

A True Copy

ATTEST

*Fausto Carusone*  
FAUSTO CARUSONE  
State Marshal  
Fairfield County

TO THE SUPERIOR COURT FOR THE DISTRICT OF STAMFORD/NORWALK AT STAMFORD on SEPTEMBER 9, 2003, comes ARS PARTNERS POPLAR PLAINS, LLC, a Connecticut Limited Liability Company with offices at 4021 Main Street, Stratford, CT 06614, appealing from a decision by the PLANNING & ZONING COMMISSION OF THE TOWN OF WESTPORT, 110 Myrtle Avenue, Westport, CT 06880, and complains and says:

1. Plaintiff, a Connecticut Limited Liability Company, is the owner of a vacant parcel of land comprising 55.8 acres, situated in an Open Space Residential District (OSRD) in the Town of Westport. The subject property is the only property in the OSRD in the Town of Westport and has been so designated since 1981.

2. The property has been the subject of investigation by professionals retained by the plaintiffs, by the intervenors and by experts retained by the Conservation Commission, as well as an independent team of environmentalists, including both Phase I and Phase II environmental studies.

3. Plaintiff applied to the defendant Planning & Zoning Commission of the Town of Westport for site plan and special permit approvals to construct a Planned Residential Community of twenty-two (22) single family homes on the subject property, having received all necessary prior approvals including approvals from Army Corps of Engineers, the Westport Flood and Erosion Control Board, the Westport Conservation Commission and the Westport Water Pollution Control Authority.

WEISMAN & LUBELL  
WESTPORT, CONNECTICUT 06880  
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JURIS. NO. 101904

4. In addition, the plaintiff has received all necessary prior approvals from the Town of Westport and the City of Norwalk for construction of a sanitary sewer line to serve the proposed development.

5. The defendant Planning & Zoning Commission conducted extensive and exhaustive public hearings on plaintiff's applications over the course of several months and on August 7, 2003, denied said applications "without prejudice" for the reasons stated in its decision attached hereto as Exhibit A.

6. Plaintiff is aggrieved by such decision because it denies to plaintiff the reasonable right to develop its property in accordance with the governing OSRD regulations.

7. The decision of the defendant Commission is illegal, improper, unreasonable and an abuse of the discretion vested in such Commission for the following reasons:

(a) in that it is contrary to the competent evidence adduced at the public hearing and unsupported by competent evidence in the record;

(b) in that it is contrary to the applicable law and regulations;

(c) in that it seeks to hold the plaintiff to a burden of proof and to impose upon the plaintiff testing obligations and environmental standards which exceed those required by

applicable law and are nowhere specified in or required by the applicable regulations;

(d) in that, in reaching its decision, the defendant Commission was unduly and improperly influenced by a written communication from the First Selectwoman, seeking to overturn its decision not to retain an independent consultant, which decision the Commission had already taken by majority vote, and urging the Commission to deny plaintiff's applications for purely political reasons and without regard to the applicable law or the evidence presented at the public hearings;

(e) in that the Commission exceeded its authority by revisiting and taking into account environmental issues which had previously been considered and decided by the Conservation Commission and others and which are beyond the purview, authority or competence of the Planning and Zoning Commission;

(f) -in that the decision fails to take into account or properly to understand information and expert testimony which was submitted by the plaintiff in support of its applications and which is uncontradicted by the Record;

(g) in that, the denial "without prejudice" constitutes a recognition that the plaintiff's application complies in all respects with the applicable regulations and


the stated reasons for denial are, therefore, wholly insufficient as a matter of law;

(h) in that if, in fact, the Commission felt that it required the services of an independent expert, (notwithstanding its public vote and decision not to retain such expert), it failed to take timely action to secure such services and is now estopped from denying the subject application for that reason;

THE PLAINTIFF CLAIMS:

1. A judgment sustaining this appeal, reversing the decision appealed from and directing the defendant to grant plaintiff's applications; and,
2. Such other and further relief as in equity may appertain.

Dated at Westport, Connecticut, this 17<sup>th</sup> day of August, 2003.



