

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Rockville, Maryland 20850
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<http://www.montgomerycountymd.gov/boa/>

Case No. A-6483

APPEAL OF GREEN TURTLE SPORTS BAR & GRILL

OPINION OF THE BOARD

(Hearing held February 24, 2016)
Effective Date of Opinion: March 18, 2016)

Case No. A-6483 is an administrative appeal filed December 10, 2015 by the Green Turtle Sports Bar & Grill (the "Appellant"). The Appellant charges error on the part of the Sign Review Board ("SRB") of the Montgomery County Department of Permitting Services ("DPS") in its denial of their request for a sign variance needed to allow an illuminated wall sign on the east elevation of the restaurant. The subject Property is located at 15660 Old Columbia Pike, Burtonsville, Maryland (the "Property"), in the Commercial Residential Town ("CRT") zone. The CRT zone is a commercial/residential zone classification under 59-2.1.3.D.1 of the Zoning Ordinance.

Pursuant to section 59-7.4.4 and 59-7.6.1 of the Zoning Ordinance, the Board held a public hearing on February 24, 2016. The Appellant was represented by Robert Hetherington. Associate County Attorney Charles L. Frederick represented Montgomery County.

Decision of the Board: Requested variance **GRANTED**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property is located at 15660 Old Columbia Pike, Burtonsville, Maryland 20886, also known as parcel N703 of the Burtonsville Town Square Shopping Center, and is zoned CRT.

2. On November 12, 2015, the SRB denied the sign variance requested by Appellant. See Exhibit 3. The reasoning for the denial was “hardship is not indicated, existing signage is considered adequate.” See Exhibit 7, circle 2. The letter was sent to Appellant on November 20, 2015. See Exhibit 3.

3. On December 10, 2015, the Appellant timely filed this appeal to the Board of Appeals. See Exhibit 1.

4. Mr. Roger Waterstreet testified that he has been employed by Montgomery County Government for approximately 31 years and that he is currently a Permitting Services Specialist with DPS. Mr. Waterstreet testified that his job duties include review of sign permit applications and acting as staff liaison for the SRB, where he reviews sign variance applications to ensure the applications are complete.

Mr. Waterstreet testified that the SRB is a five-member body comprised of County residents appointed by the County Executive and confirmed by the County Council. He explained that the SRB is responsible for reviewing sign variance requests. Mr. Waterstreet testified that at least one member of the SRB must be a business representative and that another must be an architect licensed with the State of Maryland. He testified that in order to apply for a variance from the SRB, an applicant must complete a sign variance application and provide supporting documentation including drawings, a site plan, and photographs, as well as pay the required filing fee. He then conducts a review of the documentation submitted.

Mr. Waterstreet testified that the sign variance application for Appellant, case number 348891, was found in Exhibit 7, circle 1-16. He testified the application requested approval to install a wall sign on the east elevation façade of the Green Turtle facing Old Columbia Pike. See Exhibit 7, circle 1-16. He testified that the sign was not permitted under section 59-6.7.9.2.A.2.a of the Zoning Ordinance because the east elevation facade of the Green Turtle does not have a customer entrance. Mr. Waterstreet testified that Exhibit 7, circle 10 shows the east elevation façade of the Green Turtle for which the variance was requested.

Mr. Waterstreet testified that the Green Turtle is located in the Burtonsville Town Square Shopping Center, which is located near the intersection of Old Columbia Pike and Sandy Spring Road (also known as Route 198). Referring to Exhibit 7, circle 8, Mr. Waterstreet testified that where the exhibit was labeled “Old Columbia Pike – Rte. 29” was the old Route 29 prior to its realignment further east. He testified that Route 198 would be located to the east of Old Columbia Pike at the intersection, further south of the shopping center. Mr. Waterstreet testified that on Exhibit 9, circle 9, Old Columbia Pike, located south of the Green Turtle, runs past the Capital One Bank and wraps to the left and then north.

Mr. Waterstreet testified that the main entrance to the Green Turtle faces inward toward the shopping center. He testified that DPS has approved wall signs for the Green Turtle’s south, west, and north building elevations. Mr. Waterstreet testified

that the representative from the Green Turtle had drawn an arrow on Exhibit 7, circle 8 and labeled it "existing wall sign" on the application to the SRB. These approved wall signs are depicted in Exhibit 7, circle 5-7. The sign that is the subject of the variance application is depicted in Exhibit 7, circle 4.

Mr. Waterstreet testified that the photographs included with Appellant's appeal to the Board were not part of the Appellant's variance application before the SRB. See Exhibit 9, circle 1-8. He further testified that the SRB did not have the photographs submitted by Appellant as Exhibit 10. Mr. Waterstreet testified that the Appellant did not introduce any articles about the virtues of additional signage to the SRB.

