



October 13, 2023

VIA EMAIL zoningboard@townofnewburgh.org

Chairman Darrin J. Scalzo and
Members of the Zoning Board of Appeals
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NICHOLAS M. WARD-WILLIS
Principal Member
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Also Admitted in CT

Re: Newburgh Chicken, LLC – Proposed Popeyes Chicken
197 South Plank Road
Parcel ID No. 60-3-6.1
Application for Special Permit Pursuant to Town Code § 185-19(A)(3)

Dear Chairman Scalzo and Members of the Zoning Board of Appeals:

Keane & Beane, P.C. respectfully submits this letter on behalf of Newburgh Chicken, LLC (the “Applicant”), contract vendee of the above-referenced property (the “Property”), which is currently owned by Louis J. Gallo and Jean F. Gallo and is located in the Business (B) Zoning District.

The Applicant appreciates the Zoning Board’s time and consideration when we appeared before you at your September 28, 2023 meeting. The Applicant is seeking a special permit pursuant to Town Code Section 185-19(A)(3) to continue a non-conforming fast-food use for the proposed development of a Popeyes Chicken at the Property. The Applicant also proposes to demolish the existing building and construct a new building that will be set back further from the property line, improving the aesthetics and internal site traffic circulation.

As discussed at the meeting, the proposed use is a non-conforming use, and because the Town’s Zoning Code sets forth specific dimensions for each use, the Zoning Board would need to approve the setbacks for the new construction. Nevertheless, there are certain dimensional Zoning Code provisions that apply to the project, regardless of the fact that the proposed use is not permitted by right in the Business (B) Zoning District. Accordingly, area variances would be required from those sections. Those variances are set forth in the table below. For the Board’s convenience, each variance has been numbered.

Chairman Darrin J. Scalzo and
Members of the Zoning Board of Appeals
October 13, 2023
Page 2

| # | Code | Required | Proposed ¹ | Variance |
|---|------------------|---|--|------------------|
| 1 | § 185-13.B(6) | Loading Spaces – 1 space | 0 spaces | 1 space |
| 2 | § 185-13.D(6) | No entrance or exit for an accessory off-street parking area with over 10 parking spaces or any loading berth shall be located within 150 feet of a street intersection | <u>Access on South Pank Road (Rt. 52) = 52 feet from intersection</u> | 98 feet |
| 3 | § 185-18.C(4)(a) | No building or structure shall be placed within 80 feet of the center line of Rock Cut Road, Drury Lane, Forest Road, Union Avenue (from the New Windsor line north to Union Avenue Extension), Union Avenue Extension or Plattekill Turnpike. | 67.9 feet to the physical center line on Union Avenue (Rt. 300) | 12.1 feet |

¹ The proposed distances are subject to slight changes depending on the results of the grading analysis being conducted by Dynamic Engineering Consultants, P.C. To that extent, if said analysis is not complete by the time the variances are voted on, the Applicant respectfully requests that the variances nevertheless be granted with an allowance for a slight deviation to account for any potential final adjustment to the distances (e.g., a variance for x feet \pm 2 feet).

Chairman Darrin J. Scalzo and
Members of the Zoning Board of Appeals
October 13, 2023
Page 3

| # | Code | Required | Proposed ¹ | Variance |
|---|------------------|--|--|----------|
| 4 | § 185-18.C(4)(b) | Front yards abutting all county and state highways shall be at least 60 feet in depth, except where the majority of existing buildings on either side of the road within 300 feet from the intersection of the nearest property line and street line are of a lesser average depth. In such case, the front yard depth shall be 50 feet or the average of all lot depths within said 300 feet, whichever is greater. | <u>Front yard abutting Union Avenue (Rt. 300)</u> = 36.0 feet | 24 feet |

I. Review of the Area Variance Factors

A. Area Variance Factors under New York Town Law

Pursuant to Town Law § 267-b(3)(b), in determining whether to issue an area variance, the Zoning Board must balance the benefit to the applicant in granting the variance against the potential detriment to the health, safety, and welfare of the Town and the reasonable expectations of neighboring property owners by such grant. In making its determination, the Zoning Board must consider the following factors:

- (1) Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
- (2) Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;

Chairman Darrin J. Scalzo and
Members of the Zoning Board of Appeals
October 13, 2023
Page 4

- (3) Whether the requested area variance is substantial;
- (4) Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- (5) Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

As set forth below, the Applicant respectfully submits that it satisfied all of the legal criteria required for the granting of the area variances.

1. **An undesirable change will not be produced in the character of the neighborhood by the granting of the area variances, nor will there be detriment to nearby properties.**

No undesirable change will be produced in the character of the neighborhood by granting any of the variances, nor will there be a detriment to nearby properties. As has been discussed before the Zoning Board, the proposed development will reduce the existing nonconformities on the Property. To that extent, all of the area variances will facilitate the development of a site that will enhance public safety and community character via the construction of a new building set back further from the streets, with improved on-site and off-site traffic circulation. The appearance of the building, and the landscaping and functionality of the Property will be improved through the granting of the area variances. Additionally, the nearby properties—some of which also face similar issues with setbacks from intersections and state highways—will all benefit from the improvement in the traffic flow along South Plank Road and Union Avenue. Thus, the granting of the variances will not produce an undesirable change in the character of the neighborhood, nor will there be any detriment to nearby properties.

