

**REGULAR MEETING  
ZONING BOARD OF APPEALS**

Nyack Village Hall  
Nyack, New York

October 31, 2016

Present: Catherine Friesen, Chair  
John Dunnigan  
Mary Ann Armano  
Ellyse Berg  
Roger Cohen

**In Memoriam:**  
Raymond O'Connell

The following resolution was offered by Member Dunnigan, seconded by Member Berg, and carried based upon a review of the evidence presented at the public hearings held on May 23, 2016, September 26, 2016 and October 31, 2016.

**BOARD OF APPEALS  
VILLAGE OF NYACK, COUNTY OF ROCKLAND**

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In the Matter of the application of SD&E Home Design  
(20 Prospect Street) for a Use Variance pursuant to  
VON Code Section 360-5.10A(4) to reinstate a  
Non-conforming 4 family use in the TFR Zoning District  
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The Zoning Board of Appeals held a public meetings on the 23<sup>rd</sup> Day of May, 2016, the 26<sup>th</sup> Day of September, 2016, and the 31<sup>st</sup> of October 2016, and due deliberations having been made this day;

Now, upon said hearing and upon the evidence adduced thereat, it is hereby found and determined that:

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

**FIRST:** Applicant petitions the Zoning Board for the Use Variance noted above.

**SECOND:** The ZBA, in reaching its Findings of Fact and Conclusions of Law has taken the following factual testimony and evidence under consideration:

1. The application and supporting documents submitted, including a letter from Doria and Seta Tunell, and a Narrative Summary with attachments prepared by Ira M. Emmanuel, Esq;
2. Letter from Ira M. Emmanuel, Esq., to the Zoning Board to Appeals dated October 10, 2016,

3. Testimony of Doria and Seta Tunells, Ira Emmanuel, Esq, and Kier Levesque, Architect, on behalf of Applicant.
4. Testimony of the following members of the public in support of the Application: Naaz Hosseini and William Kiesel.
5. Testimony of the following members of the public opposed to the Application: None.
6. ZBA members knowledge of the site and site visits by all members of the Board
7. Building Inspector's Plan review Summary dated May 23, 2016 and September 26, 2016
8. Minutes of the Planning Board dated April 11, 2016;
9. Letter from the County of Rockland Department of Planning to the ZBA dated April 26, 2016;
10. Letter from David Majewski, Chief Building Inspector for the Village of South Nyack, dated April 11, 2016;
11. Memorandum from Bob Galvin, the Village Planner, to the Planning board dated April 8, 2016
12. Short Environmental Assessment Form, Part 1, dated September 2016;
13. Records maintained by the Village of Nyack Building Department for 20 Prospect Street.

**THIRD:** The site in question is located in the TFR Zoning District which permits one and two family homes. The site has a lot size of 0.25 acres and includes a 4,244 square foot building. The current owner of the property, SD&E Home Designs, LLC, purchased it in December, 2015, pursuant to the local zoning regulations. Dorian and Seta Tunell are the principals of SD&E Home Designs, LLC.

**FOURTH:** The building located at 20 Prospect Avenue, which was built in 1930, underwent renovations in 1955 to become a 4-family residence, at a time when such use was legal in the zoning district. Certificates of Occupancy attesting to its 4-family use were issued in 1959, 1963, 1970, 1996, 1999, 2005, 2007 and 2008. A fire destroyed much of the building on August 20, 2010. According to the Village Planner, Mr. Galvin, and testimony from members of the public presented at the hearing before the ZBA and the Planning Board, the property is currently an "eyesore" that has a "severe blighting influence" on the surrounding residences and neighborhood. Under the Village of Nyack Zoning Code, the property lost its legal, grandfathered non-conforming status as a four family home because it was not reconstructed after the fire and went unused for a period exceeding a year. In addition, despite the size of the lot (.25 acre), the lot cannot be legally subdivided to create two, 2-family dwellings without a variance, according to the Village Chief Building Inspector.

**FIFTH:** Records submitted the Applicant establish that, following the fire and within the one year period when the owner could have legally reconstructed it without a variance as a four family home, the building was neglected and essentially abandoned. By June, 2011, the grass was 3 feet high, forcing the Village ultimately to maintain the property's external appearance by cutting it. In August 2012, the Palisades Federal Credit Union ("Palisades") began foreclosure proceedings against the then-owners which were ultimately concluded in April 2015. A referee's

auction was thereafter held on July 10, 2015, and the Premises were purchased by Palisades. During the three year period that the property was subject to foreclosure proceedings, the Premises continued to be neglected by the owner, and was, essentially, a “zombie property.”

**SIXTH:** In December 2015, the Applicants purchased the property, which was being marketed a four family house, from Palisades for \$180,000 (plus \$5,000 closing costs) with plans to renovate and restore it to its former 4 family use. Shortly before closing, the Tunells learned through a title search that the grandfathered use had expired, but they moved forward with the closing with the intention of applying to have it reinstated. After closing, the Tunells submitted an application to the Building Department to reinstate the 4-family use, which was denied pursuant to VON Code Section 360-1.9D(3). Thereafter, they filed this application for a variance.

**SEVENTH:** In support of their application, the Tunells have submitted a detailed financial analysis supported by competent evidence to demonstrate that, absent the use variance, they cannot realize a reasonable rate of return on their investment.<sup>1</sup> Their analysis demonstrates, to the contrary, that all permitted uses (including converting the property to 2-family use or subdividing the property to construct two 1- or 2-family dwellings) would cost more to operate than the income generated, resulting in a net annual income loss ranging from \$7,396 to \$39,922. The Tunells have also submitted evidence that the neighborhood surrounding 20 Prospect Street is predominantly composed of multi-family dwellings, with 10 of the 13 properties containing 3 or more families, and that unique physical conditions of the property, including its history of vandalism and abandonment, contribute to the hardship they face. The Village Planner confirms that, of the 13 properties in the immediate vicinity of the Premises, only two residences are completely conforming, with six properties having four or more units.

**EIGHTH:** The Village of Nyack Planning Board, following a public hearing at which they received input from the Applicant, neighbors, and Bob Galvin, Village Planner, recommended that this Board grant the use variance.

**NINTH:** The County of Rockland Department of Planning recommended modifications, noting that allowing a four-family residence in the TFR Zoning District would set a precedent and potentially change the character of the neighborhood, and that the Applicant must meet all legal criteria for the grant of a use variance.

**TENTH:** The Village of South Nyack also reviewed the application and submitted a letter dated April 11, 2016, noting that all residences in South Nyack require 2 parking spaces per dwelling unit. The Village of Nyack’s Planner, Mr. Galvin, notes that the property is sufficiently large to accommodate the parking required by the Nyack Village Code, and the Nyack Chief Building

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<sup>1</sup> Documentation submitted by the Applicant in support of its financial analysis includes construction options developed by Geoffrey Torres, Building Castles, Inc., building cost estimates (loan payment information provide by Don Moschetti, Mortgage Masters), annual tax estimates from Robin Goldsmith, Town of Orangetown Appraiser, insurance quotes from Joe Vitiello, Vitiello Insurance Agency, Inc., and comparable property listings provided Donna L. Cox.

Inspector has determined that the proposed use would not require a parking variance.

**ELEVENTH:** The proposed action is an Unlisted action under SEQRA with no environmental impact.

Findings of Fact moved and passed 5-0.

### **STANDARD OF REVIEW**

This Board must apply the standards set forth in Village Law §7-712b(2)(b) *et. seq.*, for use variances which are embodied generally in VON Code § 360-5.10(c)(2):

**b)** No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. To show such hardship an applicant must prove each and every factor enumerated under Village Law § 7-712-b, Subdivision 2(b) of the State of New York. In order to prove such unnecessary hardship the applicant shall demonstrate to the Board of Appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located,

- (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
- (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
- (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
- (4) that the alleged hardship has not been self-created.

If any one or more of these factors is not proven, State law requires that the ZBA must deny the variance.

### **CONCLUSIONS OF LAW:**

The Zoning Board considered the factors set forth in Section 7-712-b(2)(b) of the Village Law of the State of New York as follows:

**FIRST:** As to the “reasonable return” test, the Board finds that the Applicant has submitted competent financial evidence establishing that it cannot realize a reasonable rate of return on any use permitted by the Code. This conclusion was reached based upon deliberations of the Zoning Board at the public hearing, and based upon the factual findings set forth above in paragraph 7. (5-0).

**SECOND.** As to the “uniqueness” test, the Board finds that the Premises existed for over 50 years as a four family home before suffering severe fire damage in 2010, and it thereafter was almost immediately neglected to the point of becoming a severe and dangerous eyesore to the neighborhood. The premises then spent years in the legal limbo of foreclosure as a so-called “zombie property” when no entity either could or would assume responsibility for it. The parcel is the only multifamily dwelling in the neighborhood that sits on what is essentially a double size lot (.25 acre), and yet the lot cannot be legally subdivided to create 2, 2-family dwellings without a further variance. Under the circumstances, the Board finds that the property is unique in the neighborhood. This conclusion was reached based upon deliberations of the Zoning Board at the public hearing, and based upon the factual findings set forth above and in paragraphs 4,5 and 6. (5-0)

**THIRD:** The use variance will not alter the character of the neighborhood. Almost all the properties in the immediate neighborhood are multi-family dwellings, many of which are grandfathered uses. The property, as reconstructed, would add to the character of the neighborhood, not alter it in any way. This conclusion was reached based upon deliberations of the Zoning Board at the public hearing, and based upon the factual findings set forth above in paragraph 7. (5-0)

**FOURTH:** As to the “self-created hardship test, the Board finds that, while ordinarily an Applicant who purchases a property knowing that a use is not permitted creates his or her own hardship, the circumstances of this case – where the property was essentially abandoned within the one year period where it could have been reconstructed for a long-established grandfathered four-family use, the property subsequently went into foreclosure during which time period the bank did not restore the home, the then-owners lacked any incentive to do so (creating what was essentially legal limbo - commonly known as a "zombie property" situation), and most significantly the Applicant could not buy the property and restore the home because of the zombie property status, and where the property was subsequently marketed by a financial institution as a four family home despite having lost that non-conforming status – compel a different result. The owners purchased the now-decrepit property in good faith, and were subsequently confronted with circumstances that were considerably worse than they had anticipated and with a property that cannot feasibly be marketed for any other use than that originally grandfathered. In consideration of the foregoing, the Board finds that the hardship was not self-created under the record of this application as a whole. See Citizens Savings Bank v. Board of Zoning Appeals of the Village of Lansing, 238 AD2d 874 (3d Dept 1997)(finding that, even though petitioner acquired a property, which had a problematic septic system, knowing that it was grandfathered for use as a restaurant, hardship was not self-created where septic problems were worse than anticipated, no feasible alternatives existed, and the property could simply not be used as a restaurant). This conclusion was based upon the deliberations of the Zoning Board at the public hearing, and based upon the factual findings set forth in above in paragraphs 3, 4, 5, and 6. (5-0)

**THEREFORE**, the Zoning Board of Appeals having taken testimony and evidence at public hearings held on May 23, 2016, September 26, 2016 and October 31, 2016, has weighed the factors contained in Village Law Section 7-712-b(2)(b) as set forth above, and the factors contained in the Code of the Village of Nyack Section 360-5.10(C)(2) and found that, on balance the interests of justice would be promoted by **GRANTING** the application for a use variance, subject to the following condition to which the Applicant has agreed:

***The Applicant will be required to remediate any contamination on the property to the extent same is found to exist on the property.***

To the extent this decision is inconsistent with the Rockland County Department of Planning, its recommendations are overruled consistent with the factual findings set forth in paragraph 7.

On roll call, the vote was as follows:

Ayes: 5 (Friesen, Armano, Dunnigan, Berg, Cohen)

Nays: 0

Abstain: 0

/s/ Catherine H. Friesen  
CATHERINE H. FRIESEN, Chair  
Zoning Board of Appeals, Nyack.