

**CITY OF MIDDLETOWN
ZONING BOARD OF APPEALS
MINUTES**

January 16, 2019

A meeting of the Zoning Board of Appeals was held in the Common Council Chambers, Second Floor, City Hall, 16 James Street, Middletown, New York on January 16, 2019 at 7:00 P.M., Joel Sierra presiding.

Members Present: Joel Sierra, Nicholas Barber, Marc Woody

Members Absent: Don Luis, Deborah Clark

Other Attendees: Richard J. Croughan, Corporation Counsel; Walter Welch, Building Inspector

A motion was made by Mr. Woody and seconded by Mr. Barber to approve the minutes of November 21, 2018 as submitted.

Roll Call Ayes: Joel Sierra, Nicholas Barber, Marc Woody

**Somac Enterprises Inc.
16 Grand Avenue
5-year extension to comply with Amortization Ordinance**

Mr. Sierra: I'm going to skip the first two items on our agenda. I'm moving to 16 Grand Avenue.

Mr. Goldman: Good evening.

Mr. Sierra: Counselor, please state your name and address for the record.

Mr. Goldman: Absolutely. Jonathan Goldman, Law Office of Sussman & Associates, Goshen, New York, for the applicant. The applicant is on his way. I believe he should be here any minute, but I'm prepared to respond to whatever questions I can respond to if you have any questions.

Mr. Sierra: Do you want us to call you back up if that's okay with your client?

Mr. Goldman: That would be fine. That might be better just in case there's anything that he might have information that I don't necessarily have. If that's how you'd like to proceed, I'm happy to do that.

Mr. Sierra: All right. So we'll give you a few minutes to wait for your client.

Mr. Goldman: Very good. Thank you so much.

Mr. Sierra: Not a problem.

**17 Eldred Street -- Resolution
Frances Amelio
5-year extension to comply with Amortization Ordinance**

Mr. Sierra: We have 17 Eldred Street. Anybody here for 17 Eldred?

Mr. Barber: That was just a resolution, wasn't it?

Clerk: Yes.

Mr. Sierra: Okay.

Mr. Croughan: If the board is inclined to vote if we think that all the board members are going to vote in favor of it, we can read it into the record and then --

Mr. Sierra: You okay with that? All right. Counselor, yes. If you'd like to read the resolution for 17 Eldred.

Mr. Croughan: Sure.

AMORTIZATION RESOLUTION

WHEREAS, Frances Amelio filed an application with the Zoning Board of Appeals of the City of Middletown seeking the 5-year extension of the Amortization Ordinance for the property located at 17 Eldred Street, Middletown, New York and

WHEREAS, after due notice public hearings were held by the Zoning Board of Appeals on April 18, 2018, and September 19, 2018, at 7:00 p.m. in the Common Council Chamber, City Hall, Middletown, New York, and

WHEREAS, at said hearings all those who desired to be heard were heard and their testimony recorded, and

NOW THEREFORE BE IT RESOLVED by the Zoning Board of Appeals that the following is designated as Background:

1. Middletown's first amortization ordinance was enacted in the 1990's. It was limited to boardinghouses. It was implemented without challenges, and this Board considered a number of 5-year extension requests.

2. The present Amortization Ordinance was enacted in 2009 and was limited to multiple dwellings in R-1, R-2 and OR-2 zoning districts. The Ordinance provided for amortization of multiple dwellings in the subject zoning districts after a 5-year period. Zoning Code, Section 475-44(J)(3.5). It further authorized this Board to grant a 5-year extension if this Board finds "that the period prescribed is not reasonable and adequate for such amortization". Section 475.44(J)(4) The Ordinance has withstood challenges in state and federal courts. *See, Moraski v City of Middletown*, Index #2012-2081 (Orange Cty 2013) and *Edelhertz v City of Middletown*,

3. Due to a court decision, the Ordinance was re-enacted in 2014. All provisions remained the same, with the exception that the amortization period was designated to be 3 years, expiring on March 31, 2017. Consequently, owners of affected properties were provided, in effect, with an amortization period of 8 years and the possibility of a 5-year extension by this Board.

