

Town of Clarence
One Town Place, Clarence, NY
Zoning Board of Appeals Minutes
Tuesday November 18, 2014
7:00 p.m.

Chairman Daniel Michnik called the meeting to order at 7:00 p.m.

Zoning Board of Appeals members present:

Chairman Daniel Michnik Vice-Chairman Ryan Mills
David D’Amato Patricia Burkard
Gregory Thrun

Zoning Board of Appeals members absent: Richard McNamara

Town Officials present:

Director of Community Development James Callahan
Junior Planner Jonathan Bleuer
Deputy Town Attorney Steven Bengart
Councilman Peter DiCostanzo

Other interested parties present:

Enas Eldesouski Nancy Lipinoga
David Huck Caleb Huck
Bruce Wisbaum Roslyn Marcus
JoAnn Azzarella Richard Lippes
Sean Hopkins Michael Metzger

Motion by Gregory Thrun, seconded by Patricia Burkard, to **approve** the minutes of the meeting held on October 14, 2014, as written.

Gregory Thrun Aye Patricia Burkard Aye
David D’Amato Aye Ryan Mills Aye
Daniel Michnik Aye

MOTION CARRIED.

The Zoning Board of Appeals members entered into an Attorney Client Privilege closed session.

The meeting resumed.

New Business

Appeal No. 1

Enas Eldesouki
Residential Single Family

Requests the Board of Appeals approve and grant a 6' variance to allow for a 6.5' side yard setback for a proposed attached garage addition located at 5722 Field Brook Drive.

Appeal No. 1 is in variance to §229-52(B).

DISCUSSION:

Enas Eldesouki is present and explained that currently they have a two-car garage. Her daughter has recently been added as a driver in the household so they now have three (3) cars. It is hard to get out of the driveway when there is a car parked there and it snows, the snowplow does not get there early enough to clear the driveway when someone has to leave at 6am for work. Mr. Eldesouki is on call so he has to leave at a moment's notice. Their neighbor has a three-car garage.

Ryan Mills read an e-mail dated November 17, 2014 into the record, "Thanks for returning my call this am. I am especially concerned about the extra garage that the residents want to build. I fear it is a rouse and they will want to turn the old garage into a medical practice...he is a doctor and his home has not been an asset to the neighborhood. I would not want a slew of patient cars blocking up our neighborhood. When they first moved in they used the house like a rooming house and had multiple people coming and going all day and turned their living room in a boarding house with dividers to house people from out of the country. Thank you for your consideration, Judith Whitehead, 5686 Field Brook Drive, 14051, 6 doors down from the house asking for the variance."

Mrs. Eldesouki said she had family members and kids who were studying, she does not think that is illegal here. They are now gone. Mr. Eldesouki has his practice a Sisters Hospital. Deputy Town Attorney Steve Bengart asked if the applicant would have a problem with a stipulation saying there would be no business operated out of the home. The applicant's would not have a problem with that, this is their home, there is no business being operated there.

There are two (2) neighbor notification forms on file.

Mr. Thrun asked if the construction material will match the existing house. Mrs. Eldesouki said yes.

Mrs. Burkard asked for details on the driveway. Mrs. Eldesouki said it will curve over to the proposed garage, it will not be an extra wide driveway all the way out to the road. Mrs. Burkard asked why the garage is being set back. Mrs. Eldesouki said due to the configuration of the home it was the best option. She thought about building it behind the existing garage but she was told there wasn't enough space to make it wide enough for a car to be backed up. Also, the driveway would have had to go around the house because the existing garage's entrance is in the front. They have an architect and a contractor to do the work. Mr. Mills asked if there is any additional landscaping planned for around the proposed garage. Mrs. Eldesouki said she is building a sunroom in the back of her house. The same builder that is doing the sunroom will be building the garage. They are looking to start the construction as soon as possible.

Chairman Michnik asked if there are any plans for the second floor of the garage. Mrs. Eldesouki said there will be nothing on the second floor, it won't even be used for storage.

ACTION:

Motion by Ryan Mills, seconded by Patricia Burkard, to **approve** Appeal No. 1 with the condition that the additional garage space and the existing garage space will not be utilized for any business use.

ON THE QUESTION:

The applicants are in agreement with the condition.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Appeal No. 2

Nancy Lipinoga
Residential Single Family

Requests the Board of Appeals approve and grant a 568 square foot variance to allow for the construction of a 768 square foot detached garage located at 9890 Main Street. Principle structure is located within the Commercial Zone. Proposed accessory structure located within the Residential Single Family Zone.

Appeal No. 2 is in variance to §229-55(H).

Chairman Michnik recused himself from the discussion and vote for Appeal No. 2 and left the meeting room. The appropriate paperwork has been filed. Vice-Chairman Mills will preside over the meeting.

DISCUSSION:

Nancy Lipinoga is present and explained that she wants to build a garage to park a truck in it, a tractor and to store wheel barrels. It is 27' from the side property line and 25' from the rear property line. The proposed structure is 24' x 32', her property is 1.1 acre in size.

Vice-Chairman Mills referred to the survey dated November 26, 1988, a copy is on file.

Mr. Thrun asked if it will be a steel building, Ms. Lipinoga said yes. It will only be used for storage of tractors and wheel barrels and the like, it will not be used as a music venue. Mr. Thrun asked if the existing shed will remain. Ms. Lipinoga said yes.

There are three (3) neighbor notification forms on file.

Mr. D'Amato asked how the applicant arrived at the size of the proposed structure. Ms. Lipinoga said needed room for the truck, the lawn mower and some wheel barrels and still have room to move around. There will be lights on the structure for security reasons. There will be no plumbing.

Vice-Chairman Mills referred to the neighbor notification form with address of 9735 Main Street and asked Ms. Lipinoga for details on that location. She said that address is for the office of Stephen Development,

he owns the vacant property that is directly behind her property. Vice-Chairman Mills asked the applicant if she could get away with any less size structure, she said no. The nature of her business is exclusively a florist.

ACTION:

Motion by Gregory Thrun, seconded by David D'Amato, to **approve** Appeal No. 2 as written.

ON THE QUESTION:

Vice-Chairman Mills noted that this is a unique piece of property and can be distinguished from other parcels in that it is partially residential and partially commercial. There is a lot of depth to the parcel.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye

MOTION CARRIED.

Chairman Michnik returned to the meeting.

Old Business

Appeal No. 7 (from September 2014)

Regent Development
Commercial

Requests the Board of Appeals approve and grant an area variance for the proposed density of 124 apartments for the multi-family component of the proposed project at 8230 Wehrle Drive.

Appeal No. 7 is in variance to §229-126(D)(1)(c). Per the amendment to the Town's Multi-Family Law, adopted by the Town Board July 23, 2014, the allowable density for this proposed project is 93 units.