Lawrence P. Weisman  
Commissioner of the Superior Court

PLEASE ENTER THE APPEARANCE OF:

WEISMAN & LUBELL  
P. O. Box 3184  
Westport, CT 06880  
Juris No. 101904  
Telephone No. 226-8307

FOR THE PLAINTIFF



# WESTPORT CONNECTICUT

PLANNING & ZONING  
TOWN HALL, 110 MYRTLE AVENUE  
WESTPORT, CONNECTICUT 06880  
(203) 341-1030 • (203) 341-1079  
(203) 454-6145 - fax

Hearings: 5/1/03, 5/8/03, 5/22/03, 6/12/03, 6/18/03, 6/26/03, and 7/2/03  
Decision: 8/7/03

August 11, 2003

Lawrence Weisman, Esq.  
5 Sylvan Road South  
Westport, CT 06880

**Re: O Newtown Turnpike, Maps 5272-1 and 5272-2, Lot 1, OSRD Zone,  
The Reserve at Poplar Plains, Special Permit/Site Plan Application #03-010**

Dear Mr. Weisman:

This is to certify that at a meeting of the Westport Planning and Zoning Commission held on August 7, 2003 it was moved by Mr. Nelson and seconded by Mrs. Gottlieb to adopt the following resolution.

## RESOLUTION #03-010

WHEREAS, THE PLANNING AND ZONING COMMISSION met on August 7, 2003 and made the following findings:

1. The proposal is to construct a single family residential community for 22 single family homes, two private roads, and associated improvements including the extension of a private sanitary sewer and public water on a vacant 55.9 acre lot located in the OSRD district.
2. All uses in the OSRD are permitted subject to Special Permit/Site Plan approval in accordance with §17-2 of the Westport Zoning Regulations.
3. Excavation and fill activities must conform to the regulations contained in §32-8 of the Westport Zoning Regulations.
4. A separate application was submitted for excavation and fill activities associated with site improvements that was denied without prejudice by the Planning and Zoning Commission under Res. #03-009.
5. The Commission decided insufficient information was submitted by the applicant to determine whether the excavation and fill application conformed to §32-8.5 and §32-8.5.3 of the Westport Zoning Regulations.
6. An §8-24 Positive Report was issued by the Planning and Zoning Commission for the private sanitary sewer extension on 6/26/03. The §8-24 Report recommended a contract between the Town of Westport and the developer regarding the sewer extension should only be executed if Special Permit/Site Plan approval for development of the site is granted.

7. During the course of the public hearings, issues were raised concerning soil contamination on the OSRD property. Documentation was provided by the applicant including soil test results from various environmental investigations that were conducted between 1977 and 1999. Some of the test results show arsenic, benzene, lead, and mercury at higher than acceptable levels, located on the property. A report, referenced by the applicant prepared by Fletcher Thompson in 1977, indicates methane was detected on the property.
8. The environmental investigations conclude the contamination is associated with past use of the property as a gravel mining operation, subsequent illegal dumping activities while the site was idle, and the site's proximity to a former Town of Westport sanitary landfill which was closed in 1965, according to a letter from the applicant's consultant Leggett, Brashears and Graham Inc. included in the Prior Approvals Report submitted 3/3/03.
9. The applicant also provided documentation concerning removal in the year 2000, of approximately 10,000 discarded tires from the site, and removal of soils from the site where analyses had shown elevated arsenic levels. This documentation is contained in a letter from Land Tech Consultants dated 2/4/02 included in the Prior Approvals Report submitted 3/3/03.
10. Although the applicant's environmental consultants submitted reports indicating no adverse environmental impacts are anticipated with development of the OSRD property, (*reports were prepared by Leggett, Brashears, and Graham, Inc., dated 3/6/03, contained in the Expert Opinions package, submitted on 3/3/03, and report prepared by Leggett, Brashears, and Graham, Inc., dated 6/4/03*); reports were also submitted by environmental consultants hired by parties in opposition to the project, that indicate more soil testing must be conducted prior to any site development, to provide proper verification that there is not a serious potential for disturbance of contaminated soil to expose the public to deleterious effects from arsenic and other materials, (*reports were prepared by Michael Hopkins for Environmental Compliance Services, dated 12/11/01; David William and Robert Stewart for Consulting Environmental Engineers, dated 5/8/03; and report prepared by David William and Robert Stewart for Consulting Environmental Engineers, dated 6/25/03*).
11. The environmental report prepared by Michael Hopkins for Environmental Compliance Services, dated 12/11/01, states there is insufficient data to conclude that arsenic contamination is not present on site, and recommends further arsenic testing be conducted on site including the area of the former tire pile to verify the effectiveness and adequacy of the remedial action taken by the applicant in 2000.
12. The environmental report prepared by David William and Robert Stewart for Consulting Environmental Engineers, dated 5/8/03, states the site has not been adequately characterized with respect to arsenic, lead, mercury, and benzene in soil and/or ground water, and recommends more testing on the site for arsenic, lead, mercury, and benzene in soils and/or ground water where soils will be disturbed. The report also states additional contamination testing should be conducted to determine compliance with the direct exposure and pollutant mobility criteria (total and leachable metals, respectively) where soils will be disturbed. The report recommends that since the degree and extent of landfill decomposition gases including methane is unknown, it should be evaluated at the site to ensure the levels are within an acceptable range for ground water and soil vapor below residential dwellings. The report further concludes disturbance of contaminated soils on site can affect the water quality of area residents' private wells.

