



TANEY COUNTY PLANNING COMMISSION

P. O. Box 383 • Forsyth, Missouri 65653
 Phone: 417 546-7225 / 7226 • Fax: 417 546-6861
 website: www.taneycounty.org

CQ-2

Taney County Board of Adjustment APPLICATION AND AFFIDAVIT FOR VARIANCE OR APPEAL

NOTE: You can complete this application form on your computer and then print a copy. Use your TAB key to move from line to line, and then type in the required information. Print the completed form and submit it to the Planning & Zoning office.

SELECT ONE: ☐ Variance (\$25) ☒ Appeal (\$75)

Name of Applicant: Fountains on Fall Creek Phone: 417.348.1055 x255

Address: 245 S. Wildwood Dr.

City: Branson State: MO Zip Code: 65616

Representative: Mark Ruda Phone: 417.336.8242

Owner of Record: Fountains on Fall Creek, LL Signature: [Signature]

Project Name: Fountains on Fall Creek

Section(s) of Code Protested (P&Z office entry): _____

Site Address / Location: approx. 3855 Fall Creek Rd. Branson MO 65616

Subdivision (if applicable): na

Section: 12 Township: 22N Range: 22W

Parcel #: 18-1.0-12-004-001-002.000 and adj. Acres or Sq.Ft.: 52.12+5.9=approx. 58.02

Does the property lie in the 100-year Floodplain? ☒ Yes ☐ No

Required Submittals Checklist:

- ☒ typewritten legal description of the property involved in this request
- ☐ proof of public notification in a newspaper of county-wide circulation
- ☒ proof of ownership or approval to proceed with request from the property owner
- ☒ site plan or survey of the project that completely demonstrates this request

Board of Adjustment Application (continued)

JUSTIFICATION FOR REQUEST

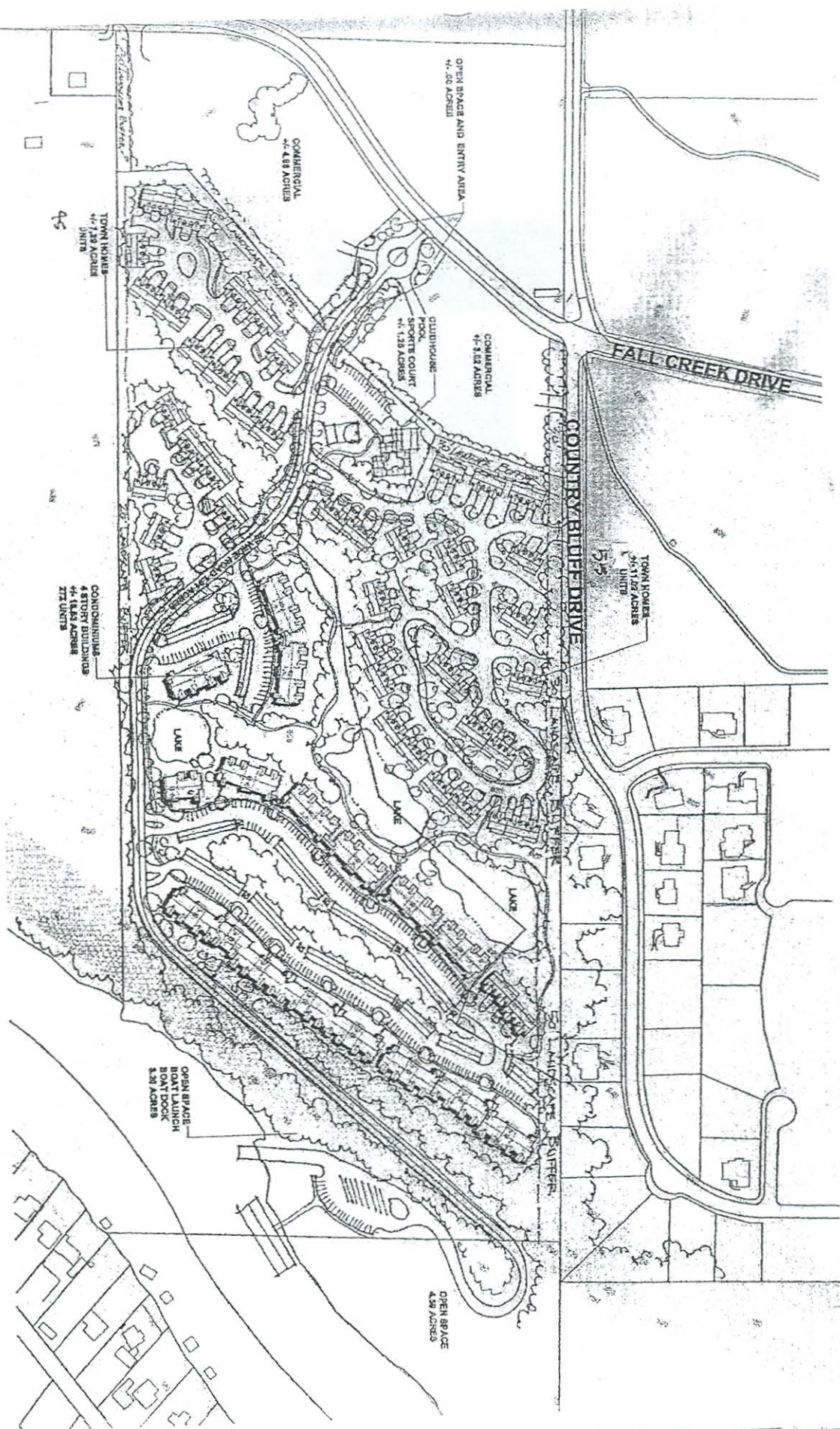
Please provide a detailed description of your request and reason(s) supporting your request.