DISCUSSION:

Sean Hopkins, of the Law Firm of Hopkins and Sorgi, is present on behalf of the applicant, Regent Development. Dave Huck and Caleb Huck are present along with the project engineer, Michael Metzger. Mr. Hopkins noted that the Board held a hearing previously on this application on September 9, 2014. Based on the receipt of additional information, it was decided to adjourn that public hearing and continue it at another date. This meeting is the continuation of that public hearing.

Mr. Hopkins explained the project site is located at 8230 Wehrle Drive, which is on the south side of Wehrle Drive. The entire site is zoned Commercial. Mr. Hopkins pointed out the adjacent apartment complexes on three sides of the site. The first is Coventry Green which is at 12 units per acre located on the property directly to the west. Secondly, Stonegate Apartments is located on the property directly to the north and east of the project site with a density of 8.5 units per acre.

The applicant needs an area variance for the allowable density for the multi-family component portion of the project. Pursuant to the amendment to the Multi-Family Law adopted by the Town Board on July 23, 2014, this project is no longer in compliance. The Town Board had adopted a Multi-Family Law on June 26, 2013, this project pre-dates that by approximately a year. When the Town Board adopted that new

Multi-Family Law on June 2013, Mr. Huck working closely with Mr. Metzger and Silvestri Architects redesigned the project. One of the key aspects of the June 2013 Multi-Family Law was that it required you to include a commercial component as well, to encourage mixed use. The commercial development is included in this plan, it is along Wehrle Drive. The multi-family portion of the project is along the northern portion of the site. New standards were also adopted such as landscaping requirements, 25% Open Space, a maximum building height of two (2) stories, etc.

Mr. Hopkins said one of the claims that was made by Mr. Lippes on behalf of his client, the owner of the adjacent apartment complex, was that when the Town Board adopted the amendment to the code in July 2014 it was just clarifying a previous interpretation. This is not the case, the language of the law that was adopted in June 2013 clearly stated that the maximum allowable density was eight (8) units per acre for the site, meaning you calculate it on the entire 15.5 acres. Projects were approved pursuant to that Multi-Family Law, one example is the Brothers of Mercy project. The density of Brothers of Mercy as approved was based on the acreage of the entire site. So to say that it was the applicant misconstruing an interpretation of that law is incorrect.

The Town Board in July 2014 amended the Multi-Family Law to clearly state that the maximum allowable density for the Multi-Family component of a project is eight (8) units per acre based on that portion of the site to be developed as multi-family. This is what triggered the need for a variance, this just occurred in July of this year. A letter that was submitted by Mr. Wisbaum claims that the applicant should have or could have known, this is just not true. The law was changed in late July 2014. It is clear that the applicant has a hardship.

Mr. Hopkins said one of the other claims that was made was that if this Board considers granting the requested relief it would be a “slap in the face to the Town Board.” Mr. Hopkins and the applicant disagree with that opinion. New York State Town Law governs not only the behavior of this Board but any Zoning Board of Appeals (ZBA) in New York State. That law clearly states that every town that has a zoning code must have a Zoning Board of Appeals and that the essential purpose of a Zoning Board of Appeals is to review requested variances whether they are area variances or use variances. Mr. Hopkins referred to the Court of Appeals Cases dealing with the early ZBA decisions and said there is repeated discussion about the ZBA being a safety valve. That means it is a recognition of the fact that in certain instances strict application of a zoning code, especially the portion of the Zoning Code that was changed well into the review of a project’s process, can result in a hardship that justifies consideration of granting a requested relief. That safety valve function is important because it is for every application that the Board reviews, it is for someone that does not comply with the Zoning Code. The applicant does not think it is a slap in the face to the Town Board. They are asking for it to be reviewed on its merits pursuant to Town Law §267(b)(3)(b) which requires the board to balance the benefits and weigh those against the resulting detriments. The Town Board issued a Negative Declaration based on this layout. The Town Board was judicious in that it said this would be the maximum allowed density. The environmental review was based on this layout, a maximum of 124 upscale multi-family units.

Mr. Hopkins said there was another claim made by Mr. Lippes in the September 9, 2014 minutes, that, but for this request, this would be 15.5 acres of greenspace. This claim is not relevant because it is not publicly accessible greenspace today, it is the Wehrle Golf Dome with an outdoor driving range. Also, the property is zoned commercial, it is surrounded by property that is zoned commercial. It is an in-fill development site located in close proximity to Transit and Wehrle. The Town has gone out of its way to protect and preserve open space, agricultural resources, and environmental resources. Mr. Callahan deserves most of the credit for preparing Master Plan 2015 and a wide assortment of regulations that followed thereafter.

This project does not interfere with any of those objectives given its location. One of the purposes of the Multi-Family Law is to preserve the rural character of the Town of Clarence, they are not interfering with this objective.

Mr. Hopkins referred to the plan prepared by Silvestri Architects which has already been reviewed by the Board members in the previous meeting. The plan reflects input that has been received to date, several changes have been made. If the Board approves this variance it doesn't mean they are endorsing this layout, they are simply looking at it from the perspective of the allowable density. The applicant has agreed to preserve the existing berm located on the northern portion of the site. A letter submitted earlier today by Mr. Wisbaum said that was not the case. The applicant would agree to a condition unequivocally that that berm and greenspace will be preserved. They have added a walking trail along the storm water detention pond based on input from the Planning Board. They have modified the access onto Wehrle Drive. They have changed the interior access to provide more connectivity between the commercial and residential components. The dog walking area has been moved. Landscaping has been added, etc., etc. They will continue to undertake the review process if this Board grants the requested variance and there may be additional changes. This is not meant to be a final site plan, that decision will be made by the Planning Board based on future meetings.

Mr. Hopkins referred to Town Law §267(b)(3)(b) and said the first criteria the Board needs to consider is whether or not a decision by this Board to grant the requested area variance will result in an undesirable change in community character or a detriment to the nearby properties. If the variance was not granted the applicant would lose two (2) buildings. Those buildings are 16 units each. From the perspective of the adjacent property owner, whether located to the north or east or west, the project will basically be the same in terms of appearance and aesthetics, etc., etc. The applicant does not believe that if the variance is granted it will result in an undesirable change in community character or a detriment to the nearby properties. Mr. Wisbaum is the individual who is opposed to this project, his property is located to the north and his driveway is located to the east of the site. If you look at the project from Mr. Wisbaum's site there will be no change.

Mr. Hopkins referred to criteria #2 which is whether or not there are feasible alternatives that the applicant can pursue that would allow it to receive the benefit that it is seeking. Mr. Lippes and Mr. Wisbaum claim there are countless examples of 93 unit apartment projects throughout Western NY and because of that it is impossible for Mr. Huck to come before this Board and claim that there are no other feasible alternatives, however that is not the criteria. The criteria is whether or not there are feasible alternatives that the applicant can pursue that would allow it to receive the benefit that it is seeking. To decrease the project by 30 units but still spend the millions of dollars in infrastructure improvements, paving, sanitary sewer lines, water lines, storm water management facilities, curb cuts, landscaping, etc., etc. is disingenuous. Losing 33% of the density is not an acceptable outcome, it would make it difficult, if not impossible, to finance the project. When Mr. Huck entered into this purchase contract for this property it was based on the Multi-Family Law that was in existence.