13. At the June 18, 2003 public hearing, members of the Commission asked for information concerning any recent contamination testing that was conducted on the site. The applicant advised that no testing had been conducted since 1999 with the exception of the arsenic testing done in 2000 in the area of the tire pile when it was removed.
14. At the June 18, 2003 and June 26, 2003 public hearings, members of the Commission raised concerns associated with the potential for disturbance of contaminated soil resulting from excavation and fill activities proposed.
15. Excavation and fill activities are required to construct the two private roads, lay the foundations for the new homes, and install underground utilities and drainage facilities to detain storm water runoff. Approximately 9,600 cubic yards (525 truckloads) of rock and excess soil will be removed from the property, and approximately 5,400 (300 loads) of road base, pipe bedding, etc. will be hauled to the property, according to the applicant's engineer. Blasting will be required in some areas to remove outcrops of bedrock.
16. At the July 2, 2003 public hearing, the applicant offered more soil testing for methane and arsenic would be conducted by the applicant during the course of the site development and a monitoring program would be established post development to determine if well water quality was affected at those wells located off-site within 750 feet of construction activity.
17. The environmental report prepared by Michael Hopkins for Environmental Compliance Services, dated 12/11/01, concludes additional testing for arsenic contaminated soil should be conducted prior to any grading activities, to prevent inadvertent redistribution of arsenic contaminated soil to previously uncontaminated areas.
18. The environmental consultants hired by the applicant advised the Commission that the environmental consultants hired by the opponents are reputable.
19. The environmental consultants hired by the opponents advised the Commission that the environmental consultants hired by the applicant are reputable.
20. Although the Commission informally voted not to hire an independent environmental consultant at the June 18, 2003 public hearing; at the June 26, 2003 public hearing, members of the Commission requested the applicant withdraw the application to allow time for an independent environmental consultant to be hired. The applicant did not grant this request.
21. The Commission now believes that an environmental consultant should be hired to provide guidance on how further testing should be conducted, to conduct further testing, and provide recommendations on remediation if necessary, to protect the health, safety, and welfare of future residents of the OSRD property and adjacent property owners.
22. A Notice of Intervention was filed by Arthur Cohen of 67 Old Hill Road pursuant to C.G.S. §22a-19. There is insufficient information submitted into the record to determine whether the proposed conduct does, or is reasonably likely to, cause the unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state.
23. A Notice of Intervention was filed by Sean Timmons of 64 Partrick Road and Bert Aber of 38 Partrick Road pursuant to C.G.S. §22a-19. There is insufficient information submitted into the record to determine whether the proposed conduct does, or is reasonably likely to, cause the unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state.
24. Although the Conservation Commission had an exhaustive review and approval of the application, Conservation's review was limited to the Inland Wetland and Watercourses regulations, and the Waterway Protection Line Ordinance. The Planning and Zoning Commission has broader jurisdiction and broader environmental concerns.

25. The applicant submitted Usable Open Space areas with the application and revised them on 6/23/03, Sheets 2-5. Some of the Usable Open Space areas impinged on the setback areas. It was unclear which ones did; some were in the 15' wetland setback area, and some were in the 25' vegetative buffer. The applicant has not submitted a revised conservation easement map as required by the Conservation Commission.

NOW THEREFORE, BE IT RESOLVED that 0 Newtown Turnpike/Partrick Road: Appl. #03-010 by ARS Partners Poplar Plains, LLC for property owned by ARS Partners Poplar Plains, LLC for a Special Permit and Site Plan approval for a residential community for 22 single family dwellings in an OSRD, Map 5272-1 and 5272-2, Lot 1 be **DENIED WITHOUT PREJUDICE** for the reasons listed below:

**Reasons:**

1. The Special Permit/Site Plan application for development of the property is contingent upon approval of the Special Permit/Site Plan application for excavation and fill activities.
2. The Planning and Zoning Commission denied the excavation and fill application under Res. #03-009.
3. More information is required to determine whether the application conforms to the Special Permit standards contained in §44-6 of the Westport Zoning Regulations that requires in part, that the project may not have a significant adverse effect on adjacent areas located within close proximity to the use, and that the project preserves features of the environment related to the public health, safety, and welfare.
4. More information is required to determine whether the application conforms to the Legislative Intent defined in §1 of the Westport Zoning Regulations that requires in part, that the Planning and Zoning Commission administer the Westport Zoning Regulations to promote health and general welfare.
5. More information is required to determine whether the application conforms to §2, Interpretation, of the Westport Zoning Regulations that requires in part, promotion of the public health, safety, and general welfare.
6. The Planning and Zoning Commission has concerns warranting further tests related to health and safety risks to site construction workers, and eventual residents of the OSRD, related to exposure to soil contaminated from arsenic, benzene, lead, mercury and other materials, that may become disturbed during site development of the OSRD property. The Commission also has concerns related to site disturbance that may result in contaminants dispersing to groundwater through the underlying bedrock. Areas to be disturbed need to be tested.
7. Reports were submitted by environmental consultants hired by parties in opposition to the project, that indicate more soil testing must be conducted prior to any site development, to provide proper verification that there is not a serious potential for disturbance of contaminated soil to expose the public to deleterious effects from arsenic and other materials. The reports were prepared by Michael Hopkins for Environmental Compliance Services, dated 12/11/01; David William and Robert Stewart for Consulting Environmental Engineers, dated 5/8/03; and report prepared by David William and Robert Stewart for Consulting Environmental Engineers, dated 6/25/03.
8. Inadequate information was provided by the applicant. Insufficient testing of soils and water was done to determine the presence of contamination, and any potential for movement of contaminants through the soils and water that may result from disturbance of the site. Testing was not done in all areas of disturbance and follow up testing was not done in the area of the



tire pile to verify the effectiveness and adequacy of the remedial action taken by the applicant in 2000. This testing is needed. Limited testing was conducted in 1977, 1985, 1986, 1997, and 1999. Limited arsenic testing was conducted during removal of arsenic contaminated soil in the area of the tire pile in 2000, but no testing has been done since, and no reason was provided for the lack of testing to date. The Planning and Zoning Commission needs updated studies conducted in 2003.

9. Inadequate information was provided by the applicant concerning the effects of blasting on contaminated soils. Disturbance of contaminated soils resulting from blasting may bring polluted soils to the surface. Once this polluted earth is brought to the surface, water runoff may contain pollutants picked up from this earth and it will have the potential of contaminating the aquifer that supplies drinking water to residents of Westport.
10. The applicant's proposal to conduct further testing during excavation activities is not acceptable because discovering additional contamination may require alternate placement of the houses and open space areas in contrast to those locations that would have been approved. The testing must be conducted prior to excavation activities, and prior to approving the locations of the houses and open space areas.
11. At the June 26, 2003 public hearing, a proposal was made to hire an independent consultant. The applicant would have had to withdraw and resubmit the application. The applicant declined to withdraw the application.
12. Based on the environmental reports submitted, the Commission now desires to hire an independent consultant to make recommendations regarding how and to what extent further testing for contamination should be conducted, complete further testing, and formulate recommendations for remediation if necessary, to protect the public health, safety, and welfare.
13. If the applicant submits another application for the development of the property, an independent environmental consultant must be hired to review the environmental reports submitted, complete additional testing for contamination, formulate recommendations for remediation if necessary, and prepare a report for the Planning and Zoning Commission.
14. The Commission has concluded that this application should not be finally decided based on the existing situation, without additional testing for contamination, and without the review and recommendations by an independent environmental consultant, and that a complete review of this application cannot be made at this time.
15. Following an independent environmental consultant's review of the environmental reports submitted, completion of additional testing for contamination, and formulation of recommendations for remediation if necessary, the Planning and Zoning Commission will be able to determine if the project conforms to the Special Permit standards contained in §44-6, and §1 and §2 of the Westport Zoning Regulations.
16. Following an independent environmental consultant's review of the environmental reports submitted, completion of additional testing for contamination, and formulation of recommendations for remediation if necessary, the Planning and Zoning Commission will be able to conclude whether it is reasonably likely, or unlikely, that the project would unreasonably pollute, impair, or destroy the public trust in the air, water or other natural resources, and if it is likely, whether there are any feasible project alternatives consistent with the reasonable requirements of the public health, safety, and welfare, considering all relevant surrounding circumstances and factors, in accordance with C.G.S. §22a-19.

17. Conservation Commission Resolution dated 4/15/02 set out conditions. Condition 6A refers to the Conservation Easement being at the 15-foot wetland setback or the 25-foot vegetative buffer. This resolution prohibits cutting, clearing and filling or building within this area. Since §17-11, Usable Open Space, indicates that the land set aside shall be graded, screened and landscaped, it is unclear how the applicant will meet that section of the regulations with the materials shown on the site plans dated 6/23/03, Sheets 2-5.

