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**UNION VALE ZONING BOARD OF APPEALS
Minutes of the Regular Meeting**

**October 2, 2018
7:30 pm**

Members Present: Chairperson Jane Smith, Board members Dennis Dunning and Ilana Nilsen

Member Absent: Board member John Hughes and Jeffrey Wimmer

Others present:

CALL TO ORDER / DETERMINATION OF QUORUM

Chairperson Jane Smith determined that there was a quorum to conduct business and called the meeting to order.

BUSINESS SESSION

- Review the Agenda
- Minutes

Chairperson Jane Smith made a motion to accept the September 12, 2018 regular meeting minutes, with corrections by Board member Ilana Nilsen page 6, #4 change “blood relatives” to “immediate family”, August 7, 2018 regular meeting minutes, and the August 17, 2018 special meeting minutes, seconded by Board member Ilana Nilsen; approved unanimously.

CORRESPONDENCE

Chairperson Jane Smith stated that one piece of correspondence from Building Inspector George Kolb, dated October 1, 2018, regarding Dawn Sun aka Verbank Deli, was received regarding removal of habitable space in the second story of a detached garage at 3122 Route 82, Vebank, NY.

PUBLIC HEARING(S) Continuation:

Adam Wiemer, 3406 Route 82, Verbank, NY 12585, TMP # 6663-20-876091:
Requesting a Use variance in order to legalize a mutil-family dwelling in the H District, as per zoning determination letter dated April 30, 2018.

Chairperson Jane Smith made the motion to open the public hearing, seconded by Board member Ilana Nilsen.

Chairperson Jane Smith asked if Mr. Wiemer was present or was anyone representing Mr. Wiemer, with no response, Chairperson Jane Smith continued discussion among the Board members present regarding the application before them.

Chairperson Jane Smith stated that with help from the Town of Union Vale Building Inspector, George Kolb, and the assessor's office she reviewed four public documents and offered them for inclusion in the record: (1) the "Bargain And Sale Deed" recorded with Dutchess County and the associated "Dutchess County Clerk Recording Page" which reflect the transfer and sale of the property from Glenn Wade to Mr. Wiemer on September 1, 2015, for \$200,000; (2) the "Purchase Money Mortgage" and the associated "Dutchess County Clerk Recording Page" which reflect that Mr. Wiemer obtained a \$180,000 mortgage from Mr. Wade; (3) Parcel Access property card, produced on 9/19/2018, showing a "Two Family Year-Round Residence" assessed at \$252,800; and (4) Union Vale Tax Assessor's property card showing that, in 2014, the property was assessed at \$252,800 as a two-family residence, and that, in 2015 the assessed value was reduced to \$200,000.

At this time Chairperson Jane Smith asked if there were any comments or questions from the Public. With no comments, Chairperson Jane Smith made a motion to close the public hearing; motion seconded by Board member Ilana Nilsen. With all in favor, motion carried.

The Board members discussed further and rendered the following decision:

**Town of Union Vale
Zoning Board of Appeals
Decision on Appeal**

ADAM WIEMER

October 2, 2018

INTRODUCTION

Adam Wiemer is the owner of property located at 3406 Rte. 82 in the H Zoning District of the Town of Union Vale. The structure on the property -- divided into three separate apartments, each of which is rented -- is currently being used as a multi-family dwelling as that term is defined in the Code § 210-86 (“DWELLING, MULTIPLE,” “also referred to as `dwelling, multi-family”), a use not allowed in the H District (or any other residential district in Union Vale). See 210 Attachment 3, District Schedule of Use Regulations/ Residential Districts.

Beginning in 2016, Union Vale Code Official George A. Kolb, Jr. issued a series of reports and determinations related to the property’s noncompliance with the Town’s Code, including the following:

1. On August 9, 2016, Mr. Kolb reported that he had inspected the property and conducted a file search. His record search revealed that the structure, constructed in 1940, is a legal non-conforming two family structure, with one unit on the first floor and one unit on the second floor; he also found that an electric meter change to 4 meters took place in 1999 without a permit being issued by the Building

Department. At a site inspection conducted on August 5, 2016, he saw that there were three separate units (one on the first floor and two on the second), and determined that the second unit on the second floor rendered the structure non-compliant. Mr. Kolb suggested two options for bringing the structure into compliance – either removal of one of the units or application for a use variance to allow for a multi-family use in the H district.