Property previously zoned commercial allowing timeshare. Previous application was completed approximately June 28, 2006 and a zoning decision of record was filed approximately September 22, 2006 zoning the property commercial specifically allowing condominiums, nightly rental, and timeshare. A few concessions were made such as increasing green space between multi-story and adjacent residential, etc. The property was then purchased by Fountains on Fall Creek, LLC approximately October 11, 2006 via a Real Estate Purchase Contract subject to prior zoning approval. Due to economic conditions the property has not been developed and a new zoning application was presented by Fountains on Fall Creek, LLC nearly identical to the previously approved application specifically including previously approved concessions. While Taney County development guidance code has changed minimally in the interim, a "relative" scoring system has been implemented and/or re-implemented. Staff initially scored this project negative six (-6) based on limited application information. Applicant addressed scoring during public hearing meeting having self scored the project positive 47 (47) based on additional information provided. The commission seemed un-concerned with the scoring of the project as it was never discussed in any detail by the commission in either the public hearing or regular meeting even after the Applicant stated separately in each meeting that certain items in question having significant positive impact on score could be included in the decision of record (i.e. underground utilities are planned increasing the score of the project 16 points on this issue alone)

In summary, arbitrary zoning appears to be in practice. When property is purchased based on current zoning and future zoning is changed based on very little change in circumstance, at very least, a hardship is created. When the County has Absolute factors and Relative factors in place to determine zoning, it seems reasonable that approved weighted measures should be considered in determining zoning. i.e. use compatibility is only one of many factors (which in itself is subjective depending on the definition of surrounding area as Thousand Hills Resort contiguous to the North is commercial specifically including timeshare and nightly rental, the property contiguous to the west is/ was for sale at a price only feasible with commercial use, Lake Taneycomo includes commercial activities specifically including electrical generation, and Acacia Club road includes commercial areas) and per the relative scoring sheets provided does not appear to over-ride all other considerations. If ultimate consideration was given to adjacent compatibility, all property would forever remain agricultural.

The Applicant asks zoning be approved as initially requested.