Mr. Waterstreet testified that the Green Turtle has put up a temporary sign following the SRB's denial of their sign variance. He compared Exhibit 7, circle 10, where the Appellant did not have a sign, with Exhibit 9, circle 7, depicting the temporary sign after it had been erected.

On cross-examination by Mr. Hetherington, Mr. Waterstreet testified that when the Appellant submitted its application to the SRB the Green Turtle was not represented by counsel but that they did submit a complete application to the SRB. Mr. Waterstreet testified that he had testified at a prior Board hearing wherein the Board granted a sign variance to a Roy Rogers restaurant to place a wall sign on the east elevation of their building. The Roy Rogers is located next door to the Green Turtle. He testified that the Green Turtle is located a distance away from any residential areas.

Mr. Waterstreet testified that the east elevation of the Green Turtle faces the most major road in the area, Route 29. He testified that the temporary sign Appellant put up was in accordance with the Zoning Ordinance and was not illuminated. See Exhibit 9, circle 7. Mr. Waterstreet testified that Exhibit 9, circle 9 showed Route 198 from the lower left corner of the exhibit to the right middle of the exhibit. He testified that there are pylon signs for the Burtonsville Town Square Shopping Center at the entrance on Route 198 and at the entrance on Old Columbia Pike, but the Green Turtle is not listed on either pylon sign. See Exhibit 10, circle 1-2.

On re-direct by Mr. Frederick, Mr. Waterstreet testified that his role as liaison for the SRB is to ensure the packet submitted to the SRB is complete and to advise the SRB if necessary, not to conduct an investigation. He testified that the wall sign on the north elevation of the Green Turtle is visible when traveling southbound on Old Columbia Pike. He further testified that the wall sign on the south elevation of the Green Turtle is visible when traveling northbound on Old Columbia Pike. Mr. Waterstreet testified that, based on the photographs in the record, the illuminated wall sign on the west elevation, which is located above the main customer entrance of the Green Turtle, would be visible from certain vantage points on Old Columbia Pike during both the day and the night. Mr. Waterstreet testified that other businesses in the shopping center, including Squisto New York Pizza and Pasta, have customer

entrances located inward toward the shopping center and do not have signs on the rear of the businesses.

On re-cross by Mr. Hetherington, Mr. Waterstreet testified that the wall sign on the west elevation of the Green Turtle faces into the interior of the shopping center but there are openings between buildings that someone could see through from Old Columbia Pike at certain points. He testified that the sign would not be visible from Route 29, either north or south.

In response to questions from the Board, Mr. Waterstreet testified that a temporary sign is considered non-permanent; it is typically constructed of non-permanent materials and the duration it may be displayed is considered short term. He testified that a temporary sign may not be illuminated. Mr. Waterstreet testified that he believed the Green Turtle thought that there would be no problem with the SRB granting their sign variance, particularly since the business next door (Roy Rogers) had been granted a variance. He testified that in his position as staff liaison to the SRB, he provides administrative guidance to the SRB but does not prepare staff reports for the SRB and does not advise applicants going before the SRB.

In response to further questions from the Board, Mr. Waterstreet testified that Appellant's application before the SRB was rejected the first time it was submitted because he felt the application was incomplete. He testified that he asked the Green Turtle to provide further justification for the need for the sign variance, and that the Green Turtle then submitted what they felt was adequate justification.

On further re-cross by Mr. Hetherington, Mr. Waterstreet testified that the sign at issue meets all size and height requirements from a zoning perspective; the only reason for the variance request is the location of the sign.

On further re-direct by Mr. Frederick, Mr. Waterstreet testified that because the proposed sign would be illuminated, it would require a separate electrical permit and would have to conform to the electrical code as well as to the Zoning Ordinance. Mr. Waterstreet explained that temporary signs are governed by section 59-6.7.12 of the Zoning Ordinance, do not require a permit, and that there is no limit on the number of temporary signs which may be displayed.

In response to further questions from the Board, Mr. Waterstreet testified that a temporary sign could be in place for up to one year. He further testified that if someone continuously removed and then reinstalled a temporary sign, DPS might determine that the sign was permanent and require a permit. Mr. Waterstreet testified that there was no indication the Green Turtle was engaging or planned to engage in this type of activity with its temporary sign.

