 number of units. If we go 13 doubles

Whitcomb – No. 46 is the number.

Hopkins – If we do 22 single family....

Whitcomb – That’s the problem. You’re a moving target. If you want a variance you have to be specific.

Hopkins – We are being specific.

Whitcomb – You were up until two minutes ago.

Hopkins – We all agree on the applicability of the chart, the original chart from way back when in 2007. We’ve asked for a variance is for that number to be adjusted instead of 560,000 sq. ft. we’re asking for that number to go up to 608,000 sq. ft. So we have to live within that combination.

Whitcomb – I calculate 591,000 sq. ft.

Hopkins – That’s with 22 singles. But the actual maximum number could be under any combination under our plan could be 608,000 sq. ft.

Chinnici – No. I’m willing to go down to that number he said. We want the maximum number of singles at 22, but if we only built 21 singles and 13 doubles that would be 47 units. All we’re asking for is a maximum 22 single permits.

Whitcomb – Then you’re outside the buildable area.

Chinnici – No, because a single house requires 16,000 sq. ft. and a double requires 20,000 sq. ft. so if you take two singles and put them together you. There is an outcome that’s possible, without violating the request before you, that would result in 47 units.

Hopkins – We had a unit that was outside what was known as the buildable area. How we can address this is to put a condition that, going forward, all units have to be in the original buildable area.

Salter – Essentially what you are saying is that because of the area required per single or the area required per double is different. If you had all singles you would need a heck of a lot more space. But if you had all doubles, you could put more in the space that was originally allocated...is that right?

Chinnici – If we built all doubles, we'd be like 56 units.

Salter – Now you want to put more singles, but still be able to stay within the original area, correct?

Hopkins – Yes. The buildable area is not changing.

Friess – But I'm still hearing "up to 47 units".

Hopkins – It's the difference of how you determine density based on the chart and what's actually on the ground. They're not the same thing. Under the chart we need a variance, but what is on site will be no different in terms of the buildable area.

Aubrecht – By coming back to that we add to the confusion. My understanding is that you are submitting this plan to build this plan, this number of single units, this number of double units...

Hopkins – Up to 22.

Aubrecht – If you're saying there's a mix, that's a different animal.

Chinnici – Let me see if I have this correct. You want a fixed number, a fixed combination?

Aubrecht – Yes, you got it.

Chinnici – Fine. 22 singles and 12 doubles.

Salter – People were upset because this was a moving plan. Now it isn't.

Aubrecht – Here's where we are. This is a Board of five members. Only four are present tonight. If we do a vote tonight, and I can't tell you where people are, if it comes up a tie vote, it's a no. Also, you can't come back with this request for a year's time.

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Bennett - A 2 yes -2 no vote defeats the motion. You need an affirmative vote or the motion fails.

Chinnici – We are asking for 22 single permits and 12 double permits.

Hopkins – Can we have a moment to discuss this, whether or not we want a vote to be taken tonight?

Aubrecht – Yes.

Hopkins – If the Board is will to consider...could we at least agree on what conditions you would like to see attached to any resolution?

Whitcomb – Sure, we can talk about it.

Aubrecht – I have three (3) conditions I would like to see:

1) The number of units will be a defined number of units – 22 singles and 12 doubles as shown on Exhibit 22, as submitted on July 17, 2014 and building will take place in the agreed to constructible area as previously defined by the Town Board.

Chinnici – Can we, say, take these two singles and put them where a double is shown and put that double where the two singles came from? Because you're saying as shown on the exhibit.

Aubrecht – As long as you don't go outside the buildable area.

Whitcomb – And as long as the number of single and double units does not change.

Aubrecht – Continuing with the conditions:

2) There is no loss of open space or increase in the amount of roadway network.

3) There will be no additional units constructed to the south along Farrier Lane (going toward Route 20A)

Salter – So you plan on leaving those three units on their own roadway?

Hopkins – Yes.

Kramer – There will be a sidewalk that connects it to the rest of the development.

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Hopkins – In light of those conditions, I think we'd be comfortable with the Board proceeding with the vote.

Chinnici – What assurance would I have that there will be five Board members in August?

Whitcomb – You never know.

Salter – Do you foresee any reason to change anything that you've agreed to tonight?

Chinnici – No.

Aubrecht – This hearing is closed.

MINUTES OF A MEETING AS HELD BY THE
ZONING BOARD OF APPEALS OF THE
TOWN OF AURORA
July 17, 2014

The meeting was called to order by Acting Chairman Donald Aubrecht, with the following Board members present:

James Whitcomb
Albert Salter
Donald Aubrecht
Rod Simeone, Alternate

Others Present: William Kramer, Code Enforcement Officer

Absent: Wayne Nowocin, Davis Heussler

CASE #1207 – Frank Chinnici aaf Legacy Polo Grounds, (Farrier Lane, Registry Lane, Martingale Court, East Aurora, NY

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 James Whitcomb and seconded by Albert Salter to grant an increase in the number of single units in the Legacy Polo Ground Development (Farrier Lane, Martingale Court, Registry Lane) by two (2) - from twenty (20) to twenty-two (22) - with the following conditions:

- 1) Only twenty-two (22) single units will be constructed.
- 2) Only twelve (12) double units will be constructed.
- 3) The buildable area will be that as shown on Exhibit 22.
- 4) There will be no loss of open space.
- 5) No units will be built further south of unit No. 1 on Farrier Lane.
- 6) There will be no increase in roadway space.
- 7) The buildable area (agreed to constructible area) is the same as the envelope area shown on the map cover approved by the Town Board and filed in 2007.

This variance is granted in accordance with exhibits and testimony presented. For purposes of SEQR, this is a Type II action.

Upon a roll call vote being taken:

Salter – aye; Whitcomb – aye; Simeone – nay; Aubrecht – aye

Ayes – three Noes – one Carried.

