

**103 EAST HIGH STREET
USE VARIANCE
SUPPLEMENTAL DATA NARRATIVE
October 10, 2023**

At the meeting on August 30, 2023, the Chair requested financial data related to the use variance standards. Please accept the below and attached updated information as documentation of expenses related to this property since ownership.

The property was purchased in 2021 for \$205,000.00 and an additional \$102,148 has been invested to date. The total investment for this property including acquisition and demolition costs is \$388,148, in addition to the ongoing costs of maintenance, taxes, etc. If the property needs to be demolished and rebuilt as a single-family home because it is not viable for any allowable use in the zone, the expenses to date far exceeds the market value of vacant lots in the village. The lot is unusable for any allowable zoning purpose, as demonstrated during my presentation, because there would be a negative return on investment. The lot is .34 acres and the land is assessed by the village at \$37,200, which is a tenth of the costs expended for this property. The variance is necessary because there are no allowable uses in the zone for this structure on this lot.

Property expenses and acquisition costs to date include the following (see also attached documentation):

Expenses	Amount	
Purchase August 2021	\$205,000	\$205,000
Closing Costs	\$6030	\$6030
2021- present Annual Taxes	\$6990 x 2 years	\$13,980
Lawn Care	\$6000	\$6000
Site Development Plans	\$15,000	\$15,000
Annual Maintenance	\$5000 x 2 years	\$10,000
Mortgage Payments	\$1296.90/month x 2 years	\$31,125
Insurance	\$1937.11/year x 2	\$3874
Asbestos Survey	\$2388.00	\$2388
Collar City Container dumpsters	\$3797.77	\$3798
Legal (ongoing)	\$4012.50	\$4012
JNF Construction & Design	\$5941.08	\$5941
JNF Construction & Design – if demolition is required	\$81,000	\$81,000
Total		\$388,148

Follow up on information raised during the August meeting:

Self-created hardship: The chair inquired about meetings with the village where the number of units was discussed. As the board may be aware, the standard for self-created hardship is relatively low and certainly does not require omniscience. The applicant does not have to correctly understand all nuances of the zoning law or even undertake a zoning analysis for self-created hardship to exist. Here, the applicant made calls to the village to inquire about the property and discussed the continued use for multi-family purposes. They are not required, under the law, to dig into the actual code and understand the provisions pertaining to non-conforming uses and expiration of those uses. The courts have instead upheld self-created hardship where the applicant did not knowingly purchase the property for a prohibited use.

Here, the applicant had discussions with the village and the then owner of the property, who was an attorney, and both discussed the continued use of the property for multi-family use. These discussions took place in advance of the purchase of the property. The advice from the village was to modify the presented plans to change the number from 8 units to 4 units if they proceeded with the purchase and development of the property. Following those informal discussions, the applicants acquired the property, thinking that the intended use was permitted. In contrast, the meeting the ZBA chair, Planning Board Chair and mayor were present at and which was raised by the ZBA chair during the meeting occurred after the applicants had purchased the property. Those were not the discussions and meetings referenced as related to the hardship standard.

The applicant did not understand that the pre-existing nonconforming status had expired at the time they met with the village and prior to the purchase of the property. They only became aware of that once the property had been purchased. Following the purchase, they met with the building office a few times to discuss the plans for the recommended reduction to 4 units. They asked Rovetto Design Group to make modifications to the plans based on the recommendations and did work to the premises to get it ready for construction. At some point when work was starting on the interior of the site, they were advised by the building department that they needed to submit for site plan review. When they completed the necessary site plans and submitted the application, the application was flagged and the village advised that the nonconforming use had expired. This information that the use was no longer allowed only occurred after they had purchased the property, revised plans based on discussions with the building department and submitted for site plan. The building inspector was absolutely correct in his statement that upon submission, he promptly determined that the use was not allowed. While he had no affirmative duty to do any zoning analysis to uncover the provisions pertaining to expiration of nonconforming use prior to the submission of the application, the informal discussions and calls with the attorney and village relating to the multi-family use and decreasing the number of units was the basis for my clients' purchase of the property.