Mr. Hopkins referred to criteria #3 which is the substantiality of the requested relief. There is no denying the fact that the deviation based on strict application of the Multi-Family Law as it currently exists is 33%, meaning the applicant is asking for 33% more density than what would otherwise be permitted. But the Case Law makes it clear that a Zoning Board cannot just make its decision on the quantification of the deviation such as 20%, 30% and so on, instead the resulting harm must be looked at. If the Board looks at what is allowed and the variance is granted and compare to what the project would be in the absence of the relief, it's hard to say there is a lot of harm that will result based on the discrepancy between the two.

Mr. Hopkins referred to the fourth criteria which is whether or not the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood. This criteria overlaps the requirement that this Board conduct an environmental review pursuant to SEQRA. Extensive documentation has been provided to the Board showing that this project will not result in any potentially significant adverse environmental impacts. On September 10, 2014 Mr. Lippes submitted a letter raising many environmental concerns in support of his client's position that this project will result in significant adverse environmental impacts. The first impact that was raised was concerns on flooding or drainage. The development of this project is not going to result in any significant drainage or flooding impacts. None of this site is located in a regulated floodway or a regulated 100-year floodplain. As part of the review of this project Mr. Metzger and his firm will be required to prepare fully engineered plans, an Engineer's Report, and a Storm Water Pollution Prevention Plan. Those documents have to demonstrate clearly that as a result of the development of this site, which will result in new impervious surfaces, that there will not be any off site drainage impacts. The project engineer must be able to demonstrate to the Town Engineer based on the DEC standards that this project will be capable to handle a 100 year storm event. Typically the development of a site improves drainage conditions. If the DEC standard cannot be satisfied the project cannot move forward.

Mr. Hopkins goes on to address the letter from Mr. Lippes in which criteria #2 states that this site is in Erie County Sanitary Sewer District #4. Mr. Hopkins said this is not the case. It is actually located in Erie County Sanitary Sewer District #5. Mr. Metzger prepared a letter responding to the comments that were received from the County confirming that fact and also confirming that there is adequate capacity; there are no known occurrences or problems in the system that will be utilized for this site. As a part of the review of this project the engineering review, which will be handled by Mr. Metzger's firm, will have to work with a third party consultant to prepare a downstream sanitary sewer capacity report. This is required of all projects in which there is anticipation that there will be more than 2500 gallons of sanitary sewer per day. That downstream sanitary sewer report will need to be reviewed and approved by the NYS DEC, the Erie County Health Department, Erie County Division of Sewer Management and the Town's Engineering Department. Pursuant to the policies that are in place now, what they will have to do is, if there are problems, they will have to demonstrate through offsite repairs that they are going to take out four (4) gallons of flow in the system during wet weather conditions for every new gallon that they add. So there will be no adverse sanitary sewer impacts. It is impossible to guarantee sanitary sewer capacity for a project on a perspective basis, it is a first come, first serve basis. The capacity could change in the future, and if it does it could result in a detriment to the project going forward. This is not anticipated, but it is a known risk and the applicant understands this.

The third impact that Mr. Lippes raised a concern about was the impact on endangered or threatened plants or species. This was based on the results of the New York State DEC Environmental Mapper which indicated there could be the presence of such a plant or species. Mr. Metzger looked into this and determined that based on a review of DEC records that relates back to a 1937 sighting of Tansy Mustard in the vicinity of the sight. The sight was checked and there is no Tansy Mustard on the sight.

Mr. Lippes raised a concern about the potential adverse impacts on archeological or cultural resources. According to the letter issued by the New York State Office of Parks, Recreation and Historic Preservation there will be no impact on such resources, the letter is on file.

Finally, Mr. Lippes and Mr. Wisbaum claimed that this Board is obligated under all circumstances to issue a Positive Declaration and require Regent Development to prepare environmental impact statement based on traffic impacts. Mr. Hopkins addressed this by noting that as part of the environmental review of the

project and based on input that was received from Erie County, Amy Dake, of SRF Associates, prepared a traffic impact study. It was based on consultation with the Town, the Town's Executive Committee of the Planning Board, and Mike Asklar, the Traffic Safety Engineer from Erie County Department of Public Works. The reason that Mr. Asklar's input is important is that Wehrle Drive is an Erie County highway. In the study there was a detailed analysis, and one of the aspects that is always addressed in a traffic impact study is impacts on level of service at intersections. There are two new driveways that are going onto the sight. There are two existing driveways located on the parcels opposite the project sight. There is North Maple Drive, and there is a driveway into the existing McGuire Rehabilitation Nursing Center. Amy Dake and SRF Associates looked at all those movements and found that at certain times during weekday pm peak travel hours, which is a small portion of the overall day, there will be some degradations in the level of service. A copy of the traffic study was provided to the Town so as to note that there are two impacts to be aware of. Number one, during that weekday pm travel hour it is difficult to make left hand turns out of the Rehabilitation Center. It is also difficult to make left hand turns out of North Maple Drive. That is the case today without this project. However, with this project it is anticipated that those levels of service will decrease, meaning there will be more of a delay. It will be more difficult during that weekday pm peak travel hour to make a left hand turn out of the Rehabilitation Center. The claim that appears to be being made by Mr. Lippes is that by the mere fact that there will be certain degradation of service for certain turning movements during certain times of the day requires the Board to issue a Positive Declaration. Mr. Hopkins said that is not true. This past summer Mr. Asklar issued a letter based on his review of the traffic study and based on his review of the supplemental traffic analysis prepared by SRF Associates and concluded that, "We are in agreement with the methodology utilized in the analysis conducted by SRF. Based on our review of the traffic analysis contained in the TIS prepared by SRF Associates, as well as its response letter dated August 8th, we concur with the conclusions and recommendations contained in the TIS. The department, as an involved agency in connection with the environmental review of the project, pursuant to the State Environmental Quality Review Act, has determined that the project will not result in any adverse impact to the affected county highways. Based on projected trips to be generated the capacity analysis contained in the TIS and the existing and proposed project roadway connections as evaluated in the TIS." This is a clear conclusion that there will not be any significant adverse traffic impacts as a result of this project.

