

**IN THE ST. MARY'S COUNTY BOARD OF APPEALS**

**VAAP NUMBER 19-132-004**

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**FOUNTAIN GROUP, LLC  
t/a HOLLYWOOD SQUARE**

**SIXTH ELECTION DISTRICT**

**DATE HEARD: September 12 and November 14, 2019**

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**ORDERED BY:**

**Mr. Brown, Mr. Ichniowski, and Mr. Miedzinski**

**PLANNERS: LAURA KAY and STACY CLEMENTS**

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**DATE SIGNED: December 12, 2019**

### **PLEADINGS**

Fountain Group, LLC, the applicant, seeks a variance (VAAP # 19-132-004) to reduce the required 50-foot setback along Three Notch Road (MD Rte. 235) and reduce the required 35-foot setback along Mervell Dean Road (MD Rte. 944). The applicant also seeks a variance to waive the required 65-foot Type B Buffer Yard along Three Notch Road (MD Rte. 235), Clarkes Landing Road (MD Rte. 944B), and Mervell Dean Road (MD Rte. 944).

### **PUBLIC NOTIFICATION**

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on August 14, 2019 and August 21, 2019. The hearing notice was also posted on the property. The file contains the certification of mailing to all adjoining landowners, even those located across a street. Each person designated in the application as owning land that is located within Two Hundred (200) feet of the subject property was notified by mail, sent to the address furnished with the application. The agenda was posted on the County's website on Thursday, August 21, 2019. Therefore, the Board finds and concludes that there has been compliance with the notice requirements.

### **FINDINGS**

A public hearing was conducted at 6:30 p.m. on September 12, 2019, at the St. Mary's County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. After testimony was taken the matter was continued until November 14, 2019 for the Applicant to present new plans to increase the plantings and lessen the reduction to the

Buffer Yard. Additional testimony was taken and all persons desiring to be heard were heard after being duly sworn, the proceedings were recorded electronically, and the following was presented with regard to the proposed variance requested by the applicants.

### **The Property**

The subject property is located at 23871 Mervell Dean Road, Hollywood, MD 20626. It is zoned Town Center Mixed Use (TMX) and Airport Environs Overlay (AE). It is identified on Tax Map 34, Grid 02, Parcel 317. The land use for the lot is Mixed-Use Moderate-Intensity.

### **The Variance Requested**

The applicants wish to develop the Property with three (3) businesses: a restaurant, a carry-out business and a coffee shop. The applicant requests three (3) variances: 1/ reduce the requirement of a 50-foot setback along Three Notch Road required under Schedule 32.1 of the St. Mary's County Comprehensive Zoning Ordinance; 2/ reduce the requirement of a 35-foot setback along Mervell Dean Road required by the Schedule 32.1 of the Zoning Ordinance; and 3/ a waiver of the 65-foot Type B Buffer Yard required under Schedule 63.3.b of the Zoning Ordinance.

### **The St. Mary's County Comprehensive Zoning Ordinance**

Schedule 32.1 of the St. Mary's County Comprehensive Zoning Ordinance details the Development Standards for the different zoning districts. In the TMX, a 50-foot

setback is required when the principal structure is adjacent to an Arterial. A 35-foot setback is required where the principal structure is adjacent to a Major Collector.

Schedule 63.3.b of the Zoning Ordinance details Buffer Yard Requirements. One of the proposed businesses on the Property is a fast food restaurant. For purposes of determining Buffer requirements, fast food restaurants are considered a "high intensity use" (See Schedule 50.4.74 of the Zoning Ordinance). Under the Schedule 63.3.b, a high-intensity commercial use requires a Type B Buffer Yard.

### **The Evidence Submitted at the Hearing by LUGM**

Laura Kay, a Planner III for the St. Mary's County Department of Land Use and Growth Management (LUGM), introduced the following evidence:

- The subject property (the "Property") is long and narrow in nature, approximately 296-feet in length and 98-feet at its widest point.
- The Property is in the Hollywood Town Center.
- The Applicant plans to develop the property with a 3-unit, 3,825 square-foot fast food and carryout restaurant facility with drive-through.
- The Planning Commission approved the Concept Site Plan for the project on June 10, 2019. Planning Commission Minutes of this meeting are attached.
- The Technical Evaluation Committee (TEC) had initially reviewed the project during its February 2019 review cycle. TEC comments from the State Highway Administration (SHA), the Department of Public Works & Transportation (DPW&T), St. Mary's County Health Department, St. Mary's Metropolitan

Commission (MetCom), St. Mary's Soil Conservation District (SCD), and the Department of Land Use and Growth Management (LUGM) are attached.

