

BZA Case #18584

July 9, 2013

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18584

EXHIBIT NO. 43

Good morning, Mr Chair and Members of the Board My name is Ellen McCarthy and I am testifying today as an expert with respect to issues of zoning, based on my forty (40) years of planning experience and more than twenty-five (25) years of experience with zoning in the District of Columbia My testimony will.

- 1 review the history and context of the dog boarding zoning regulations,
- 2 address why the proposed use does not meet the adverse impact test of the requested special exception,
3. explain why the requested variance relief should be a use variance, not an area variance; and
- 4 establish that the applicant has not met the tests to justify granting either variance

Brief Overview of the History of the Zoning Regulations on Animal Boarding

In 2004, when I was serving as the Deputy Director for Development Review and Historic Preservation at the DC Office of Planning, the Zoning Administrator issued a certificate of occupancy to WagTime, a dog boarding operation, concluding that, although dog boarding was not specifically mentioned as a permitted use in the Zoning Regulations, it was similar in character and impacts to a veterinary hospital or public baths, which were allowed as a matter of right in the C-3-A zone A group of neighbors in the 1400 Block of Q Street NW, which abutted the rear of WagTime across an alley, appealed the Zoning Administrator's determination The Board of Zoning Adjustment agreed with the neighbors that dog boarding had potential adverse impacts that were far more severe than the other uses to which the ZA had compared them, and it overturned the Certificate of Occupancy that had been granted Later, in 2005, the same group of neighbors approached us at OP, requesting that we propose a set of regulations to govern dog boarding In Zoning Commission Cases 05-21 and 05-21A, the Commission approved the regulations, which broadened the definition to include all animal boarding, animal groomers who also provided day care and veterinary hospitals for which animal boarding was 50% or more of their business The Commission heard compelling evidence that such boarding could create serious issues, particularly with respect to noise, odor and disposal of dog waste It found that the potential for adverse impacts was serious enough that such establishments were prohibited not only in residential zones but also in commercially-zoned areas which merely abutted a residentially-zoned parcel, and the Commission determined that all animal boarding uses required a special exception, even in industrial areas

There was considerable discussion of the noise factor in the hearings on the two cases, with the Chairperson of the Commission and another Commission member agreeing with witnesses who had

experienced noise as a severe negative impact, but found it extremely difficult to get any enforcement from the District of the noise violations

There was no disagreement voiced on the transcript regarding the prohibition against having an animal boarding facility abutting a residentially-zoned area. In fact, Ms. Andrea Doughty, the main organizer of the Q Street Neighbors Association, the primary group involved in researching and proposing new regulations, noted

Because of the noise impact and the special nature of the enforcement problem with the noise impact, we completely agree with the Office of Planning that dog boarding uses in general are not appropriate in locations that abut Residential Zones

No one from the Commission or any of the witnesses disagreed

Adverse Impacts

The subject property is located in a C-2-A zone district, abutting R-4 on to the northeast and CM-1 to the northwest. Animal boarding is permitted in the C-2-A zone only by special exception. Pursuant to Section 3104.1 of the Zoning Regulations, the Board is entitled to grant a special exception where, in its opinion, such relief can be granted in harmony with the general purpose and intent of the Zoning Regulations and the Zoning Maps, and will not tend to adversely affect the use of neighboring property, subject to some specific conditions outlined in Section 735, designed to address the potential for adverse impact from a proposed use. These conditions include

735.2 *The animal boarding use shall not abut a Residence Zone*

The applicant can not meet this condition, and is asking for a variance.

735.3 *The animal boarding use shall take place entirely within an enclosed and soundproof building in such a way so as to produce no noise or odor objectionable to nearby properties. The windows and doors of the premises shall be kept closed and no animals shall be permitted in an external yard on the premises*

The applicant has the burden of proof to show that, indeed, he can provide this basic requirement that the animal boarding facility can operate without having a negative effect on the neighboring property. He has not met that burden of proof. Despite the fact that Section 735 clearly states that the boarding activity must take place within a soundproof building in a manner which would produce no noise, his counsel did not submit any professional determination that the structure is indeed soundproof. An acoustical report was submitted belatedly, and the opposition has had very little time to review it in detail. What is clear, however, is that the report mentions a variety of measures which might be undertaken to cushion the sound. There is no opinion in the report regarding whether the building is soundproof or will be soundproof after the installation of certain suggested mitigation technologies. Likewise, there is no commitment by the proposed business operator as to which

approaches are going to be used, and therefore, no authoritative determination that the building will indeed be soundproof

Why is this a concern? You have already heard from a variety of parties in opposition why they fear the proposed use will have negative consequences. All dogs will enter from the front, which shares party walls with the structures on either side of 1310. And it is in the front section of 1310 that dog barking will potentially be set off by either the eagerness of the arriving dog to begin to play, or confrontations with other arriving dogs, across the party wall from either Dr Fisher, who may be trying to sleep, or the Moss Group, which may be trying to host a webinar or hold a conference call. The second floor will host grooming, adjacent to the office space of the Moss Group, the grooming operation contains numerous opportunities to set off a commotion on the part of the canine clients. Even the back "warehouse" portion, which is a rather solid-looking masonry structure, has skylights which have a low sound mitigation. The applicant indicates that it will put in the required odor control and air filtration, but there are no details about where those vents, also capable of transmitting noise, will be located. There are flimsy doors which the acoustician indicates need to be replaced, but, as with the other items, there is no commitment on the part of the future operators as to how much they are willing to spend or what technology there are planning to use. Indeed, there has been no indication that additional soundproofing will be installed to shelter the party walls. The applicant submitted its application in April, but has not, until just a few days ago, engaged a consultant to predict the level of noise that will be generated and how much it can be attenuated. The report, which is crucial to determining adverse impact, was provided so late that the opponents have not had the opportunity to review it in detail or to engage their own expert to assess its validity.

735 4 The animal boarding use shall place all animal waste in closed waste disposal containers and shall utilize a qualified waste disposal company to collect and dispose of all animal waste at least weekly. Odors shall be controlled by means of an air filtration system (for example, High Efficiency Particulate Air "HEPA" filtration) or an equivalently effective odor control system.

Not only are odors and waste disposal critical in terms of the peaceful enjoyment of the neighbors' property, but the professional publications for animal facility managers feature articles that create grave concern for the neighbors, with descriptions of serious zoonotic diseases such as ringworm, leptospirosis, salmonella and toxoplasmosis. These and other viral, bacterial and fungal diseases are present, even with well-screened, seemingly healthy animals, and they are expelled through the exhaust fans into the open air, creating dangerous conditions for neighbors, pedestrians and outdoor diners if the filters are not properly installed, or not regularly changed, which can be an extremely expensive operation.

735 5 The Board may impose additional requirements pertaining to the location of buildings or other structures, entrances and exits, buffers, barriers, and fencing, soundproofing, odor control, waste storage and removal (including frequency), the species and/or

number and/or breeds of animals, or other requirements, as the Board deems necessary to protect adjacent or nearby property

In this case, it is not even clear what additional requirements the Board may need to impose, since we do not have a specific commitment about modes of waste storage and disposal, air filtering, or a vestibule to keep the noise of barking dogs from escaping as clients enter and exit with their animals. The applicant has committed that all entrances and exits will be through the front, as will loading. Because the applicant did not provide a traffic and parking study, the Board has no way of knowing whether 45 or more dogs being dropped off in the morning rush hour and picked up at night, along with deliveries and waste disposal, will create problems with parking availability, congestion and traffic

735.6 *External yards or other exterior facilities for the keeping of animals shall not be permitted.*

The applicant has at least agreed to comply with this requirement.

The Applicant has Erroneously Identified the Needed Variance as an Area Variance, When in Fact a Use Variance is Required

The Regulations say flatly that “The animal boarding use may not abut a Residence Zone ” The purpose of this regulation was a determination by the Commission that it was not appropriate or advisable to locate animal boarding facilities abutting residence zones. The regulation does not provide a dimension, as it the case with some uses, or a minimum or maximum size of the yard, we are not talking about relief from a dimension, we are talking about introducing an inappropriate use in proximity to a residential zone As such, the appropriate relief is a use variance, not an area variance As the Board is well aware, a use variance carries an even stricter set of requirements

Whether the Applicant Has Erred in Seeking an Area Variance Rather Than a Use Variance, the Applicant Has Not Met the Tests to Justify Either Type of Variance

As the Board is quite well aware, there are several “tests” that must be met to qualify for a variance, described in Section 3103

1. The Applicant must show that its property is characterized by “exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations”, or it has “exceptional topographical conditions or other extraordinary or exceptional situation or condition”
- 2 There must be a nexus between those factors which make the property unique and a determination that strict compliance with the Zoning Regulations would constitute either “peculiar and exceptional practical difficulties [area variance] to or exceptional and undue hardship [use variance] upon the owner of the property”