Mr. Hopkins said the other claim that is being made about traffic is that there is an attempt in this instance to defer a review of traffic impacts to some point in the future. Based on the fact that the client, who did this voluntarily, agreed, based on discussions with the Planning Board and Mr. Asklar, to prepare a post development traffic impact study. Meaning that the applicant has a traffic impact study now and once the project is fully built, Mr. Huck would retain the services of SRF Associates again and they will verify the conditions at that time, that may be four (4) years from now. That doesn't mean that based on the results of that traffic study that there will be all these unforeseen mitigation measures that need to be implemented. What that report will do is it will verify that the traffic impact study is accurate and it will provide useful information to Erie County and the Town about possible roadway improvements in the future. Erie County did complete significant renovations to that portion of Wehrle Drive from Transit Road heading west into the Town of Amherst. That may occur here as well, such a decision would have to be based on a whole host of factors such as availability of funding, availability of right-of-way, the traffic impacts at that time, the anticipated future impacts, etc., etc. The fact that Mr. Hopkins' client has volunteered to prepare a post development traffic impact study should not be weighed against him. It is voluntary, he will be spending several thousand dollars to do that and it will provide helpful information.

Mr. Hopkins said the other aspect of this project is the purpose of zoning and the purpose of this Board is not to regulate competition. But it is important to realize that Mr. Wisbaum is in direct competition with

Mr. Huck relative to this project. Regulating competition by saying he is opposed to traffic or wildlife or loss of greenspace, etc. has to be weighed by this Board. Since the public hearing held on September 9, 2014, the property owner has advised Mr. Huck that Mr. Wisbaum has contacted that property owner to inquire about purchasing this property. So it is difficult to come before this Board and say he is concerned about preserving the rural character of Clarence or he is concerned about preserving greenspace but yet call the property owner, hoping that if this project doesn't occur that he can buy the property himself. Unless Mr. Wisbaum's interest is in preserving the property as greenspace or a park.

Mr. Hopkins said the benefits outweigh the detriments. Mr. Hopkins said it is clear that it is appropriate for the Board to issue a Negative Declaration pursuant to SEQRA.

Mr. Thrun asked what a post development study would prove other than whether or not it is improved traffic flow or if it got worse, then what would be the remedy if it made traffic unbearable on that part of Wehrle Drive. Mr. Hopkins said they know what the anticipated traffic impacts will be from this project based on the existing conditions on that roadway network. SRF looked at the existing conditions on Wehrle Drive and included a projection of anticipated future background growth, however 3-4 years from now when that post development traffic study is done, there may be unforeseen development in that area, perhaps even in the Town of Lancaster. Many projects do not require traffic impact studies so that post development traffic study will be helpful because it will provide updated information relative to the actual, rather than projected, conditions at that point. Mr. Hopkins said that SRF Associates in recognition of the fact that the turning movement out of the nursing home during the weekday pm peak hour is challenging. SRF looked at two (2) improvements: whether or not a signal could be installed there, Erie County quickly dismissed this idea as not being appropriate. The other improvement they looked at was if they could take the single driveway and make it into a two lane driveway providing the option of vehicles to be able to take a left or a right. The two lane driveway will not work because based on the traffic study there are 61 vehicles that leave the McGuire Rehab Center during the pm weekday peak hour, 41 of those vehicles travel west, meaning they are taking a left turn, 20 of those vehicles are taking a right and heading east into locations in the Town of Clarence or Lancaster. SRF did an updated analysis that demonstrated that because of the fact that most of those cars are taking left hand turns and would still have to cut across traffic heading to the east, it really would not improve the situation. Currently the level of service for those turning movements are "e" and "f", the resulting change for that driveway is minimal, so the level of service would remain at "e" and "f". Mike Asklar, of Erie County, agreed with that analysis; there is no need for the driveway to be modified. Mr. Hopkins noted that that problem exists today, it is not related to this project.

Mrs. Burkard asked if this is a big concern for the McGuire Group. Mr. Hopkins said he does not know if it is because they have not heard anything from them during this process. Mrs. Burkard said she finds it hard to believe that this project will not have a big impact on traffic with all those units. The units are two and three bedroom so it is possible that each unit could have 2 vehicles. Mrs. Burkard asked if the study took school bus traffic into consideration. Mr. Hopkins said the study included school bus traffic and traffic in its entirety. Mr. Hopkins clarified that school buses cannot come on site, the children would have to go to Wehrle Drive. Mr. Huck said the approximate figures are 60% two-bedroom units and 40% three-bedroom units. Mr. Hopkins said often times what you will find with three-bedroom units in higher-end apartments is that the third bedroom is used as a study or an office, but there could be school-age children as well. Mr. Hopkins said based on input received from Erie County and the Executive Committee of the Planning Board, the applicant agreed to move the curb cut further to the west than what was originally planned. This was done so there would be adequate separation with the existing driveway and to line it up with the existing McGuire Rehab Center driveway on the opposite side of the site.

Mr. D'Amato said the initial plan for the 93 apartments would be in compliance, but the project needs approval because of the additional units. Mr. Hopkins said that is correct and noted that, based on the purchase price, the project would not be financially feasible if only 93 units were built. Mr. D'Amato referred to the commercial space and said it will obviously bring in double the rent of the residential component. Mr. Hopkins said no, not on a per square foot basis, it is probably comparable. Mr. Metzger noted that if the residential units drop from 124 to 93, that will not result in an increase on the commercial side. Mr. D'Amato said that by removing the two buildings that will open up greenspace, he said Mr. Hopkins said it will not open up space. Mr. Hopkins agreed that it does open up space and went on to clarify that what he meant was it doesn't change the perspective of the adjoining property owners. Mr. D'Amato said a 12,000 square foot building is significant and will change the view shed. Mr. Metzger went on to explain that there is another building between that adjoining neighbor and the proposed buildings. Mr. D'Amato said it would still be greenspace, Mr. Hopkins agreed and went on to explain the requirement for greenspace is a minimum of 25%, the project is at 45%, this is with the 124 units. Mr. Metzger noted that the plan meets or exceeds all requirements other than the density.

Mr. Mills asked for clarification on the units per acre. The applicant is seeking 10.66 units per acre, how does this compare to the adjacent projects? He would also like clarification on how that number is being computed in terms of factoring in the total acreage of the property and just the commercial versus residential. Mr. Hopkins said the density is being proposed based on what the overall site was because that is what the Multi-Family Law was at that time. The property is 15.5 acres in size, based on the maximum allowable density pursuant to the June 23, 2014 Multi-Family Law, you end up with 124 units. As a result of the amendment that was adopted by the Town Board in July 2014 which requires the density only be based on the multi-family component, they are at a density of 10.66 units per acre. Coventry Green, which is the neighbor to the west, is at 12 units per acre. Stonegate Apartments, which is located at the north and east of the project site, is 8.5 units per acre according to the applicant's calculations. Mr. Wisbaum, in his submission to the Board today, said that he believes it is less than 8 units per acre. Mr. Metzger verified his calculation based on the size of the site. A significant portion of the Stonegate site is a driveway. If you take away that driveway and compare that density to the applicant's proposal, it is tough to argue that the proposal is higher density. Mr. Metzger said if you calculate the density of Stonegate just using the densely populated portion of the site, not the driveway, it is 10.9 units per acre. Mr. Mills asked if there is any other way to achieve the additional revenue necessary for the project other than through the additional residential apartments. Mr. Huck said no because they can only put residential on the residential part. Mr. Mills asked if there is anything else that can be done on the commercial side. Mr. Hopkins said there is no more space for commercial because they have to meet the parking requirement. Mr. Huck does not want to do anymore commercial anyway because he thinks the residential and commercial are at a good balance as the plan exists. Mr. Mills asked about building up. Mr. Hopkins explained that if they built a second story onto a commercial building, then they have to increase the parking and they do not have room for that. Parking is based on the square footage of the building.