VOTE:

AYES	-7-	{Lowenstein, Crowther, Stashower, Kuechenmeister, Nelson, Van Gelder, Gottlieb}
NAYS	-0-	
ABSTENTIONS	-0-	

Very truly yours,



Eleanor Lowenstein

Chairman,

Planning & Zoning Commission

cc: Ira Bloom, Town Attorney  
ARS Partners Poplar Plains, LLC

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RETURN DATE: SEPTEMBER , 2003 ) SUPERIOR COURT  
ARS PARTNERS POPLAR PLAINS, LLC )  
VS. ) JUDICIAL DISTRICT OF STAMFORD/  
 ) NORWALK  
 ) AT STAMFORD  
 )  
PLANNING & ZONING COMMISSION OF )  
THE TOWN OF WESTPORT ) AUGUST 12 , 2003

RECOGNIZANCE

KNOW ALL MEN BY THESE PRESENTS:

THAT Steven Folb, 124 Imperial Avenue, Westport, CT 06880, as Principal and Joanne Mazur Hill, 119 Priscilla Street, Bridgeport, Connecticut 06610, as Surety, are holden and stand firmly bound and obliged, jointly and severally, unto the PLANNING & ZONING COMMISSION OF THE TOWN OF WESTPORT, 110 Myrtle Avenue, Westport, Connecticut; ARTHUR COHEN, 67 Old Hill Road, Westport, CT 06880; CLAUDIA COHEN, 67 Old Hill Road, Westport, CT 06880; SEAN TIMMINS, 64 Partrick Road, Westport, CT 06880; BERT ABER, 38 Partrick Road, Westport, CT 06880, in a recognizance in the penal sum of TWO HUNDRED FIFTY (\$250.00) DOLLARS, to be paid to the said defendants or its certain attorneys, which payment they do bind themselves, their heirs, successors, executors, administrators and assigns firmly by these presents.

NOW, THEREFORE, if the Principal shall prosecute this appeal to effect, shall comply with the orders and decrees of the Court, and shall pay all

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costs in case they fail to sustain such appeal, then this Recognizance shall be void, otherwise to remain in full force.

Taken and subscribed before me, at Westport, Connecticut, this 12<sup>th</sup> day of August, 2003.

Lawrence P. Weisman  
Lawrence P. Weisman  
Commissioner of the Superior Court

RETURN DATE:	)	SUPERIOR COURT
	)	
ARS PARTNERS POPLAR PLAINS, LLC	)	JUDICIAL DISTRICT OF STAMFORD/
	)	NORWALK
VS.	)	AT STAMFORD
	)	
PLANNING & ZONING COMMISSION OF THE	)	
TOWN OF WESTPORT	)	AUGUST 12, 2003

SUMMONS

TO ANY PROPER OFFICER:

BY AUTHORITY OF THE STATE OF CONNECTICUT you are hereby commanded to summon the PLANNING & ZONING COMMISSION OF THE TOWN OF WESTPORT, 110 Myrtle Avenue, Westport, Connecticut; and, as Intervenors pursuant to General Statutes, ARTHUR COHEN, 67 Old Hill Road, Westport, CT 06880; CLAUDIA COHEN, 67 Old Hill Road, Westport, CT 06880; SEAN TIMMINS, 64 Partrick Road, Westport, CT 06880; and BERT ABER, 38 Partrick Road, Westport, CT 06880, to appear before the Superior Court within and for the Judicial District of Stamford/Norwalk at Stamford, on September 9, 2003, said appearance to be made by the PLANNING & ZONING COMMISSION OF THE TOWN OF WESTPORT; ARTHUR COHEN; CLAUDIA COHEN; SEAN TIMMINS and BERT ABER or their attorney by entering a written statement of appearance with the Clerk of said Court on or before the second day following said return date, then and there to answer

unto the foregoing complaint of ARS PARTNERS POPLAR PLAINS, LLC, 4021 Main Street, Stratford, CT 06614, by leaving a true and attested copy of the complaint, recognizance and this summons with the Chairman of said PLANNING & ZONING COMMISSION OF THE TOWN OF WESTPORT; ARTHUR COHEN; CLAUDIA COHEN; SEAN TIMMINS and BERT ABER, by serving in the manner provided by statute for service of process, at least twelve (12) days before said return date in the manner fixed by law for the service of civil process.

Hereof fail not, but of this writ, with your doings thereon, make due service and return.

Dated at Westport, Connecticut, this 12<sup>th</sup> day of August, 2003.



Lawrence P. Weisman  
Commissioner of the Superior Court