4. The Department of Public Works provided notice of both the 2009 and 2014 enactments to all affected property owners, known to the City, at the addresses provided to the City by those property owners. These notices included instructions as to how to apply to this Board or to the Commissioner of Public Works for an application to exempt a particular property on the ground that it would be structurally unreasonable to convert the multiple dwelling. The Ordinance also exempts owner-occupied multiple dwellings.

5. In every grandfathered multiple dwelling there must, by operation of law, be an equally grandfathered two-family dwelling. Therefore, regardless of the subject zoning district, the Ordinance does not require any property owner to reduce a multiple dwelling to a single family dwelling. Therefore, all affected property owners will be allowed to continue a two-family usage.

6. In one of the few court rulings applicable to amortization of multiple dwellings, a Maryland appellate court determined that a 10-year amortization period for multiple dwellings was reasonable. *Lone v Montgomery County*, 584 A.2d 142, 153-154 (Md.App. 1991). The court reasoned that 10 years would give owners time to recoup any investments. The court also reasoned that after conversion, the owners would still receive substantial income from a single family dwelling. Again, in Middletown, owners will receive even greater income from a two family usage. The court lastly stated that the amortization period was not unreasonable simply because the profit would not be as great after conversion.

7. In 1994, the New York Court of Appeals held that “there is no question that municipalities may enact laws reasonably limiting the duration of nonconforming uses”. *Village of Valatie v Smith*, 83 NY2d 396, 398 (1994). The Court held:

The validity of an amortization period depends on its reasonableness . . . [citing] . . . We have avoided any fixed formula for determining what constitutes a reasonable period. Instead, we have held that an amortization period is presumed valid, and the owner must carry the heavy burden of overcoming that presumption by demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the exercise of the police power *Valatie*, 83 NY2d at 400-401. The Court further held that amortization “periods are routinely calculated to protect the rights of individual owners *at the temporary expense of* public land use objectives. Typically, the period of time allowed has been measured for reasonableness by considering whether the owners had adequate time to recoup their investment in the use”. *Valatie*, 83 NY2d at 401.

8. New York’s Third Department recently cited with approval an amortization ordinance that gave the municipal Zoning Board of Appeals the authority to extend a use for up to 10 years to allow the owner to recoup investments. *Town of Plattekill v Ace Motocross, Inc.*, 7 AD3d 788,

9. In 1989, the New York Court of Appeals held:

Reasonableness is determined by examining all the facts, including the length of the amortization period in relation to the investment and the nature of the use. The period of amortization will normally increase as the amount invested increases or if the amortization applies to a structure rather than a use. Presumptively, amortization provisions are valid unless the owner can demonstrate that the loss suffered is so substantial that it outweighs the public benefit gained by the exercise of the police power.

Town of Islip v Caviglia, 73 NY2d 544, 561 (1989)

10. The courts have also made it clear that an amortization period can be reasonable even if the owner can only recoup a *portion* of his/her investment. *Georgia Outdoor Advertising, Inc. v City of Waynesville*, 900 F.2d 783 (4th Cir. 1990); *Modjeska Sign Studios, Inc. v Berle*, 43 NY2d 468 (1977)

11. Last year, a Suffolk County court provided further guidance on how to assess the reasonableness of an amortization period. *Suffolk Asphalt Supply, Inc. v Board of Trustees of Village of Westhampton Beach*, 51 Misc.3d 303 (Suffolk Cty. 2016). In that case an asphalt plant was given a 1-year amortization with resort to the Zoning Board of Appeals for a possible 5-year extension. The court first held that the recoupment should be considered over the entire life of the use, before and after amortization went into effect and including the possible extension.

12. The Suffolk court then held that to determine whether the owner's loss is so substantial that it outweighs the public benefit of ending a non-conforming use, a court would consider the value and condition of the improvements on the premises, the cost of relocation, as well as any other reasonable costs that bear on the kind and amount of damages the owner may sustain. The court held that an owner need not be given the time necessary to recoup his investment entirely, *citing, Suffolk Outdoor Adv. Co. v Hulse*, 43 NY2d 483(1977). Further factors are the length of the amortization period in relation to the investment and the nature of the use, the nature of the business, and the improvements erected on the land. Other factors include the initial capital investment, investment realization to date, life expectancy of the investment, and the existence or nonexistence of a lease obligation.

13. The Suffolk court held that "an amortization period is designed to provide the owner with an opportunity to recoup his or her investment and avoid *substantial* financial loss". The Suffolk court framed the ultimate issue as "whether, considering the amounts invested in the plant, the value of the buildings and equipment, and the ability and cost of relocating the plant, among other things, the appropriate balance has been struck and the plaintiff has been given an opportunity to recoup its investment and avoid substantial financial loss." *Suffolk Asphalt*, 51 Misc.3d at 304-312.

and it is further

RESOLVED by the Zoning Board of Appeals that the following are designated as Findings of Fact:

1. The subject property is a grandfathered 3-family dwelling. The applicant purchased the property in 2005 for a price of \$208,000. She initially financed the purchase with a private mortgage. Five years later she refinanced with a bank loan that also covered a neighboring property. As of 12/31/17, the mortgage balance allocated to the subject property was \$130,618 .

2. In 2017, the applicant received rents in the amount of \$31,200. She experienced a slight loss after expenses, including a mortgage payment of just over \$15,000.

3. The applicant submitted net income figures for the years from 2005-2017. She experienced net incomes as high as \$6,412 (2005), and net losses as low as \$1,767 (2009). She estimates that her total net rental income (after expenses) from the date of purchase to be \$21,442.

NOW THEREFORE BE IT RESOLVED by the Zoning Board of Appeals that its conclusions regarding the extension application are as follows:

1. At this point in time, the applicant has not had a substantial time period to recoup her investment. There is still a mortgage balance of just over \$130,000. There is no doubt that there would be substantially less rental income after conversion. The Board therefore grants the application for a 5-year extension, and determines that the multiple dwelling usage at 17 Eldred Street may continue until March 31, 2022. This determination, however, is contingent upon the applicant immediately filing for a rental permit and passing inspection; all aspects of the rental permit program set forth in Chapter 296 of the City Code must be adhered to for the extension to continue into 2022.

A motion was made by Mr. Woody and seconded by Mr. Barber to approve the resolution for 12 Eldred Street.

Roll Call Ayes: Joel Sierra, Nicholas Barber, Marc Woody

Somac Enterprises Inc.
16 Grand Avenue
5-year extension to comply with Amortization Ordinance

Mr. Sierra: We'll go back to 16 Grand Avenue.

Mr. Goldman: Thank you very much. Again, Jonathan Goldman, Law Office of Sussman & Associates, for the applicant, Hugh and Sophia McKenzie, owners of Somac, which owns the property.

Mr. Sierra: All right. Can you give us a brief outline of your application?

Mr. Goldman: Yes. We were here January actually of last year. In October, we provided supplemental documentation that was requested at the prior hearing, which I hope all of you have. In that, we provided copies of the current rental agreements for the properties. We outlined our estimates of the total net rental income since the applicants purchased the property in April of 2005, and respectfully I would submit, hearing the resolution that was just read in for 17 Eldred that was approved, I would submit that our situation is similar essentially in that the

numbers are similar and the hardship is essentially the same. Using full occupancy figures based on the historical rent values, we estimated a total annual -- total net income since ownership to date as of October '18 of \$24,500. Then we indicate in our submission that there were periods though of not full vacancies, for example, the first seven months of 2018. The two-bedroom unit, which obviously obtain the most rent, was vacant for about seven months, which cost about \$6,650 in rental income in 2018. In 2010, there was actually a \$3,200 operating loss, which if you wipe out \$3,200, it would also wipe out the approximately \$1,800 of net income that was factored into the total net income to date using full occupancy figures. So that wipes out another \$5,000. And then there was a \$3,000 expenditure at some point in time since the ownership to replace a driveway. So taking those figures out, the actual, as we estimate it, total net rental income since April 2005 through October 2018 is approximately \$9,850. We also submitted with our submission an estimate that was provided to the applicant for the cost to convert. This is Exhibit 3, I believe, to our submission in October of 2018. It was estimate by Ed Virag, Dynamic Creations, that it would cost \$17,750 to convert the three-family into a two-family, and then obviously going forward with a two-family, the cash flow would be less, and based on the monthly operating expenses, would operate at a net loss as we as estimate at approximately \$150 a month. So with all that, we would submit that there's substantial hardship, that the extension is warranted because the time to date has been insufficient to recoup the investment.

Mr. Sierra: Counselor, I just want to let you know that every situation and every application that comes before the board is done case by case.

Mr. Goldman: Absolutely.

Mr. Sierra: Is this all the documentation that you're going to submit?

Mr. Goldman: This is all the documentation we've submitted to date. If the board desires further documentation, we'd obviously provide whatever the board --

Mr. Sierra: I'm sure Martina gave you an outline of what we're looking for -- bank statements, any invoices, mortgage statements.

Mr. Barber: Rent receipts.

Mr. Goldman: So we did provide with our initial application in December of 2017 --

Mr. Sierra: This is the size of our normal packet, so I know you provided me some of the other stuff. Again, whatever information you can provide this board will be (inaudible).

Mr. Goldman: Sure. Absolutely. So just to go back to the original application in December '17, which proceeded our appearance here in January, we did provide rental receipts. We provided mortgage statement at the time. We provided utility statements to document the expenses -- to substantiate the expenses. And then with our --

Mr. Sierra: Does this property have a mortgage?

Mr. Goldman: The property has a mortgage. I should advise the board just in full disclosure, there has been a bankruptcy, so the personal obligation is gone, but there is still the lien on the property so to the extent that the property is still being used by the applicant, obviously the payments still have to be made, otherwise the property will be taken. So there is in that sense still a mortgage and expense that's paid every month.

Mr. Sierra: Has it been refinanced recently?

Mr. Goldman: It has not been refinanced.

Mr. Sierra: Did you submit those items in the package?

Mr. Goldman: In our original application, we submitted the mortgage statement as of that date. We could provide -- I don't know if -- I don't believe in our October submission if we provided an updated statement.

Mr. Croughan: Who's the owner of the property?

Mr. Goldman: The owner is Somac Enterprises. It's a corporation which is owned essentially by Mr. and Mrs. McKenzie. It's just in a corporate form for ownership of the property.

Mr. Croughan: So the liability exists still to the corporation but not personally?

Mr. McKenzie: No. It's personally also. The mortgage is on there.

Mr. Goldman: There's a lien on the property essentially, so as I understand it, the note has been discharged as to whoever the borrower was, which I believe was personally.

Mr. McKenzie: Personally, right.

Mr. Goldman: It was personally, but obviously if the payments stop, then the lien can foreclose and the property's gone.

Mr. Croughan: But it still exists towards the corporation.

Mr. Goldman: No. Because I don't believe it was in the corporation when the mortgage was originally -- it was a purchase mortgage, and then after the property was purchased and put to use as a rental, it was transferred into a corporate entity, as I understand it.

Mr. Croughan: Okay. So what I think we need, or what I'm hearing, is we need some updated statements.

Mr. Goldman: Okay.

Mr. Croughan: But you should also make sure that you've complied with Martina's list of what is needed.

Mr. Goldman: Okay.

Mr. Croughan: Just so the board has a full package.

Mr. Goldman: Absolutely. And just to be clear, when we were here last January, there wasn't a written list at the time. The board did ask for specific things, which in our October submission I indicated the things that the board specifically asked for, and I think the only thing we didn't provide was the bank statements. I think that was just a matter of the burden of it, but if there's a written -- is there a written list that --

Mr. Sierra: There is.

Mr. Goldman: Okay. Very good. All right. So we'll get the written list. We'll provide updated statements in conformity with what the list is asking for, and then hopefully that'll satisfy the board in terms of the evidentiary requirements that its looking for.