LAND USE	ACRES	UNITS	UNIT/ACRE
COMMERCIAL	7.9		
TOWN HOMES	18.31	100	5.46
CONDOMINIUMS	16.09	212	13.18
SUB TOTAL	32.3	312	10.01
PUBLIC ROAD ROW	1.01		
CLUBHOUSE	1.39		
OPEN SPACE	8.39		





Bryan O. Wade
Attorney

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June 3, 2009

Via Federal Express

Bonita Kisse and
Taney County Planning Commission
132 David Street
P.O. Box 383
Forsyth, MO 65653

Re: The Fountains on Fall Creek, LLC Applicant BOA Appeal No. 09-2

Dear Bonita:

I enclose here my Entry of Appearance on behalf of the Applicant and six copies of a Legal Memorandum in Support of The Fountains on Fall Creek appeal in this matter. I would appreciate it if you would provide copies of this Memorandum to the Board of Adjustment in advance of the scheduled hearing. I have also forwarded a copy to Bob Paulson.

Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Bryan Wade'.

Bryan O. Wade

BOW/dl

Enclosure

cc: Eddie Coxie (email)
Bob Paulson (email)
Mark Ruda (email)
Dan Ruda (email)

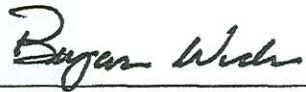
BEFORE THE TANEY COUNTY, MISSOURI
BOARD OF ADJUSTMENT

The Fountains on Fall Creek, LLC,)	
)	BOA Appeal No. 09-2
Applicant.)	
)	
)	

ENTRY OF APPEARANCE

COMES NOW Bryan Wade of the law firm of Husch Blackwell Sanders LLP and enters
his appearance on behalf of the Applicant in this matter.

HUSCH BLACKWELL SANDERS LLP

By: 
Bryan O. Wade, #41939 (MO)

1949 E. Sunshine Street, Suite 2-300
Springfield, MO 65804
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fax: 417.862.6948

Attorneys for Applicant

BEFORE THE TANEY COUNTY, MISSOURI
BOARD OF ADJUSTMENT

The Fountains on Fall Creek, LLC,
Applicant.

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)

BOA Appeal No. 09-2

LEGAL MEMORANDUM IN SUPPORT OF FOUNTAINS ON FALL CREEK APPEAL

Relevant Facts

On June 17, 2006, the Taney County Planning Commission first considered the 58 acre Fountains on Fall Creek property for rezoning and mixed use development. At the first public hearing, Mr. Sprague presented the Fountains on Fall Creek application as the owner-representative. The first question posed by the Planning Commission to Mr. Sprague after review of the application was **"you are going into nightly rental and timeshare – [Mr. Sprague] that is correct."**

The Planning Commission subsequently approved the mixed use development and issued its decision of record on September 11, 2006. The decision of record, attached hereto and marked as Exhibit "A," rezoned the property for mixed use development by unanimous vote, with one abstention. Exhibit "A" was recorded at the Taney County Recorder's Office, Book 499, Page 2204-2206.

Since Exhibit "A" was issued and recorded, there have been no substantive changes to the Taney County Development Guidance Code ("Development Code") with the exception of an amendment concerning height restriction. The height restrictions are not at issue in this matter.

In reliance upon the recorded Exhibit "A," the owners conveyed the property to The Fountains on Fall Creek, LLC with the continued intent to develop the property consistent with

the Planning Commission approval. The Fountains on Fall Creek, LLC did not obtain building permits within one year of the issuance of Exhibit "A" and because of that the Taney County Planning staff directed The Fountains on Fall Creek, LLC to reapply for a Division III permit. On April 20, 2009, the same Taney County Planning Commission denied The Fountains on Fall Creek, LLC's second application even though it approved the almost identical application on September 11, 2006.