2. In a “Notice of Zoning Determination” dated December 20, 2016, Mr. Kolb noted that an application “has been made for the Legalization of a non-conforming 3 family structure.” He also noted that any approval would require a use variance, as well as a special use permit from the planning board. According to Mr. Kolb, “This violation was reported from the Town of Union Vale Tax assessor based on information received to his office from Dutchess County access. No record of any approval or indication based on research could confirm that this use conducted before Zoning enactment in 1969.”

3. On March 19, 2018, Mr. Kolb issued a “Final Notice of Violation,” “Final Notice of Non-Compliance.” He identified the violation as a “210-75 Failure to obtain permit and or ZBA Variance for illegal apartment in the above location,” and instructed, “You are required [to] contact the ZBA secretary... to finalize placement on the next agenda for a “Use Variance”... with-in 5 days of receipt of this correspondence” and that “Failure to provide information will result in legal action by this office.”

4. After Mr. Wiemer submitted material date stamped as having been received March 30, 2018, and described below, Mr. Kolb issued a “Notice of Zoning

Determination” dated April 30, 2018. Received by the ZBA on May 1, 2018, the Notice provided: “Application has been made for the legalization of a third apartment in a legal non-conforming structure built in 1940. A third apartment was constructed without approvals or permits issued from this office.... This additional apartment would designate a Multi-Family dwelling which is not allowed in the ‘Hamlet’ Zone... A ‘Use Variance’ would need to be obtained for any permit to be issued by this office.”

Mr. Wiemer’s application for a use variance to permit the structure to be used as a multifamily dwelling is now before the Zoning Board of Appeals. (As set forth in the footnote below, there was some confusion in the record as to the dates of Mr. Wiemer’s various submissions. Ultimately the Board determined on July 3, 2018, that the application (though submitted on the wrong form) was timely as measured by the determination letter dated April 30, 2018. Mr. Wiemer was directed to submit a completed application on the correct form.)¹

THE RECORD

The Record before this Board consists of the Applicant’s Applications and Submissions as described in the previous footnote; the minutes of this Board’s meetings and the two public hearing sessions (September 12, 2018, October 2, 2018), including the

¹ A submission from Mr. Wiemer dated “5/223/18” (and date-stamped as having been received by Union Vale Zoning on “Mar 30 2018”) included a description of the proposed plan and “history behind this house”, a map, portions of a deed apparently notarized on September 1, 2015, a variance application dated “1/31/18”, and a Short Environmental Assessment Form, dated “5/23/18.” On July 24, 2018, the ZBA received a different Environment Assessment Form dated “5/20/18” with attached photographs of the property. On July 30, 2018, a “Use Variance Application,” dated July 23, 2018, with attachments (but missing the application cover page) was received; the Application cover page (dated August 8, 2018) was received on August 21, 2018.

one-page summary chart submitted by the applicant; the Town of Union Vale’s Building, Zoning, Planning and Tax Assessor files; correspondence and submissions from interested parties; and publicly filed deed and mortgage documents relating to the property.

DETERMINATION OF ISSUES

An applicant for a Use Variance must prove that the applicable zoning regulations and restrictions have caused “unnecessary hardship.” By law, in order to prove “unnecessary hardship,” the Applicant has the burden of demonstrating that **four tests** are met for each and every permitted use under the zoning regulations for the particular district where the property is located. The Zoning Board of Appeals is not authorized to issue a Use Variance unless it finds that **each** of the four tests is proved. The four tests, the evidence presented, and the Board’s findings with respect to each follow.

Before addressing the tests, the Board must resolve a legal question – whether the multi-family dwelling is a lawful non-conforming use that predates the current prohibition on multi-family residences in the H District and, therefore, may be continued pursuant to Code §210-68.