Chairman Michnik asked if the applicant explored changing the two inner two-story buildings with one-story buildings. Mr. Hopkins said they have not explored that option but would if the Board asked. This would bring the unit count to 109, Mr. Huck would need time to consider this option. Mr. Thrun said the applicant can adjust the numbers, he will charge more rent for a three bedroom unit, so maybe he can build more of those to make up the revenue he needs to make the project feasible. Mr. Hopkins suggested attached single story units with attached garages.

Chairman Michnik asked if the driveway to the west is Howard Road. Mr. Hopkins clarified that the street opposite the site is North Maple. He also clarified that the street will line up true. Mr. Metzger said there

is an agreement to work with the salon to share a driveway because the Salon's driveway lines up with North Maple. That driveway is primarily located on the applicant's property but they will share it with the Salon. Chairman Michnik asked if the applicant thought about making right turn only and left turn only lanes. Mr. Hopkins said no, Erie County will sometimes suggest that but the County doesn't like the right in and right out only because people ignore it.

Mrs. Burkard referred to the statement that the developer couldn't do any less amount of units because it would not be economically feasible, she then asked if that meant any other developer that wanted to do a project in Clarence would have the same issue with that current law. Mr. Hopkins said that at the time Mr. Huck entered into the purchase contract it was based on 124 units being allowable. If Mr. Huck was forced to do 93 units he would have to walk away because he would be paying too much for the land. If the Multi-Family Law had been adopted at that time, prior to Mr. Huck expressing interest in the property either they would not have reached a deal or the purchase price would be lower. Once under contract Mr. Hopkins said the purchase price cannot change, plus they know there are others who are interested in the property. It is noted that if Mr. Wisbaum built his site today he would have to have a 25% commercial component.

Mr. Mills referred to the section of Town Law §267 that discusses the hardship being self-created and asked Mr. Hopkins to speak to this. Mr. Hopkins said the alleged hardship is not self-created because Mr. Huck in good faith proceeded under the Multi-Family Law that was adopted on June 26, 2013. The plan submitted complied with that law and was consistent with all the other multi-family projects approved during that 13 month period. In Mr. Lippes' letter he takes the position that if you have not purchased the property you can't claim that the alleged hardship was not self-created because of the fact that when you close you will have knowledge that the code has changed. The cases that Mr. Lippes sites are exclusively use variances, that is a different situation; that case law Mr. Lippes referred to does not apply to area variances. Mr. Hopkins said no one could have predicted in June 2013 that the Multi-Family Law would change and that is what Mr. Huck designed the project around.

Richard Lippes is present on behalf of Stonegate Apartments and its residents. Mr. Lippes said he submitted two letters. One that dealt with the Town Law and what this Board is supposed to look at in determining whether or not to grant a variance. The second letter was submitted yesterday regarding the issue of the environmental review and whether this Board should require an environmental impact statement prior to making any determination. Mr. Lippes said there is no question that there is an alternative project that could go up on that site that would meet the code with 93 units. The applicant did a site plan with 93 units even though they said they would not go through with the project if they were limited to 93 units; however he does not know if that was before or after the amendment to the Clarence Zoning Ordinance. He said Mr. Wisbaum is more knowledgeable about all the projects that are being built for 93 units or less and if they have made a bad deal in overpaying for the project. What if people came to the Board and said they made a bad deal and paid too much for the project so they have to be granted a variance, so they can make more money. For purposes of planning, zoning and the Constitution, an owner of property is not entitled to make the most money possible that they can make on a piece of property. They are entitled to make a reasonable return on their investment. But to say that they can't make a reasonable return on the investment with 93 units belies all those apartment complexes that have been built with 93 units or less. What would happen if the applicant owned the property and this Board denied the variance? Would they try to resell it at a loss? Or would they leave it vacant? Or will they maximize the use with 93 units by increasing the commercial or whatever it might be?

Mr. Lippes said the applicant claims that a hardship exists. A hardship is not determinative of your decision when there is an area variance as it is when there is a use variance. The issue here is the definition of a

hardship, it is the same whether dealing with a use or area variance. They do not own the property, if they purchased the property with knowledge of what the Zoning Law is, that is a self-created hardship. Courts have said this consistently, it does not matter if it is a use or area variance, it is the definition of whether or not you have a self-created hardship.

Mr. Lippes said the applicant addressed the fact that this isn't greenspace because of where it is located, however for purposes of SEQRA and the Town Law, this is currently a recreational amenity, it is a driving range. It is also an open space. Both of those things, or the ability to put further recreation on the open space, is lost with this project no matter what the unit count. The board must consider this for purposes of the Environmental Review in determining whether or not to do an environmental impact statement, it is one of the regulations that must be applied according to §617.

Mr. Lippes said Mr. Hopkins indicated that the Town Law amendment took place as an amendment to the Zoning Ordinance and before this the language of the Zoning Ordinance was clear that you can consider the whole site, not just the site where the residential is planned; they would have been able to erect 124 units. If the Town Board intended that the entire property be looked at when they passed the previous ordinance in June 2013, why would they have amended it in July 2014? The fact is that the Board's intention was always to limit the density to the area of the residential alone. The developers misinterpreted the language in coming before this Board regularly saying they can build at higher density. Just because they made that misinterpretation doesn't mean that the July clarification is not in fact the case. Because they misinterpreted the language doesn't mean they have the right to enter into this contract assuming that they will be able to build 124 units. Now the applicant is coming before the Board, several months later, saying the Board should grant a variance. Mr. Lippes went on to say that the applicant claimed that if another project comes before the Board and asked for the same type of variance it would be different than the applicant's request, because they started work on this earlier. The purchase price has nothing to do with what the buyer is going to do with the property. Mr. Lippes said the Board is going to set a precedent, three months later, which is what the Town Board was trying to avoid when they did their clarification.

Mr. Lippes said the applicant claimed that a 30% greater density is not a substantial variance. 31 extra units means 40-62 extra cars going in and out, that is substantial. The density requirements are there for a purpose, when you increase them by 30%, you increase the noise and the traffic by 30%. The Board is supposed to look at how substantial the request is for Town Law purposes, but for SEQRA purposes the Board must look at the entire project. What are the environmental consequences of 124 unit complex?