The Taney County Planning Commission's Decision Incorrectly Applies the Taney County Development Guidance Code, Was Arbitrary and Capricious, and Was a Taking of Private Property Without Just Compensation or Due Process

The Development Code Division III permit process performs two functions: (1) property zoning changes, and (2) approval of major development. Property zoning changes are a legislative function. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157 (Mo.banc 2006). Approval of major development for construction is an administrative function that provides no discretion to the Planning Commission beyond application of the relevant ordinances to the proposed development. The Planning Commission may only determine whether the proposed major development satisfies the conditions of the Development Code. *Gunter v. City of St. James*, 189 S.W.3d 667 (Mo.App.S.D. 2006).

As stated above, The Fountains on Fall Creek property was originally considered and approved on September 11, 2006 (Exhibit "A"). The decision of record effectively rezoned the property for construction of mixed use development. The Planning Commission could change the zoning now prescribed by Exhibit "A," but only by following certain procedures. Chapter 3 of the Development Code, paragraph 8 states, in pertinent part:

"Abandonment: Zoning Permits. After a zoning permit has been issued and a land use change has been made and the project has been found to be unfeasible,

Division Services of City of Springfield, 192 S.W.3d 545 (Mo.App.S.D. 2006).¹ The Missouri Supreme Court confirmed in *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157 (Mo.banc 2006) that the Planning Commission's discretion is limited to determining whether the development plan meets ordinance requirements. Here, it is obvious that The Fountains on Fall Creek development plan does, because it was approved unanimously in 2006. The *Furlong* Court further indicated that abuse of this discretion in the application of the ordinance process subjects the County and members of the Planning Commission to liability and damages under 42 U.S.C.A. § 1983.

Relative Scoring

The Planning Commission staff did prepare a scoring sheet on The Fountains on Fall Creek resubmission and initially scored the project a -6 based on limited information. Accurate information was provided at the April 13, 2009 Planning Commission hearing which, if accurately applied, would have increased the score to a +47. The Planning Commission staff did not take into consideration the following important information when scoring the project: (1) the property can be served by City of Branson Central Sewer; (2) the property will be served by fire hydrants with adequate pressure and flow; (3) weekly solid waste disposal is available and documented; (4) underground utilities will be utilized; (5) upon completion of construction, the project will have no storage or equipment materials or outdoor work areas; (6) the property will meet all Missouri Department of Natural Resources requirements; (7) the proposed construction materials are equivalent to existing surrounding structures; and (8) the project does not include roof equipment or vents, except as required for added venting beyond the capability of building ridge fence. Because the Planning Commission staff did not bring these matters to the Planning

¹ The Planning Commission raised concern during the hearing process about the potential for nightly rental and sale of timeshare interests. However, that was clearly pointed out, discussed and addressed during the first application approval.

Commission's attention, the decision, again, was arbitrary and capricious and a taking of private property without just compensation or due process. *Williams v. Department of Building Division Services of City of Springfield*, 192 S.W.3d 545 (Mo.App.S.D. 2006).

Conclusion

It is per se arbitrary and capricious for the Planning Commission to approve The Fountains on Fall Creek development by unanimous vote and then deny that same application when no substantial changes have occurred to the Development Code or the proposed development. Approval in this instance was ministerial in nature because the rezoning had already occurred. *Benton v. Disnake*, 230 S.W.3d 10 (Mo.App.E.D. 2007). The only real change to the resubmitted application was the applicant. Courts have consistently held that a change in the applicant is not a basis for denial of a permit. *Roussell v. City of Ozark*, 160 S.W.3d 831 (Mo.App.S.D. 2005). The Board of Adjustment can correct this wrong and, in the process, protect the County and the Planning Commission from potential liability and damages for their actions in this case.