Mr. Sierra: Sure.

Mr. Goldman: Fair enough?

Mr. Sierra: Absolutely.

Mr. Goldman: All right. Very good.

Mr. Sierra: We just can emphasize that every property is unique, their own situation.

Mr. Goldman: I understand that. I was just making the comparison because while every property is unique, the circumstances of that property, just as I heard it being read, 2005, the amount it was purchased for, the total net, all the numbers seemed to line up, so while every case is looked at on a case-by-case basis I totally get, but when you're comparing apples to apples, I would think the equal application of the standards would apply to here as well, but we'll definitely provide the further documentation.

Mr. Sierra: Sure.

Mr. McKenzie: One of the things that I'm trying to understand is that when we bought this property, we paid \$216,000 for the property, right, and you know, we invested money into the property, and to know we're asked to spend money to convert it to a two-family which, one, is going to be less income, it's an additional expense for us, so I'm trying to understand. It's a long drawn out thing to prove all this stuff when we have to spend money to convert the property; right? So logically, if you were in that position that it didn't make sense for you to convert it, to spend money to convert a property making less income in the first place, so to me, right off the bat that's a hardship to the homeowner. Here you're going to spend \$17,000, right, to convert the property.

Mr. Croughan: Well, sir, it's based upon when you bought it and the time to recoup your investment. As you read what the case law says, some case law is as low as 10 years, so we're saying that you've had since when you purchased, 2004.

Mr. McKenzie: Right.

Mr. Croughan: We're now in 2019. That's 15 years that you had to realize your investment.

Mr. McKenzie: Right. But we still haven't realized our investment yet.

Mr. Croughan: Well, but the courts have found that only 10 years is what the amortization --

Mr. Goldman: That's fine. Thank you very much. We'll provide the additional documentation. Hopefully at the next hearing, we'll be able to move forward.

Mr. Croughan: Great. The sooner that you can get it into Martina, the quicker you can get onto our next date.

Mr. Goldman: Very good. All right. Thank you so much.

Mr. Sierra: We'll table this until next month's meeting.

Mr. Goldman: Very good. Have a good evening.

Mr. Croughan: Do we have a resolution to table it?

A motion was made by Mr. Woody and seconded by Mr. Barber to table the application of 16 Grand Avenue until next month.

Roll Call Ayes: Joel Sierra, Nicholas Barber, Marc Woody

JBA Associates, Inc.

12 Myrtle Avenue

Area variances and use variance in order to have a single family home in I-2 zone

Mr. Sierra: Next item on our agenda, 12 Myrtle Avenue, JBA Associates.

Mr. Armstrong: Yes, sir.

Mr. Sierra: Please state your name and address for the record, sir.

Mr. Armstrong: Ivan Armstrong, 233 Broadway, New York, New York 10279.

Mr. Croughan: I believe we've discussed this, and I believe it's the general opinion of the board that we're going to draft a resolution, and we should have that ready for the next meeting so then board can act that at the next meeting.

Mr. Armstrong: Okay.

Mr. Croughan: All right?

Mr. Armstrong: All right.

Mr. Sierra: All right, sir.

Mr. Armstrong: A good resolution, I hope. Thank you, gentlemen.

Mr. Sierra: Thank you.

Mr. Barber: You didn't drive all the way up from New York for this, did you?

Mr. Armstrong: Oh, yes.

Mr. Sierra: At least there wasn't snow.

Mr. Armstrong: True.

Mr. Barber: He doesn't have to come back next month, right?

Mr. Sierra: No.

Mr. Barber: The resolution will be read --

Mr. Sierra: Call her office. They'll mail it to you or email it to you, what have you.

Mr. Armstrong: Thank you.

Mr. Sierra: All right. Have a good evening, sir.

Mr. Armstrong: Have a good evening.

Mr. Barber made a motion to adjourn, seconded by Woody.

Roll Call Ayes: Joel Sierra, Nick Barber, Marc Woody

Adjourned 7:25PM

Respectfully Submitted,

Diane Genender, Transcriptionist