5. Mr. Harry "Bear" Kreger testified he is the Director of Operations for Mid-States Management Group, which owns seven Green Turtle franchise locations, including the Burtonsville Green Turtle. Mr. Kreger testified that the Burtonsville

Green Turtle has been open since May 2015. He testified that since opening, the Appellant has been under-performing by up to 11 percent. In comparison, Mr. Kreger testified that the Green Turtle's other locations have been over-performing by three to five percent.

Mr. Kreger testified that the Annapolis Green Turtle had been under-performing by seven percent. He testified that in spring or summer of 2015 the Annapolis Green Turtle installed a substantial pylon sign, which gained visibility to Route 50, and as a result the Annapolis Green Turtle is now over-performing by two or two and half percent. Mr. Kreger testified that, based on studies conducted prior to opening the Burtonsville location, including traffic counts and household income, the Burtonsville Green Turtle was predicted to be the Green Turtle's second best location. He testified that the Burtonsville location is operating as the sixth best location and that he believes a large part of its underperformance has to do with the lack of visibility and of people not knowing its location. Mr. Kreger testified that he has heard comments out in the field and from management at the Burtonsville location that people do not know where the Burtonsville Green Turtle is located.

Mr. Kreger testified that studies have shown that between 14 and 25 percent of the Green Turtle's business is from drive-by traffic. He testified that, during the course of a year, these percentages would equate to around \$400,000 to almost \$750,000 in profit for the business. Mr. Kreger testified that the Appellant currently has around 50 employees and that when they opened the business they anticipated hiring 90 to 95 employees. He testified that Montgomery County has higher minimum wage requirements than Green Turtle's other locations.

Mr. Kreger testified that the temporary sign the Appellant put up was erected upon approval by the County. He testified that a requirement was that the sign be rigid enough that it would not move in the wind. Mr. Kreger testified that the temporary sign is made out of aluminum and could not be larger than 50 square feet.

On cross-examination by Mr. Frederick, Mr. Kreger testified that he did not know whether the Appellant had made any attempts to have their location advertised on the pylon signs at the Burtonsville Town Square Shopping Center. Mr. Kreger testified that 14 to 25 percent of full service dining restaurants business generally is from drive-by patrons, not specifically the Green Turtle's or the Appellant's business. He testified that he does not know the percentage of drive-by business the Appellant receives and that the Green Turtle advertises itself as a destination restaurant, not as a drive-by restaurant.

In response to questions from the Board, Mr. Kreger testified that the temporary sign was attached to the Burtonsville Green Turtle with screws or bolts, not an adhesive material, due to the requirement that the sign not move in the wind. He testified that the Annapolis Green Turtle has been around for three or four years. Mr. Kreger testified that the sale increase at the Annapolis Green Turtle was determined

by looking at three months of sales after the pylon sign was erected and comparing them to three months of sales a year prior before the sign was erected.

In response to further questions from the Board, Mr. Hetherington directed the Board to Exhibit 9, circle 11A, which is a study of sit down restaurants whose businesses increased due to signage. Mr. Kreger testified that the Green Turtle is a similar concept to the restaurant mentioned in the study, Frenchie's Bistro, which increased gross revenue by 322 percent due to signage. See Exhibit 9, circle 11A.

6. Mr. Thomas Krappweis testified he is the Vice President of Road Runner Permits and that he was hired by the Green Turtle and Apple Signs to assist with the variance process. Mr. Krappweis testified that he was retained prior to the original variance application submitted to the SRB and that he assisted the Green Turtle with that application. He testified that at that time the Green Turtle was not represented by counsel.

Mr. Krappweis testified that when the Appellant submitted the original application to the SRB, they looked at the variance granted to Roy Rogers and used a similar approach to generate their variance application. Mr. Krappweis testified that now, before the Board, the Appellant has included a lot more evidence.

Mr. Krappweis testified that Exhibit 9, circle 9 is an aerial view of the geographical area where the Appellant is located, showing all the major highways. He testified that the two pylon signs for the shopping center are located to the left of the entrance into the shopping center off of Old Columbia Pike and at the entrance into the shopping center when heading west on Route 198 and turning right into the center. Mr. Krappweis testified that the pylon signs are landlord controlled, and that he took photographs of the signs around 8:00 p.m. on February 20, 2016. See Exhibit 10, circle 1-2. He testified that the Green Turtle is not listed on either pylon. See Exhibit 10, circle 1-2.

Mr. Krappweis testified that during the course of his investigation of the signage at the Burtonsville Green Turtle prior to the variance application, he determined the signage was inadequate because there were multiple views on major highways surrounding the restaurant where the restaurant was not identifiable during both the day and the night.