HUSCH BLACKWELL SANDERS LLP

By: Bryan Wade
Bryan O. Wade, #41939 (MO)

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Springfield, MO 65804
main: 417.862.6726
fax: 417.862.6948

Attorneys for Applicant

BK0499PG2204



2006L49808
REC. FEE: 30.00
NON-STD FEE:
PAGES: 3

ROBERT A. DIXON, RECORDER
OF TANEY COUNTY, MO., DO HEREBY
CERTIFY THAT THE WITHIN
INSTRUMENT OF WRITING, WAS
ON 09/22/2006 AT 11:43:53AM
DULY FILED FOR RECORD AND IS
RECORDED IN THE RECORDS OF
THIS OFFICE BOOK: 499
PAGE: 2204-2206
WHEREOF, I HAVE HEREUNTO
SET MY HAND AND AFFIXED MY
OFFICIAL SEAL AT FORSYTH, MO,
Kevin Seaford, DEPUTY

TANEY COUNTY PLANNING COMMISSION
DIVISION III DECISION OF RECORD
SEPTEMBER 11, 2006
FOUNTAINS ON FALL CREEK
#06-42

On September 11, 2006 the Taney County Planning Commission (grantor) approved a request by Dwight and Linda Sprague (grantee) to develop a mixed use development. In accordance with this approval a Division III Permit #06-42 is issued for the property located at the attached legal description.

The following Decision of Record details this approval and lists all applicable conditions:

Dwight and Linda Sprague are authorized to develop 56 acres into a mixed use development. With seven out of nine Planning Commissioners present the vote to approve was unanimous with one abstention. The following conditions shall be complied with:

1. Compliance with the provisions of the Taney County Development Guidance Code that include plans for the following:
 - a. Sediment and erosion control (Appendix B Sec. VI Item 2)
 - b. Stormwater management (Appendix B Item 3)
 - c. Land grading permit (Appendix B)
 - d. Delineation of the 100 year floodplain (Taney County Floodplain Management Ordinance 60.3b Sec. A)
 - e. Utility easements and building line setbacks (Table 12)
 - f. Foliage screening or fencing for commercial area that adjoins residential tracts, with a 50' buffer between Country Bluff Sub. 30' buffer next to the lake, and the existing buffer undisturbed (Appendix C)
 - g. Improvements with scale of buildings, streets, onsite parking and utilities (Table 6)
2. Compliance letters from the Fire, Sewer and Water Districts (Chapter VI-VII).
3. No outside storage of equipment or solid waste materials.
4. Division II Permits will be required for all applicable structures in the development (Chapter 3 Sec. I Item B)
5. The Decision of Record shall be filed with the Taney County Recorder's Office within 120 days or the approval shall expire (Chapter II Item 6).

Legal description attached

2006L49808



BK0499P62205

TRACT 1: All that part of the East $\frac{3}{4}$ of the East $\frac{1}{4}$ of the SE $\frac{1}{4}$ lying South of Fall Creek Road in Section 12, Township 22, Range 22, in Taney County, Missouri.

TRACT 2: All that part in the NE Corner of the NE $\frac{1}{4}$ (left bank of White River descending) of Section 13, Township 22, Range 22, containing 1 65 acres more or less.

2006L49808

BK0499PG2206

In signing this record of decision I understand that any breach in the terms of the Division III Record of Decision will result in the revocation of this permit. I further agree to abide by and comply with all the requirements of the Taney County Planning Commission and the Development Guidance Code.

Signature: *Dwight Sprague Linda Sprague*
Dwight Sprague LINDA SPRAGUE

As the Designated official for the Taney County Planning Commission, I hereby issue the foregoing document as the permit and decision of record as detailed above.

Harry Rowland
Harry Rowland, Dir. I Corp.

STATE OF MISSOURI)

SS On this *22nd* day of *Sept*, 2006

COUNTY OF TANEY)

Before me personally appeared *Kurt Parnen* and *Dwight and Linda Sprague* to me known to be the persons described in and who executed the foregoing instrument

In testimony Whereof, I have hereunto set my hand and affixed my official seal, at my office in Forsyth, Missouri the day and year first above written. My term of office as Notary Public will expire 2/6/10

Bonita Kisse
Bonita Kisse, Notary Public



END OF DOCUMENT

2006L49808



Fountains on Fall Creek