Mr. Lippes said the applicant indicated there are no problems with storm water and they understand why Mr. Lippes made an issue of it. He said the County said they are currently using District #4, that's what is being used today, and there is not enough capacity in District #4 for this project. The applicant said they are going to use District #5. Why are they using #4 now and how can they switch to #5 so easily? It is clarified that Mr. Lippes meant to refer to sewage not storm water. For SEQRA purposes the issue isn't will there be a problem, the issue is might there be a problem. This is a major distinction between the Federal Law, on which SEQRA was patterned which required a determination that there will be a significant adverse effect, and the NYS Legislature said no this is important stuff and they want to make sure the environment is considered and the decision makers understand all of the potential significant adverse consequences and they required an environmental impact statement not if it is shown that a project will cause an adverse effect but whether it might cause an adverse effect. They do not know for sure which district they will use. The applicant indicated they will be required to prepare a downstream capacity plan, this is a red flag for anyone who deals with SEQRA Law. They are deferring a determination, information that must be before this Board in order to know whether or not there will be a significant adverse

environmental consequence. They can't defer these things. It's the same with the sanitary sewer report and the storm water plan, both have to be done and the Board has to know this information for SEQRA purposes. He sues on these issues all the time.

Mr. Lippes said the DEC indicated this area is archeologically sensitive, there has been no Phase I archeological study. To say that the area has already been disturbed doesn't deal with the fact that archeology is under ground and that part has not been disturbed. This project will clearly have an effect on noise. The applicant indicated they don't know if they will have to blast next to a senior citizen facility and an assisted living facility, blasting could have significant consequences.

Mr. Lippes said the most significant issue is traffic. The Town Board issued a Negative Declaration, this is no way binding to the Zoning Board nor is it a precedent, the Zoning Board must make an independent determination. In issuing the Negative Declaration the Town Board said traffic may be a significant adverse consequence. Once a determination is made that there may be a significant adverse environmental consequence, even just one, the Board is compelled to do a Positive Declaration on an environmental impact statement. He cited the specific regulations that deal with this in his letter that he submitted yesterday. There is no question that, in fact, there will be significant adverse effects on the traffic issue. Level "f" is the worse level of service you can have. It may not seem like a big deal because it's already bad and a little bit worse is no big deal unless you are sitting in line everyday waiting to make that turn. He noted that the traffic study was done by the applicant under the best possible conditions. He also noted that Stonegate is not in competition with the proposed project, they are two totally different markets. The traffic issue is also a safety issue for his client's senior citizens, whether they are walking or driving.

Chairman Michnik said Stonegate has been referred to as senior apartments, he asked if every apartment has a senior living in it and what age is considered senior. Mr. Lippes said the Stonegate Apartments consist of 75% residents that are over 55 years of age. Chairman Michnik said Erie County will make the determination of which District the sewer will be in based on the control, they will have control of the flow and the amount. He asked if it matters what district will be handling it because not matter what it is still being removed from the site. Mr. Lippes said there was a letter from Erie County saying that if this project goes into #4 there isn't enough capacity. If it stays in #4 the plans will have to be changed or just not go through. Mr. Lippes said he suspects his client would buy the property if this doesn't go through, but he would preserve the property. Chairman Michnik referred to the Multi-Family Law and said if the intent in 2013 was to have this clarification of 25% and the mixed use has to be business, at this point, it should have been incorporated into the law. In 2014 the Board clarified the law because there were too many questions regarding it. Mr. Lippes said it is clear that the Town Board intended the density to be calculated on the residential only in 2013 or they would not have clarified it.

Bruce Wisbaum, one of thirteen owners and manager of Stonegate Apartments, is present and distributed a letter to the Board. Mr. Wisbaum said the Mr. Hopkins said that his client was going to be substantially harmed financially if the variance was not granted due to all the time spent and cost incurred. By their own time table, which is attached to the document, between August 1, 2012 when the Planning Board reviewed the Multi-Family Law, and March 25, 2014 there was very little done. Most of the work was done and shown on the next three pages of the document, which is where they would have incurred the cost. They knew there was an issue going back to 2012. The final purchase agreement wasn't entered into until March 25, 2014 so any cost that they incurred was knowing there was a big risk in going forward. He referred to the initial proposal which showed a road along the boundary along the east side and the west side. The Town suggested they move the roads and make them internal, so on their latest drawing they moved the road between Coventry and their property from the boundary line on the west to internal. On Mr.

Wisbaum's property the applicant left the road along the boundary, instead of switching them and putting the building along the road. This issue still needs to be addressed. The applicant committed to the berm not being touched, Mr. Wisbaum likes that idea and hopes it is in writing somewhere. But the way they showed it on the plan it looked like the berm was going to be disappearing. The dog park was where the berm is. At the September 9 meeting and in the September 9th letter from Mr. Hopkins he refers Stonegate being built at 8.5 units per acre. Mr. Wisbaum has the calculations and the original drawings and said it is 7.3 units per acre. He does not think it is a fair comparison anyway, the housing type is different. The proposed development has double the number of people per unit that Mr. Wisbaum has. The number of vehicles are doubled as well. The average resident at Stonegate has one car per unit, there are a number of residents that do not have a car at all. Mr. Wisbaum said you have to look at this when you are looking at density. If the Zoning Board of Appeals was to grant the request to allow the extra 21 units, which would be a 33% increase, it would be in direct conflict with the 8 units per acre Multi-Family Law which was clearly spelled out and adopted by the Town Board on July 23, 2014. That amendment was approved by a four to one vote. It was a clarification of the amendment that they prepared previously. Mr. Wisbaum said he was told by developers that the law was 8 units per acre, he doesn't know if it was ever changed to anything other than that. Coventry was built at 12 units per acre and if Mr. Wisbaum was around at that time he would have fought that. He noted other options that developers could look into when developing multi-family projects. Why did the Town even have that discussion if the intent was to make it 8 units per acre, why did they even have this as an issue? The developer also has a contention that the project would not be financially feasible at 93 units versus 124 or that their financing "will be in serious jeopardy". Mr. Wisbaum said that is a ridiculous statement. There have been many projects built in the area with less than 93 units, he listed a few. Chairman Michnik said that is good information but it is not pertinent, Mr. Wisbaum said Mr. Hopkins brought it up. He went on to say that the fact that 124 unit project would be substantially more profitable than a 93 unit community is not a reason to justify approval of this variance request. Mr. Wisbaum believes the applicant fails all the five criteria that the Zoning Board looks at when reviewing a request. He said the applicant claims he has been working on it for over two (2) years. He had a contract that expired and he had no contract for a nine month period. It is true that Mr. Wisbaum asked about purchasing the property, he got as far as putting a contract together. It was a lease, it was not a purchase. It was structured as a five year lease and he was going to continue to using the golf dome as a driving range. Mr. Wisbaum said he was not going to build on it, he would have left it vacant. He noted that there is no competition between a senior community and a regular community. The applicant's biggest competition is going to be Coventry Green. Stonegate is a senior community and the regulations require that 80% of their residents have a person age 55 years or older living in their community. 90% of their people are over 60 years of age. Mr. Wisbaum makes it clear that he does not own several thousand units, his affiliated companies own approximately 800 units. There are separate companies which are made up of four communities and there are over 30 partners that own different percentages of each deal.

Mr. Wisbaum referred to the three-bedroom units mentioned by Mr. Hopkins in which Mr. Hopkins said usually the third bedroom would be used as a study. Mr. Wisbaum said he owns numerous three-bedroom units and the majority of them have five or six people living in them, they do not use it as a study. With the additional units the applicant is looking for it could bring 80-100 more people into the community.

Having discussed the price of the land with Michael Seeman, Mr. Wisbaum said the applicant is paying less than \$9,000 per unit, which is less than the going rate.

Mr. Wisbaum said the traffic is definitely going to get worse. There are a lot more than 10 people leaving Mr. Wisbaum's other apartment complexes at peak hour and he thinks the proposed project will be similar to those complexes.

Mr. Wisbaum said Mr. Hopkins claimed that the elimination of two buildings will not affect the Stonegate Apartments. Mr. Wisbaum said it depends on which two buildings he will be eliminating. He does not believe that it won't affect his complex, it will affect a lot of things. Mr. Hopkins showed the Board the two buildings that would have the least impact on Stonegate.

Mr. Mills asked if Mr. Wisbaum would agree that the aesthetic impact is minimal related to those two structures. Mr. Wisbaum said there is a huge difference depending on which building will be eliminated. In theory, the applicant could eliminate any building but Mr. Hopkins referred to the two inner buildings saying it would not have an aesthetic impact on Mr. Wisbaum's development. That is what Mr. Wisbaum understood as well.

Mr. Mills asked Mr. Wisbaum if he would agree that the proposed project has a higher percentage of greenspace than Stonegate. Mr. Wisbaum said it may appear that way but he has not measured it. He referred to a color aerial photograph depicting the eastern portion of his property all the way to Wehrle Drive and said he has a lot of greenspace around his building, he was required to leave a certain stand of trees as an undisturbed area. He was required to leave greenspace along the northern boundary and he owns some green space on the western portion as well. Mr. Mills asked Mr. Wisbaum what is the most problematic issue he has with this request. Mr. Wisbaum said traffic, then he referred to the Coventry Green area and his development and said it is dense. He said the Town has not taken into consideration that a development could go west of Coventry and that Natale is proposing a 140 unit development near the North Forest Development project at Harris Hill and Wehrle. He goes on to say there are other developments in the works that will impact traffic. He said his primary concern is traffic and that the developer is putting too much into a small space and that it violates the code and if they do it the next guy is going to do it too. Mr. Wisbaum said you can't look at number of units per acre you have to look at number of bedrooms like Amherst does. There are no sidewalks for the kids to walk on, they will walk on the walking path.

Mr. Thrun asked Mr. Wisbaum for further details on the purchase agreement. Mr. Wisbaum said the first agreement expired and that is the point in time he was negotiating with Michael Seeman from August to January, Mr. Wisbaum wanted a lease but the owners of the property wanted an outright sale, Mr. Wisbaum had no interest in purchasing the property. Mr. Thrun clarified that the original purchase agreement dated back to May 2012, which goes back prior to either law being passed by the Board. Mr. Wisbaum said back in 2012 the developer proposed a senior community of 100 units.

Mr. Callahan clarified that from 2005-2013 the density requirement was 8 units per acre, prior to that it was 5,000 square feet per unit.

Mr. D'Amato asked Mr. Wisbaum, as a builder, if the project can be done with 93 units. Mr. Wisbaum said it is being done all around town. Mr. D'Amato asked if Mr. Wisbaum has an objection to the 93 units going there. Mr. Wisbaum said no, it is acceptable and agreeable to him.

Chairman Michnik referred to the road on the west side of the plan, which is on the inside, and the road on the east side of the project, which is on the outside, and asked if they flipped that road and stayed at 124 units, does it make a huge difference to Stonegate? Mr. Wisbaum said it makes it better but he is upset that they could go to 124 instead of 93 and whether the count is 93 or 124 he wants the road flipped.

It is clarified that the proposal is still in the Concept Plan stage at the Planning Board level.

Chairman Michnik reminded everyone that the Zoning Board of Appeals members do what is important for the Town, not just one person or one group.

David Huck, resident of Clarence, clarified that his first purchase agreement ran out because, although it was not called a moratorium, nobody in the Town would look at his proposal, he was stopped. He obtained another contract and went to the Town Board who referred it to the Planning Board. At that meeting the Town Supervisor asked what the current approach to the 8 units per acre is. What was given to him was "on the entire property". This made sense to Mr. Huck. He has developed all over this country. The significant change was when they combined commercial with residential and made it mandatory. So now you have an integrated site so it makes sense to apply those things to the whole site. The Town Board accepted a plan that had 124 units on it, that is the plan that was sent to the Planning Board. There are additional costs that need to be considered when commercial development is being required. It does impose some costs on the property, this is why the 124 units are important. Development is site specific. Mr. Huck's experience with the apartments that he is involved in is that there are not 4-6 people in a three-bedroom unit, they just don't have it. These apartments are going to appeal to everybody of every age. His partner owns Coventry Green so Mr. Huck obtains much of his statistics from him, in fact, they currently have one person renting a three-bedroom unit. Mr. Huck referred to Mr. Wisbaum's interest in leasing and said if you are leasing the property you are not buying the property so you are not really leaving it all greenspace, there would still be a dome there that has to operate.

Roslyn Marcus is the community manager of Stonegate Apartments and is speaking on behalf of the residents who are seniors. They want Ms. Marcus to tell the Board that they are very upset and concerned about the traffic, this is their main concern. It is very dangerous for them to make a left hand turn on to Wehrle Drive at any time of the day. She leaves the site every day at 5pm and should turn left to get home but often times she will take a right to go out to Transit and take a roundabout way to get home. These older people get nervous and upset and the thought of 200 cars in that same area is overwhelming to them. She submitted a petition signed by residents against the variance, the petition is on file.

JoAnn Azzarella, has lived in the Stonegate Apartments for a year, it is a 55 and over community. She is 65 years old and still works two jobs, she is in and out of there all the time. The traffic is horrendous at certain times of the day. She works for the Clarence Transportation Center and for Cracker Barrel. With the transportation center she moves buses and constitutes taking care of special needs kids on the small buses and those buses do come into the community to pick up certain children. The buses have difficulty getting in and out of that particular driveway on Wehrle. Traffic is a major problem. If they decide to put the other development up on Harris Hill there will just be more traffic. By the time you hit 4pm there are lines of traffic at the Harris Hill and Wehrle Drive intersection. The guests at the rehabilitation center across the street add to the traffic too. There are medical buildings on the east side of Stonegate with a constant flow of traffic coming in and out of there all the time. She cannot understand how anyone could think this would not have a traffic impact. The noise level will go up, 124 units is too much.

It is clarified that there are 216 units in Coventry Green.

Michael Metzger confirmed that special needs buses do enter private property such as those being discussed. He clarified that the property is entirely within Erie County Sewer District #5. When the Golf Dome project was done there were no actual sewers in the immediate area that are a part of Erie County Sewer District #5. There is sanitary sewer on Wehrle Drive that is part of Erie County #4, so what was granted to the Golf Dome at that time was an out-of-district user status/agreement to allow them to tap into the sewer for that building. It would be the applicant's intent to use Erie County Sewer District #5 sewers because sewers are

not available in that area and there is dry weather capacity in Erie County Sewer District to support this project. They made reference to a downstream sewer capacity study. This is a new requirement mandated by the DEC and the Erie County Sewer Districts are complying with it. For every project that has greater than 2500 gallons per day in flow anticipated from the project, they are mandated to do this study. The only purpose of this study is to determine whether that particular project has to contribute towards some Inflow and Infiltration remediation. Many sewer systems throughout Western New York are problematic, groundwater and surface water leaks into the sanitary sewers, so a study had to be done to determine if any of that is going on. If it is determined that there is an issue, the developer will be mandated to contribute towards a remediation project somewhere within the sewer district to actually tighten it up and take some of the excess flow out. This is done at a 4 to 1 multiplier, so for every gallon of new sewage flow that is put into the sewer by this project, they would have to take four gallons out of the excess water which makes the system better for everybody. So that downstream study does not determine whether the project passes or fails. The applicant's intent is to tie into Erie County Sewer District #5 in which this project resides. To do the storm water design prior to SEQRA being done is totally inappropriate. Mr. Metzger said with 100% certainty that they will be able to put in a storm sewer that will comply with all state and local regulations and will not flood out any neighbors.

Mr. Metzger referred to archeology and said the NYS DEC pointed out in their initial SEQRA letter that the area lies within what is known as a potentially archeologically sensitive area. This is a flag that says there could be something there. Mr. Metzger took the steps to approach the NYS Office of Parks and Historic Preservation, they are the entity that has control over archeological matters and they issued a letter that has cleared the site for archeology, there are no significant finds.

Mr. Metzger said the calculation of the Stonegate density was done by taking the number of units within the development, divided it by the acreage of the property and came up with 8.5.

Mr. Metzger said they hired a professional, licensed engineer, traffic consultant respected in the field to do a traffic study. The information they use is from the Institute of Traffic Engineers, this is the standard across the nation for determining the number of trips generated for certain types of projects. Mike Asklar is the Erie County Department of Public Works Traffic Engineer and he reviewed the numbers and agreed with the information. It is Mr. Asklar's responsibility to review any information that is provided for a project, relative to traffic, and make sure it is accurate.

Mr. Metzger has been involved with the discussions on the Multi-Family Law for the past few years. When the Town Board decided to amend the law earlier this year to utilize a density that is based on only the residential portion of these projects, 75% of the site as opposed to 100% as the code previously said, there were many people that objected to that because it was felt that the density allowed by the code as it was adopted in 2013 was reasonable and workable. Mr. Metzger said that he and others were told by the Town Board during those discussions that if there is a project that is in an area where it makes sense for it to be more dense, they strongly encouraged those who were objecting to making that change in the code, to apply to the Zoning Board of Appeals. The Town Board directed those people to come to the Zoning Board of Appeals if there is a project where it makes sense, put forth the extenuating circumstances that are associated with that project and that area to the Zoning Board of Appeals and let them make a decision. This was the relief mechanism that was put forth by the Town Board.

Deputy Town Attorney Steve Bengart explained the process of the Zoning Board of Appeals meeting noting that the policy is to allow the applicant the opportunity to respond to questions brought forth. He reminded

all attendees that normally anyone from the public who wishes to speak on the proposal is limited to three (3) minutes.

Mr. Hopkins said it all comes back to the balancing test, the benefits to be received by Mr. Huck and his company versus the detriments that Mr. Wisbaum and his residents are claiming. In the absence of this variance it will be difficult for Mr. Huck to pursue the project. He will receive substantial benefits by the variance being granted and the detriments to Mr. Wisbaum are not substantial, there will be a little more traffic and noise but nothing substantial.

Mr. Hopkins said if the 31 units are removed it would result in a reduction of traffic during the peak hour of 15 vehicles, that is .00014 percent. It is not a lot of traffic. If in the future, when the post development traffic impact study is done, substantial improvements on Wehrle Drive are needed that would be the obligation of Erie County and taxpayers.

Deputy Town Attorney Steve Bengart said the Board has a few options which include but are not limited to, moving forward with the request, making a SEQRA determination, making a determination on all that has taken place thus far or the matter can be tabled. He referred to the discussion regarding the reduction in the number of units and other various ideas. He then asked the applicant if he would be interested in tabling the request to explore those opportunities. Mr. Huck said he would consider it. Deputy Town Attorney Steve Bengart said the Board can also opt to make a decision and close the hearing at this meeting.

Mr. Mills said if there is a preliminary interest from the applicant in reducing the number of units he would be inclined to leave the hearing open and table the request. If there is not at least some preliminary interest in reducing the amount of the units and the applicant wants to have the request remain as is, then he would be inclined to table the meeting, close the meeting, stop the fact finding, allow some time for a written submission prior to the Board making their decision and perhaps make the decision at the next meeting.

Mr. Huck said he considered all the comments and decided that he can come down to 112 units. He thinks this will mitigate some of the issues and concerns that were voiced. Mr. Mills asked the applicant if he wanted more time to revise the site plan to reflect the 112 units and then present it to the Board or would he rather the Board make a decision based upon the reduced density. It is clarified that the applicant is now asking the Board to make a determination on a variance request for 112 units, not 124. Mr. Metzger said that brings the density to 9.63 per acre.

Deputy Town Attorney Steve Bengart said the written minutes from this meeting do not need to be completed in order for the Board to make a decision at the next meeting when this request is heard again. If the Board members are comfortable with what they heard at this meeting they can go forward in December, or there could be a separate deliberation date that would have to be publicly notified.

ACTION:

Motion by Ryan Mills, seconded by Daniel Michnik, to **table** Appeal No. 7 under Old Business, the fact finding period is officially closed, all parties that have an interest have until December 1, 2014 at 4:30pm to submit to the Planning Department any and all written submissions that they want to be considered by the Board in their final deliberations. Most likely an action will be taken at the December 2014 meeting.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

It is clarified that the applicant has amended his request to reflect 112 units, not 124 units.

Meeting adjourned at 10:15pm.

Carolyn Delgato
Senior Clerk Typist