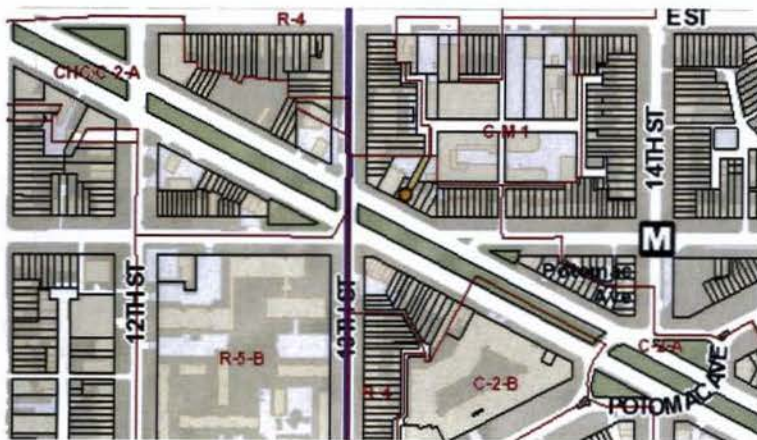
3. The requested relief must be able to be granted "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map "

In this case, the Applicant meets none of the tests. It claims that the "extraordinary or exceptional situation" is that the lot is long and narrow, and the property owners sold an easement for access across the property to a neighboring owner. However, a review of Exhibit 1 (attached) shows quite clearly that, even in the immediately adjacent blocks there are other lots which are similarly long and narrow. Neither the Applicant nor the Office of Planning report document why that situation is exceptional. They certainly do not then make a connection between the shape of the lot or the easement with any "peculiar and exceptional practical difficulties" or "undue hardship" that would occur if the building were to be used for another purpose. As the applicant's statement indicates, the building was used until recently as an office for a construction company and warehouse. A very similarly-shaped lot is across Pennsylvania Avenue to the south and slightly east, and, according to Google Maps, it is being used as dental offices. The Potomac Avenue Metro Station is slightly more than a block away, and there is a new Harris Teeter grocery store across the street, making the building a very attractive redevelopment opportunity for any number of uses which are matter of right in this zone.

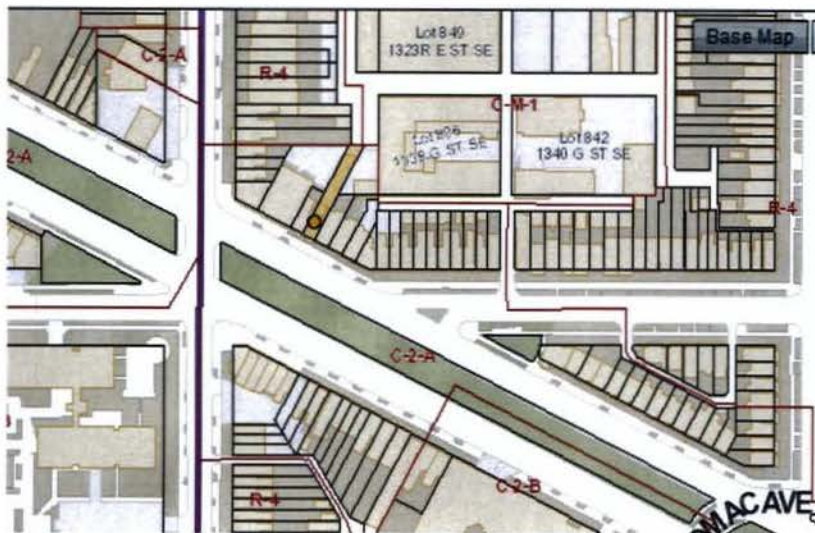
With respect to the "detriment to the public good", the testimony of the numerous neighbors as to how they will be adversely affected makes it clear that the variance request does not comply with the standards established in the Regulations for granting variance relief.

Without the requested relief, the Applicant has also not complied with the requirements of Section 735. Because the Applicant cannot comply with that requirement, and because, in my professional opinion, the Applicant has not met its burden of proof to demonstrate that there will not be serious adverse impacts, therefore, the application must be denied.

Exhibit 1. DC Property Quest Maps of Vicinity of 1310 Pennsylvania Ave. SE



Scale: 1:1,600



Scale 1: 1,300