Mr. Krappweis testified that Exhibit 9, circle 1 was taken to show the visibility of the Burtonsville Green Turtle in the early morning hours. Exhibit 9, circle 2 was also taken during the early morning, before sunrise. Mr. Krappweis testified that he had one of his permit technicians take the photographs in the early morning hours to avoid safety risks. He testified that the east elevation of the Green Turtle was located in the dark area of Exhibit 9, circle 2.

Mr. Krappweis testified that traveling west on Route 198 and making a right onto Old Columbia Pike to go north, there is the Burtonsville Green Turtle restaurant.

See Exhibit 9, circle 3. He testified that the restaurant is unrecognizable from that vantage point without the temporary sign. See Exhibit 9, circle 3. Mr. Krappweis testified that this would be the path someone would take coming off northbound 29, and the view that person would have. See Exhibit 9, circle 3. Mr. Krappweis testified that Exhibit 9, circle 4 is the early morning view of the Green Turtle and the Roy Rogers from the same view as Exhibit 9, circle 3. He testified the Roy Rogers is identifiable but that the Green Turtle is not identifiable. See Exhibit 9, circle 4.

Mr. Krappweis testified that he took some more recent photographs at night with the existing signage illuminated. See Exhibit 10, circle 1-24. He testified that, coming west on Route 198 and making a right onto Old Columbia Pike north, the Roy Rogers is identifiable. See Exhibit 10, circle 9. There is a spotlight visible on the back of the Green Turtle that is not a sign. See Exhibit 10, circle 9. Mr. Krappweis testified there is a light coming from the south side of the Green Turtle, but it is not identifiable as to what that light is. See Exhibit 10, circle 9. He testified the photograph was taken between 8:00 p.m. and 9:00 p.m. See Exhibit 10, circle 9. He testified that he took a close-up of the light that was not identifiable in Exhibit 10, circle 9, which is a sign on the Green Turtle that faces south. See Exhibit 10, circle 24. The sign is located directly next door to Roy Rogers.

Mr. Krappweis testified that Exhibit 10, circle 12 was taken from an island on the crosswalk turning from Route 198 to Old Columbia Pike and shows the sign for the Green Turtle as well as the spotlight on the back of the building. He testified that beyond the spotlight is the east elevation of the Green Turtle, which is unrecognizable. See Exhibit 10, circle 12. He testified that the temporary sign was in place on the east elevation at that time but was not illuminated. See Exhibit 10, circle 12.

Mr. Krappweis testified that Exhibit 10, circle 16 portrays the view of the Green Turtle when turning further onto Old Columbia Pike north from Route 198, showing that again the Green Turtle is unidentifiable. He testified that Exhibit 10, circle 17 is further into the turn and again the Green Turtle is unrecognizable. Mr. Krappweis testified that the remainder of the photographs in Exhibit 10 are essentially the same.

In response to questions from the Board, Mr. Krappweis testified that he was aware the Appellant had to show a hardship in order to be granted a variance by the SRB. He testified he did not specifically mention the importance of illumination for the sign in his application to the SRB. Mr. Krappweis testified that the pylon signs at the Burtonsville shopping center are able to be adjusted so that the various stores can have their store emblem on the bottom of the sign on a rotating basis. See Exhibit 10, circle 1. He testified he personally has not gone to the landlord about having the Green Turtle placed on the pylon signs.

In response to further questions from the Board, Mr. Krappweis testified that the photographs in Exhibit 10, although taken by a photographer standing off the roadway, still show what would be in the field of vision of a driver.

CONCLUSIONS OF LAW

1. Section 59-7.4.4.E of the Montgomery County Zoning Ordinance provides that “[a]ny party of record may appeal any final decision of the Sign Review Board within 30 days after the action to the Board of Appeals under Section 7.6.1.” Section 59-7.6.1.C.3 provides that “Board of Appeals review of any action, inaction, decision or order of a department of the County government must be de novo.” When an appeal from a quasi-judicial body is heard “de novo,” the matter is to be tried anew as if it had not been heard before and as if no prior decision had been rendered. In effect, the Board is exercising what amounts to original jurisdiction. *Pollard’s Towing, Inc. v. Berman’s Body Frame & Mech., Inc.*, 137 Md. App. 277 (2001); *Boehm v. Anne Arundel County*, 54 Md. App. 497 (1985); *Lohrmann v. Arundel Corp.*, 65 Md. App. 309 (1985); *Hill v. Baltimore County*, 86 Md. App. 642 (1991).

2. Therefore, the Board must consider the Appellant’s application for a sign variance anew and in light of the criteria set for a sign variance in section 59-7.4.4.C.2. The burden is on the Appellant to show by a preponderance of the evidence that the criteria have been met.

3. Section 59-7.4.4.C.2 provides that an application for a variance from the sign requirements of Division 6.7 may be approved if: “a. the strict application of the sign requirements of Division 6.7 would result in a particular or unusual practical difficulty, exceptional or undue hardship, or significant economic burden on an applicant; b. the sign variance is the minimum reasonably necessary to overcome any exceptional conditions; and c. the sign variance can be granted without substantial impairment of the purpose of Division 6.7.”

4. Section 59-6.7 of the Zoning Ordinance outlines the general design elements and limitations imposed on signs. Section 59-6.7.9.A.2.a imposes the following restriction on wall signs in a commercial/residential zone:

a. One sign is allowed for each customer entrance. A customer entrance includes, but is not limited to, a direct outside entrance to a shop or store, and a direct outside entrance to an enclosed mall or shopping center.

5. The Board finds, based on the testimony and the evidence of record, that the requested sign variance can be granted. First, the Board finds that the Appellant has demonstrated that the strict application of the Zoning Ordinance to only allow a wall sign on those elevations which have a customer entrance would result in a particular or unusual practical difficulty, exceptional or undue hardship, or significant economic burden on the Appellant. This full service dining restaurant lacks visibility from surrounding roads, and these types of restaurants depend upon visibility to capture drive-by traffic, which constitutes between 14 and 25 percent of their business, according to studies submitted by the Appellant. Further, nearly half of all customers learn about a business due to signage. The Appellant’s Director of Operations, Mr.

Kreger, testified that Appellant has been underperforming by up to 11 percent and that another Green Turtle in Annapolis was able to increase its performance significantly due to additional signage. He further testified that he has heard comments in the field and from Green Turtle management that people do not know where the Burtonsville Green Turtle is located.

The Board finds that the photographs in the record and the testimony of Mr. Waterstreet, Mr. Kreger, and Mr. Krappweis all demonstrate that drivers passing through the intersection of Route 198 and Old Columbia Pike, in any direction, as well as drivers on Route 29, cannot see the wall sign over the main entrance on the west elevation of the Green Turtle. The Board further finds that due to the town center nature of the Burtonsville Town Square Shopping Center, all of the businesses face inward toward the west elevation while the east elevation faces the most significant traffic. The Board finds that without a sign on the east elevation of the Burtonsville Green Turtle, the restaurant is unrecognizable to drivers on Old Columbia Pike and Route 29, and that without an illuminated sign on the east elevation the restaurant is completely unrecognizable to those drivers after dark. Thus, the Board finds that the strict application of section 59-6.7.9.A.2 and the inward orientation of the restaurant required by the developer to create the town center result in no wall signage on the east elevation facing two main roads. The Board finds this to be an a particular and unusual practical difficulty for the Appellant. This difficulty is causing a significant economic burden on the Appellant's business, as outlined in Mr. Kreger's testimony.

The Board also finds that the sign variance requested by Appellant is the minimum reasonably necessary to overcome the exceptional conditions caused by the lack of visible signage allowed under strict application of the Zoning Ordinance. The sign meets all requirements of the Zoning Ordinance other than the requirement that the sign be placed over a customer entrance. Further, the Appellant has a temporary sign currently in place that will be virtually identical to the sign approved in this sign variance, except the new permanent sign will be illuminated.

Finally, the Board finds that the variance can be granted without substantial impairment to the purpose of Division 6.7, which regulates the size, location, height, and construction of all signs placed for public view. An outlined intent of Division 6.7 is, under section 59-6.7.1.C, to promote the use of signs to identify buildings. The Board finds that granting the requested sign variance to allow a wall sign on the east elevation of this Green Turtle will enable people to identify this building in a manner that is consistent with other Green Turtle restaurants in the County. The Board further finds that the Appellant is located in a commercial area and the sign will not affect any nearby residential property.

6. The Board finds that the Appellant submitted additional information for the Board's hearing that was not provided to the SRB when it rendered its decision. This additional information included photographs depicting the lack of visibility and/or identification of the Appellant without the sign variance as well as articles about the virtues of additional signage.

7. For all of the foregoing reasons, the requested sign variance needed to permit the installation of a wall sign on the east elevation of this Green Turtle is **GRANTED**.

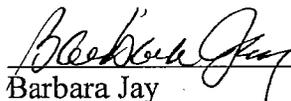
On a motion by Member Stanley B. Boyd, seconded by Vice Chair John H. Pentecost, with Chair Carolyn J. Shawaker, Member Bruce Goldensohn, and Member Edwin S. Rosado, in agreement, the Board voted 5 to 0 to adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



Carolyn J. Shawaker
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 18th day of March, 2016.



Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).