During the meeting, the applicant stated "in the language of the contract, yes, it was missed, it does say that from a municipal (inaudible) that we would have to go through the variance process." He also later stated that "in the contract I have with her [Donna Wardlaw], you would need to get a variance." As I stated during the meeting, the contract does not mention any requirement for obtaining any variance. Both of my client's above statements were inaccurate statements, and clearly demonstrate that they were not experienced developers. Even at the meeting, it was clear that the applicants were not aware of the

nuances of the zoning and what was required in the contract. Following the meeting, I reviewed the contract. The purchase contract did not address the necessity of a variance. Instead, the language of the contract actually stated as follows: "The Contract is contingent upon Purchaser being able to obtain all governmental approvals for purposes of restoring the Property and building to an eight-unit apartment complex thereon." In legal terms, "governmental approvals" is a broad catchall which can mean everything from SEQR, site plan, building permit, remediation or other approvals necessary to obtain a certificate of occupancy. My clients understood that for a commercial apartment building, they would have to get building permits and perhaps go through site plan review. They have confirmed to me that they did not understand, at the time of purchase, that a use variance would be necessary. This realization only occurred after the site plan was submitted and rejected because the nonconforming use had expired. As such, it is clear they did not knowingly purchase the property for an unpermitted use.

In order to close on the property as was required by its terms, it was necessary to waive the governmental approvals provision because they had to close within 30 days of execution of the contract. The applicant instead contacted the village (by phone call) to discuss the property. They assumed, incorrectly, that they could renovate the property for continued multi-family use. They were assured of that by the seller, who was an attorney they assumed was familiar with the allowable uses. Based on the discussions with her and with the village, they decided to proceed with the purchase. As stated earlier, the legal standards on self-created hardship does not require an applicant to know and understand every nuance of the zoning code. Instead, it required some measure of diligence in checking into the zoning. It was reasonable that they did not understand the expiration provisions of the nonconforming use, as the village had also similarly not uncovered the nuance of the expiration of the use until more than a year after the initial conversation about the property. By the time the site plan was submitted and the use was identified as expired, more than a year had passed since the initial discussion.

The applicant also provided some information about his involvement with 550 Waterfront, a property in which he is part owner. Based on his statements, the board would reasonably infer that he was the sole and driving force behind the creation of this restaurant. What he did not mention was that he owns that property with several other owners, many of whom are experienced real estate developers or involved extensively with land use. One of the other co-owners, Mike Phinney (owner and lead architect/developer at Phinney Design Group), led the property through the development process for the restaurant. Phinney Design Group did all the architectural renderings, got all approvals from the municipalities and oversaw the construction. This is the first project where the applicant is seeking to develop a site on his own.

Privacy: Adjacent neighbors raised issues pertaining to privacy for their residential homes. The applicants spoke with one of the adjacent neighbors following the meeting and they discussed working together to create screening on the ends of the balconies to provide both properties with enhanced privacy from what presently exists. The applicant is also sensitive to the issues raised pertaining to the maintenance of the property. If the variance is granted, these issues will be part of the site plan review process.

Parking: If approved for 4 residential units, the applicants would be required to go through site plan review before the Planning Board and would comply with the requirements for parking. While the site can accommodate some parking on the lot itself without detracting from the aesthetics of the lot, applicants would likely seek a waiver from some part of the parking requirements as adequate on street parking is available, especially along Eastern Ave.

Viable use of the property: As stated by several different members of the public, this property has been derelict and a blight on the neighborhood since the fire that discontinued its use. Its continued derelict condition is not good for the village or the nearby property owners. It sits on a well-traveled section of the village in a very visible location. The applicants have met the four part test of the legal standards for granting a use variance. Granting the variance is the only viable mechanism to restore this property to a usable state and the proposed 4 units will decrease the previous allowable use by half, a fraction of that which exists in the property across the Eastern Avenue. The ZBA has an opportunity to make lasting and beneficial change to the village with the granting of the use variance.