- Pursuant to Schedule 32.1 of the Ordinance, the required principal structure setback where adjacent to a Major Collector is 35-feet in the TMX. The required principal structure setback where adjacent to an Arterial is 50-feet in the TMX. The applicant seeks to reduce the required 35-foot setback to 25-feet and reduce the required 50-foot setback to 39-feet.
- Pursuant to Schedule 50.4 of the Ordinance, Use type 74, Restaurant Fast Food, is defined as:

An establishment that offers quick eat-in or takeout food service, which is accomplished through a limited menu of items already prepared and held for service, or prepared, fried, grilled quickly, or heated in a device such as a microwave oven. Orders are not generally taken at the customers' table, food is not served at the same table or counter where the food is consumed, and food is generally served in disposable wrapping and containers.
- A fast food restaurant is considered a high intensity use for purposes of determining buffer requirements. Pursuant to Schedule 63.3.b of the Ordinance, a high-intensity commercial use proposed adjacent to a public road right-of-way having a Major Collector or higher road classification requires a Type B buffer.
- A Type B buffer is 65 feet in depth and contains 4 canopy trees, 5 understory trees, 22 shrubs, and 11 evergreens / conifers planted every 100 feet along the property line. The Applicant requests a waiver of this requirement.

- Pursuant to Section 24.8 of the Ordinance pertaining to lapse of variance, variances shall lapse one year from the date of the grant of the variance by the Board of Appeals unless:
  1. A zoning or building permit is in effect, the land is being used as contemplated in the variance, or regular progress toward completion of the use or structure contemplated in the variance has taken place in accordance with plans for which the variance was granted; or
  2. A longer period for validity is established by the Board of Appeals; or
  3. The variance is for future installation or replacement of utilities at the time such installation becomes necessary.
- The following Attachments to the Staff Report were introduced:
  - #1: Standards Letter dated July 2, 2019 from Gene Burroughs;
  - #2: Planning Commission Minutes of June 10, 2019;
  - #3: Land Use Map;
  - #4: Location Map;
  - #5: Concept Site Plan (6 sheets);
  - #7: TEC comments.

### **Testimony and Exhibits**

The Applicants were represented Gene Burroughs and Wayne Hunt from Little Silences Rest, Inc. The following evidence was presented at the September 12 hearing from the Applicants:

- Several diagrams and photos were introduced which showing a view of the Property from several angles;
- Illustration of the Property showing the area left to build on the Property with the current setback requirements; without a variance, the Property would only have a 13.42-foot wide buildable area;
- The Property owners also own Bruster's Ice Cream located next door to the Property;
- The Planning Commission requested a sidewalk to connect both lots;
- The applicants are requesting variances for all four sides of the Property;
- Only the fast-food business requires a Buffer Yard;
- Requesting the set-backs be reduced from the 50-foot to 39-foot along Three Notch Road (MD Rte. 235) and from 35-foot to 25-foot along Mervell Dean Road (MD Rte. 944);
- Pictures were introduced showing the proposed architecture of the buildings for the site;
- The stormwater areas on the Property will have landscaping;
- The entire length of the Property along Mervell Dean Road will be an accelerate/decelerate lane;
- Vehicles will only be able to make a right turn out of the northern exit of the Property;

Public testimony was given by Mr. Elias Garcia:

- There was no "uniqueness" to the Property;

- He requests the Board to deny the variance because the request doesn't meet the requirements in the Ordinance.

Testimony was again presented at the November 14, 2019 hearing on behalf of the Applicants by Wayne Hunt and Gene Burroughs from Little Silences Rest, Inc.

- An updated plan was presented which made the following changes to the square footage of the proposed building:
  - Increased the square footage of the restaurant;
  - Decreased the square footage of the carry out;
  - Decreased the square footage of the coffee shop;
  - The total reduction was 255 square feet.
- The specific revisions to the entire property were as follows:
  - Building depth was reduced from 30' to 28';
  - Square footage of the building was reduced from 3,825 sq. ft. to 3,570 sq. ft.;
  - Parking on the Three Notch Road side was adjusted to provide 6' to the property line rather than 4';
  - Parking on the Clark's Landing side was adjusted to provide a minimum of 12.8' from the road rather than 3.5';
  - Parking on the fast food side of the Property was adjusted to provide a minimum of 6' between the sidewalk and the Property line rather than 1/2';

- The access was moved 9' further away from the Clark's Landing intersection;
- The total parking spaces was reduced from 42 to 28;
- The pedestrian path to Bruster's was revised;
- The landscaping plan was revised to provide as many Type-A Buffer Yard plantings as possible. The total number of plantings between the property lines and the development will equal a Type-A Buffer Yard requirements with the exception of canopy trees along Clark's Landing Road.

### **DECISION**

#### **County Requirements for Variances**

The St. Mary's County Comprehensive Zoning Ordinance § 24.4 sets forth seven separate requirements that must be met for a variance to be issued from the Ordinance.

They are:

1. That because of particular physical surroundings such as exceptional narrowness, shallowness, size, shape or topographical conditions of the property, strict enforcement of this Ordinance will result in practical difficulty;
2. That the conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification;
3. The request is not based exclusively upon reasons of convenience, profit, or caprice;

4. The alleged difficulty has not been created by the property owner or the owner's predecessors in title;
5. It will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood and the character of the district will not be changed by the variance;
6. It will not substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood; and
7. That it complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

In granting any variance, the Board may impose such conditions and restrictions upon the property as may be necessary to comply with the objectives of the St. Mary's County Comprehensive Zoning Ordinance.

**Findings – Buffer Waiver and Setback Variance**

Upon review of the facts and circumstances, the Board finds and concludes that the applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. There are a number of factors that support this decision. First, in determining whether practical difficulty exists, the zoning board must consider three factors:

1. Whether strict compliance with the requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome;

2. Whether a grant of the variance would do substantial justice to the applicant as well as to other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property and be more consistent with justice to other property owners; and
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed, and public safety and welfare secured.

The Board finds these three factors apply to the circumstances of the subject property. Because of the small size of the Property, strict enforcement of the Ordinance would result in practical difficulty in that it would unreasonably prevent the use of the property for a permitted purpose.

Strictly applying the required setback's and Buffer Yard requirements to the Property would leave an area too small for any meaningful development. Relaxing the requirements of the setbacks and Buffer Yard will give substantial relief to the Applicant. Additionally, because the proposed development is allowed in this zone, granting the relief requested will be in accordance with the spirit of the zoning ordinance.

Second, the conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification because they do not have a similar small developable area when applying the required setbacks and Buffer Yard.

Third, the request is not based exclusively upon reasons of convenience, profit, or caprice. The applicant had no control regarding the size of the property.

Fourth, the alleged difficulty has not been created by the property owner or the owner's predecessors in title. The applicant did nothing to the Property to cause a need for a variance.

Fifth, it will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood and the character of the district will not be changed by the variance. The granting of the variance will not detrimentally affect the neighboring businesses. In fact, the Applicant owns the business on the adjacent property and would like to have the two properties be in sync with each other. In furtherance of that goal the applicant plans to build a sidewalk connecting the two properties.

Sixth, there was no evidence that granting the variance would substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood.

Lastly, it complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan. All three of the proposed businesses for the Property are approved uses in this zone.

The Board, however, finds certain conditions are necessary to be attached to the variance granting a waiver of the 65-foot Type B Buffer Yard. Those conditions are as follows:

The waiver of the required 65-foot Type B Buffer Yard adjacent to Mervell Dean Road (MD Rte. 944), Clarkes Landing Road (MD Rte. 944C) and Three Notch Road (MD Rte. 235), will have the following conditions:

- a. Reduction along Mervell Dean Road (MD Rte. 944) from a Type B to a 10-foot Type A Buffer Yard with no canopy trees;
- b. Reduction along Clarkes Landing Road (Md Rte. 944C) from a Type B to a 10-foot Type A Buffer Yard with all prescribed plantings; and
- c. Reduction along Three Notch Road (MD Rte. 235) from a Type B to a 6-foot Type A Buffer Yard with all prescribed plantings.

**ORDER**

PURSUANT to the application of Fountain Group, LLC, petitioning for variances from the St. Mary's County Comprehensive Zoning Ordinance to reduce a required 50-foot setback; a required 35-foot setback and to waive a required 65-foot Type B Buffer Yard on the subject Property; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

ORDERED, by the St. Mary's County Board of Appeals, the applicant is granted the following variances:

- 1/ A reduction of the required 50-foot setback along Three Notch Road (MD Rte. 235) to 39-feet;
- 2/ A reduction of the required 35-foot setback along Mervell Dean Road (MD Route 944) to 25-feet; and
- 3/ A waiver of the required 65-foot Type B Buffer Yard along the Property with the conditions listed in detail in the Findings section above.

The foregoing variance are subject to the condition that the applicant shall comply with any instructions and necessary approvals from the Office of Land Use and Growth Management, the Health Department, and the Critical Area Commission.

This Order does not constitute a building permit. In order for the applicant to construct the structures permitted in this decision, they must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Date: December 12, 2019

  
George A. Hayden, Chairman

Those voting to grant the variance:

Mr. Brown, Mr. Ichniowski, and Mr. Miedzinski

Those voting to deny the variance:

Mr. Hayden, Mr. Richards

Approved as to form and legal sufficiency

  
~~James Tanavage, Assistant County Attorney~~  
David A. Weiskopf

**NOTICE TO APPLICANTS**

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

Further, § 24.8 provides that a variance shall lapse one year from the date of the grant of the variance by the Board of Appeals unless: 1) A zoning or building permit is in effect, the land is being used as contemplated in the variance, or regular progress toward completion of the use or structure contemplated in the variance has taken place in accordance with plans for which the variance was granted; or 2) A longer period for validity is established by the Board of Appeals; or 3) The variance is for future installation or replacement of utilities at the time such installation becomes necessary.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, otherwise they will be discarded.