Applicant presented the Board with a variety of dates on which, he claimed, the structure was converted to three apartments: (1) In the submission dated “5/223/18” and dated stamped received on March 30, 2018, he stated, “The third apartment was added onto the house in 1991 by the previous owner.”² (2) On his application for a use variance received on July 30, 2018, he asserted in connection with his claim that the character of

² Recorded deeds to the property show that Mr. Wiemer acquired the property from Glenn Wade in September 2015, and that Mr. Wade acquired the property in October 1990.

the neighborhood will not be altered by the issuance of a use variance, “It will remain the same as it has since 1999 when it was updated into a three family residence.” (3) At the public hearing on September 12, 2018, Sharon Slocum stated that she lived in the residence in 1988 and that it was a three family residence at that time; she said that the building’s original owner ran a general store and lived there, then it was converted into a three family once the store closed. No documentary evidence supported any of these assertions.

Apparently, there is also no public record of the conversion to three apartments. To the contrary, both the current Dutchess County Parcel Access Record as well as the property card records from the Union Vale Tax Assessor’s office identify the structure as a two-family residence.

The prohibition on multi-family dwellings in the H District went into effect in 2003. Before that, from 1969-2002, the property at issue was in the C-1 District. Multi-family residences were permitted in the C-1 District during that time period; however, all multifamily uses required a site plan approval of the Planning Board. There is no record of such a site plan approval by the Planning Board.

Moreover, the Code prior to 2003 restricted the minimum density for residential use with the C-1 District to one dwelling unit per 30,000 square feet of lot area. According to the Parcel Access record, the parcel is 2 acres – or 87,120 square feet, less than the 90,000 square feet that was required for a three-family structure.

Conclusion: The record before the Board does not clearly establish either when the third apartment was added or that, when it was added, it conformed with the zoning laws that existed at the time. Accordingly, the multifamily use cannot be deemed a

lawful nonconforming use that may be continued indefinitely pursuant to Code § 210-68
A.

The Tests For A Use Variance

1. Test # 1: Deprivation of “Economic Use of Benefit”/Reasonable Return

The applicant cannot realize a reasonable return, provided that the lack of return is substantial as demonstrated by competent financial evidence.

Established? Yes ___ No X

The applicant for a use variance bears the burden of demonstrating among other things that the property cannot yield a reasonable return if used for *any* of the purposes permitted as it is currently zoned. Such an inability to yield a reasonable return must be established through the submission of dollar and cents proof with respect to each permitted use. Bare conclusory statements are not enough.

In addition to single family and two-family residential uses, there are more than 20 non-residential permitted and specially permitted uses of the property listed in the District Schedule of Use Regulations/Residential Districts.

Mr. Wiemer told the Board that he purchased the property in October 2015 from Glen Wade for \$220,000 and that Mr. Wade held a mortgage for \$200,000 with a 5.5% interest rate. He also presented the Board with a summary chart purporting to show that the income from the rental properties did not cover his monthly expenses and other costs of maintaining the property.

Mr. Wiemer did not provide any back up documents substantiating any of the numbers he presented. For example, he did not proffer a bill of sale for the property, or

tender any documents relating to the mortgage, leases on the apartments, utility bills, tax bills, or receipts related to the improvements and costs of maintenance. Mr. Wiemer also told the Board that he owned several rental properties in the H District, yet he did not explain or substantiate how he attributed the purchase price of listed maintenance equipment (for example, “Lawn mower – 5500”) to this particular property.

Moreover, the numbers provided by Mr. Wiemer to the Board conflict with what is shown in Dutchess County and Union Vale Tax Assessor records. These records show that he purchased the property on September 1, 2015, for \$200,000, that he obtained a mortgage for \$180,000. They also show that, in 2014, the property was assessed at \$252,800 as a two-family residence, and that, in 2015 the assessed value was reduced to \$200,000.

Mr. Wiemer showed (though, despite the request of the Board, did not provide for the record) what he claimed to be information showing the market prices of comparable properties, but did not present any appraisal reflecting the current market value of this particular property or any realtor statement regarding the ability or inability to generate revenue from any of the permitted uses of this property.