2. **The benefit sought by the Applicant cannot be achieved by any feasible method other than the area variances.**

The benefit that the Applicant seeks cannot be achieved by any feasible method other than the area variances due to the existing nature of the Property. The location of the site—namely that it is located at the corner of an intersection of two state highways—results in the need for certain setbacks for accessways and front yards, while the size of the Property limits the ability to comply with said setbacks. Said difficulties would apply to almost all development. Although the Applicant has endeavored to comply

Chairman Darrin J. Scalzo and
Members of the Zoning Board of Appeals
October 13, 2023
Page 5

with all Town regulations to the maximum extent possible, there is no feasible alternative other than the area variances to comply with the requirements set forth in the table above.

3. The requested area variances are not substantial.

It is well-established that substantiality is not measured strictly by mathematical means, but it must also be measured by consideration of the facts and circumstances surrounding the impact of the variance if granted. None of the requested variances are substantial, whether analyzed mathematically or in consideration of the facts and circumstances surrounding their impact if they were granted. As stated above, the proposed project will reduce the existing nonconformities on the Property. Moreover, the surrounding properties face similar issues with setbacks from intersections and state highways. Thus, the impact of the variances if granted is not substantial, nor are they mathematically substantial.

4. The proposed area variances will not have any adverse effects or impacts on the physical or environmental conditions in the neighborhood or district.

Should the variances be granted, there will be no adverse effects or impacts on the physical or environmental conditions in the neighborhood or district. At its September 28, 2023 meeting, the Zoning Board confirmed that the proposed project is a Type II action under SEQRA, as it will not have a significant impact on the environment. Moreover, as part of the site plan approval process, the Applicant will submit a stormwater management plan and any other required documents that will further demonstrate that the variances (and the project generally) will not have any adverse effects or impacts on the physical or environmental conditions in the neighborhood.

5. The alleged difficulties were not self-created.

While the Applicant has agreed to purchase the Property subject to its limitations, the need for these variances is driven by the existing size/layout and location of the Property. As touch on above, any reasonably suitable development of the Property will result in the need for some, if not all, of the requested variances. Nevertheless, even if the Zoning Board determines that the difficulty is considered self-created, this factor does not preclude the granting of any of the variances.

Chairman Darrin J. Scalzo and
Members of the Zoning Board of Appeals
October 13, 2023
Page 6

**B. Considerations Under the Town
of Newburgh Zoning Code**

Pursuant to Zoning Code § 185-54.B(1), in determining whether to issue an area variance, the Zoning Board must find that such variance will not be contrary to the public interest where, owing to exceptional and extraordinary circumstances, there are unnecessary hardships or practical difficulties in the way of carrying out of the strict letter of the Zoning Code. No area variance can be granted unless the Zoning Board finds:

- (1) That there are special circumstances or conditions fully described in the findings of the Board applying to the land or building for which the variance is sought, which circumstances or conditions are unique to such land or building and do not apply generally to land or buildings in the neighborhood and have not resulted from any act of the appellant or applicant subsequent to the adoption of this chapter, whether in violation of the provisions hereof or not.
- (2) That for reasons fully set forth in the findings of the Board, the aforesaid circumstances or conditions are such that the strict application of the provisions of this chapter would deprive the appellant or applicant of the reasonable use of such land or building and the granting of the variance is necessary for the reasonable use of the land or building and that the variance which is granted by the Board is the minimum variance that will accomplish this purpose.
- (3) That the granting of the variance will be in harmony with the general purposes and intent of this chapter and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

As stated above, the circumstances necessitating the variances are unique to the Property inasmuch as they are due to a combination of its size and location. The strict application of the Zoning Code would certainly deprive the Applicant of a reasonable use of the Property, and the variances sought are indeed the minimum necessary. Finally, the granting of the variances will be in harmony with the purposes and intent of the Zoning Code, and will unquestionably benefit the public welfare.

II. Discontinuance of a Nonconforming Use for More than a Year

In pursuing the development of the Property, the Applicant is also mindful of Zoning Code § 185-19.A(4), which provides, in relevant part, that “[a] nonconforming use shall

Chairman Darrin J. Scalzo and
Members of the Zoning Board of Appeals
October 13, 2023
Page 7

not be reestablished if such use has been discontinued for any reason for a period of one year or more....Intent to resume a nonconforming use shall not confer the right to do so.” As part of the proposed project, the existing nonconforming use (which is the same as the proposed nonconforming use) will be discontinued for more than one (1) year between the closing of the current Dairy Queen and the opening of the proposed Popeyes Chicken. Demolition, construction, and other associated site work and project financing is anticipated to take approximately two (2) years to complete. Accordingly, the Applicant is also respectfully requesting a variance from Zoning Code § 185-19.A(4) to allow the discontinuance of a nonconforming use for two (2) years. Should the Zoning Board determine that such a variance is not needed, then the Applicant respectfully requests that any approval resolution issued by the Board includes language to address the cessation of a nonconforming use for a period of approximately two (2) years.

III. Conclusion

For the reasons set forth above, the benefit to the Applicant from granting the variances far outweighs any detriment to the Town and the neighboring property owners. The Applicant thus respectfully submits that the Zoning Board should grant all of the area variances requested.

We look forward to continued discussions with the Zoning Board concerning the application at its regular meeting on October 26, 2023.

Thank you for your consideration.

Very truly yours,



Nicholas M. Ward-Willis

cc: Gerald Canfield
Michael Donnelly, Esq.
Patrick Hines, PE