

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

June 19, 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 June 19, 2019 at 7:05 P.M., Joel Sierra presiding.

Members Present: Joel Sierra, Nicholas Barber, Marc Woody, Don Luis, Deborah Clark

Other Attendees: Richard J. Croughan, Corporation Counsel

A motion was made by Mr. Barber and seconded by Mr. Woody to approve the minutes of May 15, 2019 as submitted.

Roll Call Ayes: Joel Sierra, Nicholas Barber, Marc Woody, Don Luis, Deborah Clark

**Szilard Dibble -- RESOLUTION
53-63 Anthony Street
area variances in order to have attached townhouses**

Ms. Plass: Good evening.

Mr. Sierra: Did all the board members receive a copy of the resolution? Is there any questions from the board members?

Mr. Barber: No.

Mr. Croughan: The public meeting was held open.

Mr. Sierra: We need a motion to close the public hearing.

Mr. Croughan: Do you want to see if anybody's here on it?

Mr. Sierra: Anybody else here on 53-63 Anthony Street? Anybody wishing to be heard?

Motion to close public hearing by Mr. Barber, seconded by Ms. Clark.

Roll Call Ayes: Joel Sierra, Nicholas Barber, Marc Woody, Don Luis, Deborah Clark

The public hearing was closed.

Mr. Sierra: All right. Any questions from the board members on the resolution as before you?

Motion to approve the resolution by Mr. Woody, seconded by Mr. Barber.

Mr. Sierra: We'll deem the resolution read into the minutes.

Mr. Croughan: Just for the public's sake, I'm just going to read the conclusion.

RESOLUTION GRANTING AREA VARIANCES

_____ X
In the Matter of the Application of Findings of Fact
SZILARD DIBBLE

Premises located at 53-63 Anthony Street,
Middletown, NY 37/6/8, 9, 10

For An Area Variance for Lot Area, Lot Area
Per Dwelling Unit, Front Yard and Lot
Coverage

_____ X

Background

Applicant appeared on May 15, 2019 and made their presentation. Applicant is the current owner of the premises, which is a single family home in a residential neighborhood. Applicant is seeking an area variance from the required 1 acre total, applicant has 0.579 acres, Lot Area per Dwelling City requires 5,000 square feet to what applicant has available 2,520 square feet, Front Yard City requires 30 feet applicant has 15 feet and Lot Coverage City requires 25% applicant has

29%. Applicant has owned the subject property since November 2006. Currently he lives in the property with his family. The meeting was properly called to order and the public was invited to voice their concerns, if any.

DISCUSSION

For an Area Variance the Applicant must demonstrate that the home meets each criterion as laid out on our application, City ordinance, and State Law.

The applicant states that what he is proposing is a three building, seven unit townhouse complex, while knocking down the current single family home. The applicant is seeking 4 area variances, first an area variance from the required 1 acre total, applicant has 0.579 acres, a variance sought of 0.421 acres; Second, Lot Area per Dwelling City requires 5,000 square feet to what applicant has available 2,520 square feet, a variance sought of 2,480 square feet; Third, Front Yard City requires 30 feet applicant has 15 feet, a variance sought of 15 feet; and lastly, Lot Coverage City requires 25% applicant has 29%, variance sought of 4%.

For all four variance sought the Board would need to determine if an undesirable change in the character of the neighborhood or detriment to nearby properties will be created by granting the variance; Applicant stated neighborhood is mostly single family homes, in accordance with development by property, so converting premises from single family home to 3 multi-family townhouses would be more in line to character of neighborhood and would not be detrimental to surrounding properties.

The benefit sought by applicant can be achieved by some method feasible for the applicant to pursue, other than a variance; The applicant cannot purchase land from surrounding neighbors as it would lessen their square footage and potentially make them non-conforming. The lot size cannot be changed so to build the proposed Townhouses it would require the use of all the lots he owns with no ability to increase the size.

The proposed area variance is substantial; first an area variance from the required 1 acre total, applicant has 0.579 acres, a variance sought of 0.421 acres, 42% variance sought; Second, Lot Area per Dwelling City requires 5,000 square feet to what applicant has available 2,520 square feet, a variance sought of 2,480 square feet, variance sought approximately 50%; Third, Front Yard City requires 30 feet applicant has 15 feet, a variance sought of 15 feet or 100%; and lastly, Lot Coverage City requires 25% applicant has 29%, variance sought of 4%., or 16% variance. This is substantial, however the front yard was recommended by DPW so as to be consistent with other homes. This is not to be used as a determining factor but weighed in with other factors.

The proposed area variance will have adverse effect or impact on the physical or environmental conditions in the neighborhood or district; The change will not result in any negative environmental conditions or neighborhood and can be controlled through the Planning

Board..

Lastly, the alleged difficulty was self-created: It was self-created as applicant knew what he was purchasing.

All of the above are factors for Board to consider but any one negative response shall not necessarily preclude the granting of an area variance.

Public Discussion

When meeting was called for public comment it is noted that no members of the public spoke nor were any letters in opposition submitted.

The Board questioned applicant regarding the location of proposed townhomes, what the neighborhood looked like and potential impact of adding new homes, the variances sought and ability to use alternative means or lack thereof. There was considerable conversation over the percentage of variances sought and all were factored in when the Board considered the granting of variance along with all the other factors as detailed above.

Conclusions of Law

Applicant has demonstrated to this Board that the area variance's sought although substantial is unique to this property in that it is an existing lot with no other means to increase the lot size and will be in conformity with surrounding area. In addition the applicant will still need to comply with the DPW and/or Planning Board requirements. For these reasons the Board is approving the area variances sought.

Roll Call Ayes: Joel Sierra, Nicholas Barber, Marc Woody, Don Luis, Deborah Clark

132 Prospect Avenue

Kwaku Nodumehlezi

5-year extension to comply with Amortization Ordinance

Mr. Smith: Good evening. Christopher Smith, Middletown, New York, and I have the applicant, Kwaku Nodumehlezi.

Mr. Sierra: Can you give us a brief outline on your application?

Mr. Smith: Sure. So Mr. Nodumehlezi requests a use variance. He has two

properties. This is one of them. He's a not occupying owner.

Mr. Croughan: Just excuse me, Chris. Are you seeking a use variance or the amortization?

Mr. Smith: Well, I think what we're -- this property is subject, apparently subject to the amortization law, which has actually compelled property owners in the I believe it was the R-1. I don't remember what the historical designation was, but I think it was the R-1 district that were three units or more to convert to two units or less for a not occupying owner, so the property is subject to the amortization law as far as I can tell.

Mr. Croughan: So that's what you're here seeking the 5-year extension on.

Mr. Smith: Well, Mr. Nodumehlezi believes that he's made an investment into this property when he bought the property in 2003, and he hasn't recovered that investment, and so he believes he's entitled to a permanent exemption from that requirement. So, again, I'm not -- procedurally, I'm not sure how to couch this, but he's asking for a permanent exemption. He believes he has a vested interest in the property as a three-unit when he bought it, and there's authority that says that when you have a vested interest in a property that has a particular characteristic in terms of its income-generating capacity, you have rights in that and the government can't just take it away.

So in any event, I think what we're asking for is permanent exemption, and if you refuse to provide a permanent exemption, then I suppose we would try for -- we'd want to go with the temporary exemption under the amortization provisions.

But, again, I can't voice my opinion. I have to communicate what the applicant's position is, and that's what his position is. He has a vested interest in this property. It's a three-unit, so that's what I'm communicating right now.

Mr. Croughan: Okay. And you've seen the case law regarding the enactment of the City law and the challenges to it and that they've been upheld.

Mr. Smith: Well, actually, I have looked at the case law and the authority out there. There's not very much out there. I think there was a federal case, but no court case I don't believe really squarely addressed the issue of whether the constitutionality of the amortization law in terms of whether the five-year term is sufficient for property owners to recover their investment. I can't recall exactly what the procedural issue was with the federal case. There may've been like one state court case, but I don't really think -- but again, I don't really think the issue was really litigated, was addressed in case law in terms of this particular

amortization -- this particular law.

Mr. Croughan: It has, and it was modeled after a Cincinnati -- similar circumstances in the City of Cincinnati, and it was upheld, but you can certainly make your presentation to the board, but the board has been pretty clear on allowing only the 5-year amortization. But you can go ahead and make your presentation.

Mr. Smith: Okay. I mean, I guess there's just two parts to this, and I'll try to just keep this short. I think I summarized it, the legal aspect, in my affirmation and (inaudible) the application.

So basically, there's case law in New York at the state court level that basically, you know, essentially states something that's -- I don't think anybody would disagree with, and that is once the property owner purchases a property on Day A, and then there's subsequently zoning changes to zoning laws or zoning codes that alters the ability of that property owner to use the property as they originally purchased it, they have a vested right, and it's essentially a taking of property without, you know, there has to be compensation, and essentially there's, you know, it's New York State constitution and federal constitution. I'm not going to get into like due process and all that, but I'm just talking about giving away property rights.

So that's essentially is what I'm saying is there's proper -- Mr. Nodumehlezi has a property interest that's protected, that's protected under the law, and --

Mr. Croughan: The board has given him the opportunity through the 5-year amortization. After the 5-year amortization, which the board has been very lax on, but as far as when that time period is up and whether it's -- they don't grant it or they do, that's up to the board whether he meets all the criteria necessary. But as far as litigating it before this board, it's not appropriate.

If you want to make your application for the amortization, you can, and if it gets denied, you can certainly bring about a challenge to it by whatever means necessary to protect your client's interest. But as far as for this board, they're not here to hear litigation on it. What they're here is for the amortization, so if you want to make a use variance, I think it would be more appropriate after an amortization, whether it's granted or not. But the board is not here to hear -- for legal arguments on it.

Mr. Smith: Okay. I appreciate your clarifying that. Yeah. I mean, I wasn't really totally clear on the difference between the, you know, the use variance, quote unquote, and the amortization. I mean, I think the amortization is kind of a form of a use variance, but I guess I understand what you're saying.

Why don't we do this? I guess I could just make the argument that -- for the amortization in terms of financial hardship.

Mr. Croughan: Sure.

Mr. Smith: That's more of a standard. So Mr. Nodumehlezi is over 70 years old. He's retired. He has two rental properties, and he relies on this income to support himself. This property has a mortgage on it, so it's not -- it's not owned free and clear.

Okay. So basically, for the 132 Prospect Avenue -- so he purchased -- Mr. Nodumehlezi purchased the property in August of 2003 for \$230,000. He currently has a mortgage with (inaudible) on the property, and that has a balance of about \$185,000.

Mr. Barber: Has that been refinanced since 2003?

Mr. Nodumehlezi: No, sir.

Mr. Barber: Not at all?

Mr. Nodumehlezi: No, sir.

Mr. Barber: And you've been renting it as a three-apartment?

Mr. Nodumehlezi: Yes, sir.

Mr. Croughan: Is it a 30-year mortgage?

Mr. Nodumehlezi: Yes, sir.

Mr. Barber: Currently there's two tenants?

Mr. Nodumehlezi: Yes, sir.

Mr. Barber: And that would be Exhibit A; correct?

Mr. Smith: Yes. So basically --

Mr. Barber: So with Exhibit A, you're still making around \$900 a month income?

Mr. Smith: That's approximately correct.

Mr. Barber: Somewhere in that range, between \$800 and \$900.

Mr. Smith: Yeah. I mean, it may be a little bit more, may be a little bit less, but that's roughly it.

Mr. Barber: Yeah. In that range someplace.

Mr. Smith: Yes. And I guess just a corollary to that is if the building was allowed to be a three-unit dwelling, that would assume that he can charge an additional \$1,000 a month for the third tenant, his debt income would be about \$1,786, about there, so, you know, for a retired person that relies on the income to support himself, that's not an insubstantial amount of money.

Mr. Barber: I understand that, but if it has three rentals available now, why isn't the third one rented? And it appears it hasn't been rented for a while.

Mr. Nodumehlezi: Which building are we speaking of?

Mr. Barber: 132 Prospect.

Mr. Nodumehlezi: 132 Prospect has two families, but the reason this rent is so high, one of the families have extended themselves into the vacant apartment. The grandmother, the mother, and the daughter lives there.

Ms. Clark: So it's two for one then.

Mr. Barber: Well, that's not our, you know --

Ms. Clark: No. I'm just saying. It's two-bedroom -- two apartments, that's the \$2,200 one.

Mr. Barber: It's three apartments, two families.

Ms. Clark: Correct.

Mr. Nodumehlezi: Yes.

Ms. Clark: Right?

Mr. Nodumehlezi: Yes.

Ms. Clark: Okay. How many bedrooms is that?

Mr. Woody: Three, three, three, three.

Mr. Nodumehlezi: And one.

Mr. Smith: So I suppose it's possible that, excuse me, if the difference between the rent, a three-unit and a two-unit, may be a little bit less than what I said above because if he brought it into a three-unit, then probably he'd have to charge less for the other. He would have to reduce the size of the second unit, so, I mean, yeah, it's a little bit difficult to approximate how much that would be, but that could be the case. But again, we're not talking about material. I don't think we're talking about --

Mr. Barber: He's not charging the extended family full rental.

Mr. Nodumehlezi: No. No.

Ms. Clark: Correct.

Mr. Nodumehlezi: But, Your Honor, when we get to --

Mr. Croughan: I'm not Your Honor. It's the chairman and the board you would direct your comments to.

Mr. Nodumehlezi: Okay. Mr. Chairman and the board, from 22, I'm losing money every month.

Mr. Smith: Well, we're not talking about that one yet.

Mr. Nodumehlezi: Okay. Okay.

Mr. Smith: Yeah. So the difference is roughly about \$1,000 a month, and we think that makes a difference. Like I said, there's a mortgage on the property. There's a very big balance of \$185,000. It'll take him forever to pay that off. In fact, he may never pay it off until he sells the property given that he's only netting -- right now, he's only netting about \$860 a month.

Mr. Barber: I understand you're going for the hardship on this, but it's up to the owner of what he charges per rental. If he's giving that second family a break,

well, if we were to approve him and give him the amortization, he's going to continue to give them a break because they're still living there. So it's kind of hard to show a hardship if you're not charging full bulk for the rental.

I see you're giving them a break because, you know, I'm sure they just took over your place, you know. That's how I see it. I'm sure you're giving them a decent break. You know, if you're hurting because you gave them a break, I think you've got to turn around and charge full rent for it.

Mr. Nodumehlezi: That would make it a three apartment.

Mr. Barber: Right now, it is still a three-apartment building.

Mr. Nodumehlezi: Right.

Mr. Barber: Right now.

Mr. Nodumehlezi: Yes.

Mr. Barber: And that's why you'll be forced to keep it that way.

Mr. Sierra: What he's saying is that DPW or this board hasn't taken action yet on the amortization. It's not taken effect. Understand?

Mr. Nodumehlezi: No, I don't.

Mr. Croughan: You haven't legally been reduced to two apartments. You're still three apartments, so the fact that you're not renting out the third apartment the way you should, the board is saying you should be.

Mr. Sierra: You're losing money.

Mr. Croughan: And that's through no fault of the City's.

Mr. Nodumehlezi: Or my own.

Mr. Barber: On your own. You took that letter, and you acted on it.

Mr. Sierra: That third apartment is separate utilities, separate kitchen, separate completely?

Mr. Nodumehlezi: Yes. And, Mr. Chairman --

Mr. Sierra: We can't give you advice on what to do with your property.

Mr. Nodumehlezi: Mr. Chairman and members of the board, I was very good in my maintenance, so this don't have any maintenance in it. I do not have repairs and --

Mr. Barber: Why don't you get us the list of all the repairs you've done. Everything. What you have done to show us that this property is a hardship on you.

Mr. Nodumehlezi: Okay.

Mr. Barber: You have to show -- you have to prove it to us that it's a hardship. By telling us you're renting out the third apartment for barely nothing, that's not really a hardship. That's falling on your shoulders. Prove to us it's a hardship.

Mr. Sierra: Legally we can't give you any advice, counselor. We're not going to give your client any advice.

Mr. Smith: Well, we're not asking -- we're not asking for --

Mr. Sierra: What we're telling you is that in your client's favor is that the more you can prove to us the hardship, any bills that you have, any updates that you've done, any and all money that you have invested in this property --

Mr. Croughan: Cost of conversation.

Mr. Sierra: The (inaudible) was your client. Secondly, just an example of other properties, not -- they've taken and they've combined two units to make just a bigger unit.

Mr. Croughan: Which you can charge more rent.

Mr. Sierra: Understand?

Mr. Smith: I think that's what's happened here. I'll talk with the applicant after the hearing.

Mr. Sierra: Yeah. Again, this board cannot give you any advice on what to do with your property, but if you were to take two apartments and convert them into one, you could legally do that. You would have to talk to DPW, our building inspector,

and take the proper channels, but other multi-family members have done that on their property.

Mr. Barber: Give us the map of the property, you know, inside, how the apartments are staged, you know. Draw that up and submit that back to us so we can look at it because right now, we just see that a family took over two of your apartments and you're only charging for one. Well, shame on you.

But I understand you got that letter from the City. You were trying to follow it. I understand that, you know.

Mr. Smith: Okay, yeah. Basically, I mean, the general principle that we're trying to communicate tonight is that he could get more income in a three-unit than in a two-unit, if the property was three rentable units than two rentable units.

Mr. Barber: Right now, it is three rentable units.

Mr. Sierra: At this time, it still is at this time. The amortization has not taken effect.

Mr. Croughan: You haven't had the apartment taken away. You're still listed as three apartments, so you should be renting it accordingly until there was an action saying you're down to two. But as it stands right at this moment, you're still listed for three apartments, so you should be renting accordingly.

But I think what also the board is telling you is we need more information from your client.

Mr. Smith: Okay. Well, we'll work on the substantiation, and I know -- I understand that's important, so I mean, most of the expenditures are pretty straightforward, but we can still --

Mr. Croughan: Well, your client is saying that he had some maintenance expenses that he didn't list here. He needs to itemize those. He needs to give us a layout of what the apartments look like. We also need the cost of conversion from three to two, and he has to provide that to us.

Mr. Smith: Okay.

Mr. Sierra: An estimate from a contractor, a plumber, electrician. You have something to say, sir?

Mr. Smith: Well, the applicant says that there are -- he already has converted it.

Now, whether there's been a physical, where he's moved walls, I don't think that's what's happened, but I think he has taken two of the units and combined them into one.

Mr. Nodumehlezi: Basically, I am (inaudible) amortization. I'm amortized already for two apartment for two-family.

Mr. Sierra: Since when?

Mr. Smith: Did you combine two of the units into one?

Mr. Nodumehlezi: I got a letter from the City of Middletown. They forced me to convert both buildings as two families.

Mr. Sierra: When?

Mr. Nodumehlezi: You have the information.

Mr. Smith: My question is did you combine two of the units, or are you simply not using one of the units?

Mr. Nodumehlezi: I didn't really combine, per se. It's kind of combined. It's a big apartment. The top floor is one apartment.

Mr. Sierra: We're going to adjourn this --

Mr. Smith: Okay. That's fine.

Mr. Sierra: -- until next month's meeting.

Mr. Nodumehlezi: Can we skip a month?

Mr. Sierra: You need an additional month?

Mr. Nodumehlezi: Yes.

Mr. Sierra: 60 days?

Mr. Nodumehlezi: Yes, please.

Mr. Sierra: Okay. Martina has a list of what we've been asking for for all these

properties.

Mr. Smith: Okay.

Mr. Sierra: The more information you get us, the better.

Mr. Smith: Okay.

Mr. Sierra: So he needs to basically show a loss, and every penny he puts into this building or has put into this building since he's owned it, put it on paper.

Mr. Smith: Okay. That's fine.

Mr. Sierra: And we need a diagram. Handwritten, it doesn't have to be anything professional, of the layout of the apartments.

Mr. Smith: Okay. No, that's fine.

Mr. Sierra: For not only this property, but the 22 Franklin Street also.

Mr. Nodumehlezi: I have made the ground floor (inaudible), and the City of Middletown has them.

Mr. Sierra: I believe you.

Mr. Nodumehlezi: Okay.

Mr. Sierra: Get it to us.

Mr. Nodumehlezi: Okay.

Mr. Sierra: DPW doesn't always give us all the information. Walter's not here tonight. Usually the Building Inspector sits on this board, but I'm sure you have the information, and if you get us copies, get them to Martina's office.

Mr. Smith: Okay. That's fine. I guess I just want to point out that I don't think that what we have to show is a loss per se, not necessarily. I mean, we could show a loss, but I think we're trying to establish the financial hardship, not necessarily the conversion through the loss.

Mr. Sierra: However you want to call it, it's fine.

Mr. Smith: Okay.

Mr. Sierra: But do you want to pitch the 22 Franklin Street, because I'm going to tell you the same thing applies for 22 Franklin.

Mr. Smith: I think it's the same.

Mr. Sierra: Okay. So we'll adjourn both these properties for the August meeting.

Mr. Smith: Okay. You're not here next month?

Mr. Sierra: That's fine. Continue to operate as you are. This doesn't stop you from operation.

Mr. Barber: You can go back to that three-family if you want to.

Mr. Sierra: I'm not going to tell you what to do with your property, but this is correct.

Mr. Nodumehlezi: Okay.

Mr. Sierra: The amortization has not taken effect yet on the property.

Mr. Smith: All right. Thank you.

Mr. Sierra: Thank you.

Mr. Croughan: Okay. Thank you.

Executive Session 7:26 p.m. - 7:42 p.m.

Mr. Barber made a motion to adjourn, seconded by Ms. Clark.

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

Adjourned 7:43PM

Respectfully Submitted,

Diane Genender, Transcriptionist