With regard to permitted uses, Mr. Weimer did not provide the Board with any evidence as to the costs of converting the nonconforming three apartments into a conforming two-family structure, or any evidence as to whether, by increasing the size of one or the other of the two remaining apartments, the rental income could be increased. He provided, at best, only anecdotal and conclusory statements that it would not be feasible for him to use the property in a way that was permitted (such as a gas station or a church). He did not even address, let alone submit financial proof, relating to the

majority of permitted uses listed in the District Schedule of Use Regulations/Residential Districts.

2. Test # 2: Uniqueness

The alleged hardship relating to the property is unique, and does not apply to a substantial portion of the district or neighborhood.

Established? Yes ___ No X

This test for uniqueness does not focus on the plight of the owner. Rather, it focuses on the property. The applicant must show that there are unique conditions peculiar to and inherent in the lot as compared to other properties in the district, and that, due to physical traits of the property, conforming uses would pose practical difficulties or hardship and prevent the owner from realizing a reasonable return.

Mr. Wiemer contended that this lot is unique because the structure on it is residential and across the street from it are properties used for commercial and other non-residential uses, such as a firehouse, post office, restaurant, and gas station, and, accordingly, it is not in a rural area “as the majority of the hamlet is.”

The New York Court of Appeals has held that the fact that a residentially-zoned corner property is situated on a major thoroughfare in a predominantly commercial area does not suffice to support a finding of uniqueness if other nearby residential parcels share similar conditions. *Vomero v. City of New York*, 13 NY3d 840 (2009). Here, not only are there other residential parcels on the road, but also the property is not zoned exclusively residential. There are more than 20 non-residential permitted and specially permitted uses.

3. Test # 3: Character of the Neighborhood

The requested use variance, if granted, will not alter the essential character of the neighborhood.

Established? Yes X No _____

While there were conflicting reports as to the precise year that the conversion of the structure to a three-family dwelling occurred, there was no dispute that it has been this way for many years, and that, until 2003, multifamily dwellings were permitted in the district provided that there was site plan approval and lot size requirements were met. Board members agreed that the granting of a use variance for this particular property alone would not alter the essential character of the neighborhood.

4. Test # 4: Self-Created Hardship

The alleged hardship has not been self-created.

Established? Yes ___ No X

Hardship is considered self-created where the applicant for a variance acquired the property subject to the restrictions from which he seeks relief. Even if the applicant had no actual knowledge of these restrictions, the applicant is bound by the restrictions if the applicant could have learned of them through reasonable diligence such as contacting zoning and building authorities. See *Tharp v. Zoning Board of Appeals*, 138 AD2d 906 (3d Dept. 1988); *First National Bank v. City of Albany*, 216 AD2d 680 (3d Dept. 1995); *Ferruggia v. Zoning Bd. of Appeals*, 233 AD2d 505 (2d Dept. 1996).

Mr. Wiemer confessed that he purchased the property without making any inquiries with the Town officials as to its compliance with local zoning laws. While the Board respects the applicant's expressed desire to improve and maintain the property, this does not excuse or explain why he did not exercise due diligence prior to his purchase.

Determination of the ZBA based on the above factors:

The ZBA, after reviewing the above four factors, finds:

The applicant has failed to prove unnecessary hardship through the application of the four tests required by state and local statutes.

Record of Vote

	Aye	Nay	Absent
Jane Smith	X		
Dennis Dunning	X		
Ilana Nilsen	X		
John Hughes			X
Jeffrey Wimmer			X

REGULAR SESSION / NEW BUSINESS/ OTHER BUSINESS

None.

ADJOURNMENT

As there was no further business, a motion was made by Board member Jane Smith, seconded by Board member Dennis Dunning, and unanimously accepted by the Board, to adjourn the meeting at 8:40 p.m.

The next regular meeting of the Zoning Board of Appeals is scheduled for **WEDNESDAY, November 6, 2018 at 7:30 PM.**

The agenda will close on **October 23, 2018 at 12:00 Noon.** Items for consideration at the **November** meeting must be received by that date.

Respectfully submitted,

Jean E. Miller

ZONING BOARD OF APPEALS CLERK

Annexed documents: