

Alan N. Hernandez and Mary D. Rodriguez
4823 Reservoir Road, NW
Washington, D.C. 20007

February 18, 2014

Mr Lloyd Jordan, Chairman
District of Columbia Board of Zoning Adjustment
One Judiciary Square
441 Fourth Street, NW
Suite 200 South
Washington, DC 20001

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18669

EXHIBIT NO. 41

RECEIVED
OFFICE OF ZONING
2014 FEB 18 PM 3:05

RE: Supplemental Submission for BZA Case No. 18669 - Application of Shiau Feng Chen for Special Exception for Dog Boarding

Dear Mr Jordan

We have reviewed the letter dated February 5, 2014 from David Cumins Mitchell,¹ together with the report from George Spano dated February 4, 2014, which was filed in this case before the District of Columbia Board of Zoning Adjustment (the "Board") Exhibit ("Exh.") 40 at 1. For the reasons identified below, we believe that the applicant has failed to satisfy its burden of proof, under Section 3119.2 of the Board's Rules of Practice and Procedure, to show that the proposed dog boarding " . will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations ..." as required under Section 3104.1 of the District of Columbia Zoning Regulations (the "Zoning Regulations").

The sound study commissioned by the applicant did not properly respond to the Board's request to produce a sound study that fully measures the sound impact of the proposed dog boarding use. First, the study purportedly tested the barking of a medium size dog of unspecified breed. The study did not test the barking of a large dog whose barking is significantly louder and which could also be among the dogs proposed to be boarded on the premises. As Mr Mitchell admitted at the December 18, 2013 hearing on this case, "you never know what size and shape the dogs are going to come in" See Transcript of Board's December 18, 2013 Public Hearing ("T ") at 169. The study should therefore have tested the barking of a large dog to properly determine the full extent of the noise impact of a dog's bark.

Second, the sound study tested the barking noise from only one dog. It did not test the barking noise from six dogs, which is the total number of dogs that the applicant wishes to board on the premises. As anyone who has or has had a dog knows, when one dog barks, other dogs in the immediate vicinity of that dog are also prone to bark. The sound study should have therefore tested the simultaneously barking noise from six dogs. Even if the applicant maintains that the

¹ Mr Mitchell identifies himself as the "Authorized Agent for Mr Ricks". We are not familiar with Mr Ricks. He does not appear to be either the applicant in this case, Shiau Feng Chen, nor one of the owners of the Diva Dogs business operating at 4824 MacArthur Boulevard, NW, who have been identified as John C Kim and April Lee. We therefore question whether Mr Mitchell is duly authorized to act for the applicant in this case.

dogs proposed to be boarded at the premises will be divided equally between two rooms, the probability that one dog barking in one room will trigger barking by the dogs in the same room remains high. The sound study should have therefore, at the very least, measured the noise created by three dogs in the same room barking simultaneously. The study failed to do so.

Third, the sound study did not test the level of noise created by the dog's bark at night when there is much less ambient noise and the noise from a dog's bark would therefore have more impact. The study conducted testing at 2:30 pm when there is ambient noise from traffic, playing children, the businesses on MacArthur Boulevard, and passing aircraft. It is therefore difficult to determine how much of the noise measured outside of the premises was from the dog barking in the premises or from other sources. Moreover, we are especially concerned about the noise impact at night when we are sleeping or trying to fall sleep. Even the report from the applicant's acoustical consultant intimates that the impact of barking from the premises would be greater at night when there is "lower background sound levels" Exh. 40 at 2. However, the study failed to adequately measure that impact.

Fourth, the sound study did not address the "acoustical level of the windows" as required by the Board. See T at 170. In fact, the sound study makes no reference at all to the condition of the windows. In addition, the applicant has not provide any photographs of the windows as requested by the Board. See id

The applicant has therefore failed to identify the potential noise impact on a residential zone of boarding six dogs of any size in the premises overnight as the applicant wishes to do. The applicant has further failed to respond to the Board's request for further information about the premises that are relevant to determining such noise impact. In addition, the applicant has failed to comply with all of the conditions on which the District of Columbia Office of Planning ("OP") recommended approval of applicant's request for a special exception. Among other things, the OP requested that the applicant provide information about its systems for, among other things, odor control, including how its existing control system has the capacity to handle animal boarding. The applicant has merely asserted that it has "an odor-free suite 700 commercial grade ozone machine", see T at 110, but has not provided any evidence that such machine can effectively and adequately eliminate odors created by the boarding of six dogs as proposed by the applicant.

It is precisely because of the potential impact from noise and odors generated by dog boarding that Section 735.2 of the Zoning Regulations provides that "[t]he animal boarding use shall not abut a Residence Zone." As we previously noted in our Additional Submission to the Board and the December 18, 2013 hearing, the residential zone in which our house is located abuts the proposed animal boarding use. We therefore believe that the Zoning Regulations prohibit animal boarding on the premises. Advisory Neighborhood Commission 3-D ("ANC-3D"), whose commissioners, to our knowledge, include a number of lawyers and architects, voted 6-1-3 in favor of this opinion after careful consideration of this issue on their own² Exh

² Mr. Mitchell's characterization that "ANC 3D was totally misled by the vehement nature of a nearby neighbor" and that "[a]s a result of the diatribe, the ANC voted to oppose the application" is unfortunate and incorrect. ANC-

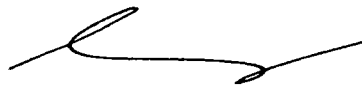
No. 39 Under Sections 3012.6 and 3115.2 of the Board's Rules of Practice and Procedure, ANC-3D's view should be given great weight³

In short, we believe that the applicant's request for a special exception to board dogs should be denied as a matter of law. The applicant has failed to satisfy its burden of proof under Section 3119.2 of the Board's Rules of Practice and Procedure to show that the proposed dog boarding "... will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations . ." as required under Section 3104.1 of the Zoning Regulations. In addition, under Section 735.2 of the Zoning Regulations, the proposed dog boarding use is prohibited on the premises because it abuts a residential zone.

If the Board disagrees with our view as a matter of law, we respectfully request that the Board consider three additional conditions, along with the applicant's commitments set out in Mr. Mitchell's February 5, 2014 letter, to address our concerns about noise, particularly at night, and odors. First, we propose that the applicant be required to replace with new acoustical windows all of the existing windows which are believed to be the original windows installed in the 1930s and are therefore approximately 80 years old. This should occur before a special exception is issued to the applicant. Second, we propose that, consistent with the nighttime noise limitations approved by the United States Federal Aviation Administration for aircraft flying into Ronald Reagan Washington National Airport, the animal boarding on the premises be restricted to the hours of between 7 am and 10 pm. This condition should be included as part of the special exception. Third, we propose that the special exception be limited in duration to a period of one (1) year after which applicant can reapply for the special exception and thereby confirm that the levels of noise and odor from the premises do not adversely impact us or our neighbors in the abutting residential zone.

Thank you for your consideration of our concerns and the opportunity to submit this response.

Respectfully submitted,



Alan N. Hernandez

3D postponed deciding on the application until it could consider the issue of whether the Zoning Regulations permitted the proposed animal boarding use. After careful consideration of the issue on their own, the ANC-3D Commissioners voted overwhelmingly in favor of the opinion that the proposed animal boarding use was not permitted by the Zoning Regulations.

³ The view of Mr. Matthew Le Grant, Zoning Administrator, to the contrary is confusingly flawed. Mr. Grant indicates, in an email dated December 5, that "I agree that when separated by an alley that the subject property is not abutting a property across from said alley, instead it is confronting the other property, and therefore Section 735.2 does not apply." Mr. Le Grant fails to explain how a property can "confront" another property but not abut it. In addition, Mr. Le Grant fails to note that the boundary line between the commercial and residential zones in which the premises and our house are respectively located runs through the middle of the alley. See Zoning Map, 11 DCMR § 107.5 (zone district boundary lines shall follow center lines of alleys).