

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**



Application No. 20201 of DC Superpack LLC, pursuant to 11 DCMR Subtitle X, Chapter 9 for a special exception under Subtitle I § 303.1 and Subtitle U § 513.1(a) and, pursuant to Subtitle X, Chapter 10, for a variance from Subtitle U § 513.1(a)(2) to allow an animal care and boarding use in an existing building in the D-4-R zone at 450 Massachusetts Avenue, N.W. (Square 517, Lot 50).

HEARING DATES: February 12 and March 4, 2020
DECISION DATE: May 6, 2020

PROPOSED DECISION AND ORDER

This self-certified application was filed on November 25, 2019 on behalf of DC Superpack LLC (the “Applicant”). Following a public hearing, the Board voted to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. In accordance with Subtitle Y §§ 400.4 and 402.1, the Office of Zoning provided notice of the application and of the public hearing by memoranda dated December 27, 2019 to the Applicant, the Office of Planning (“OP”), the District Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 2C, the ANC in which the property is located, Single Member District ANC 2C02; ANC 6E, whose boundaries include the area directly across the street from the subject property,¹ the Office of Advisory Neighborhood Commissions, the Councilmember for Ward 2 as well as the Chairman and the at-large members of the D.C. Council, the National Park Service, and the owners of all property within 200 feet of the subject property. Notice was also posted at the subject property and on the Office of Zoning website and was published in the *D.C. Register* on October 4, 2019 (66 DCR 16381).

Parties. Pursuant to Subtitle Y § 403.5, the Applicant, ANC 2C, and ANC 6E were automatically parties in this proceeding.² The Board received no requests for party status.

¹ Pursuant to Subtitle Y § 101.8, the term “affected Advisory Neighborhood Commission” or “affected ANC” refers to the ANC where the property that is the subject of an application is located as well as to any ANC that represents an area directly across a street from the subject property.

² ANC 6E did not submit a report or otherwise participate in this proceeding.

BZA APPLICATION NO. 20201
PAGE NO. 2

Applicant's Case. The Applicant provided evidence and testimony in support of the request for zoning relief to allow an animal care use in the ground-floor commercial space at an existing apartment house.

OP Report. By memorandum dated January 30, 2020, the Office of Planning recommended approval of the zoning relief requested by the Applicant. (Exhibit 33.)

DDOT Report. By memorandum dated January 24, 2020, the District Department of Transportation indicated no objection to the Applicant's proposal. (Exhibit 32.)

ANC Report. By letter dated January 29, 2020, ANC 2C indicated that, at a public meeting on January 14, 2020 with a quorum present, the ANC voted to support the application. (Exhibit 34.)

FINDINGS OF FACT

1. The property that is the subject of this application is an irregularly shaped corner lot on the south side of Massachusetts Avenue near its intersection with 5th and I Streets, N.W., with the address 450 Massachusetts Avenue, N.W. (Square 517, Lot 50).
2. The subject property has a lot area of 44,648 square feet and is improved with an apartment house built around 2002, known as the "Meridian." The building is approximately 110 feet in height.
3. The ground floor of the building contains 21 apartments as well as non-residential space. The upper floors contain apartments.
4. The Applicant entered into a lease for a commercial space on the ground floor of the building for the operation of an animal boarding use. The space contained 1,910 square feet of space located in the northwestern portion of the building, facing I Street.
5. The animal boarding use would be located next to an apartment in the residential space on the first floor and directly below residential space on the second floor.
6. The proposed animal boarding use would offer daytime and some overnight animal boarding in addition to dog training and limited retail sales of pet accessories. The hours of operation would be 7:00 a.m. until 7:00 p.m. every day. The animal boarding use would not utilize any external animal recreation yard or facilities except that employees would take leashed dogs for walks around the neighborhood.
7. The Applicant's space would be configured as two larger pens (470 and 590 square feet) as well as smaller pens, a reception area, lounge, restroom, food preparation area, and a storage area. The facility was designed to care for approximately 50 dogs per day.
8. The Applicant proposed to utilize "animal boarding best practices featuring industry-standard construction methods" such as acoustical concrete and masonry and sound-

absorbing materials including acoustical flooring and panels and two-ply stone wall sheeting to minimize the transmission of noise to an abutting residential unit. The building had a concrete floor, six inches thick, between the first and second floors, which the Applicant asserted would adequately minimize the transmission of sound from the planned animal boarding use. The Applicant also noted that its commercial lease agreement included a “do not disturb” requirement, creating an additional incentive “to limit the transmission of sound to adjacent spaces to maintain enjoyment by all tenants, both commercial and residential.” (Exhibits 40, 44.)

9. The Applicant indicated that all animal waste would be stored in closed waste disposal containers. The Applicant would contract with a qualified commercial waste-disposal company to collect and dispose of all animal waste at least weekly.
10. The Applicant would install an air filtration system to control waste-related odors.
11. Vehicular access to the subject property is provided from I Street and Massachusetts Avenue. Vehicle parking at the subject property is provided in four spaces at grade for visitors and a below-grade garage and loading facilities.
12. The subject property has frontage on three streets (5th Street, I Street, and Massachusetts Avenue) and abuts a public alley, 20 feet wide, along the rear (south) lot line.
13. The subject property is located approximately 185 feet from the closest residential use on any other property.
14. Properties to the north, across Massachusetts Avenue, contain small office buildings as well as large office buildings with ground-floor retail space. Properties to the south, across the alley, contain a 10-story apartment house as well as two- and three-story commercial buildings. Other nearby properties contain a large apartment house with ground-floor commercial space and a church.
15. The surrounding neighborhood is characterized by high-density commercial and residential uses, including restaurants, retail and service uses, hotels, office space, churches, and apartment houses.
16. The subject property and surrounding lots are located in a Downtown (D) zone, D-4-R. The zoning provisions applicable in the Downtown zones are intended to:
 - (a) create a balanced mixture of land uses by providing incentives and requirements for retail, residential, entertainment, arts, and cultural uses the Comprehensive Plan identifies as essential to a successful downtown, and by guiding and regulating office development;
 - (b) protect historic buildings and places while permitting compatible new development, subject to the review process of the Historic Landmark and Historic District Protection Act of 1978;

- (c) guide the design of buildings into being not inconsistent with the policies of the Central Washington Element and other relevant elements of the Comprehensive Plan;
 - (d) provide for the return of historic L'Enfant streets and rights of way;
 - (e) establish design or use requirements for the ground-level of buildings facing certain streets that are of high priority for furthering retail, pedestrian or historic purposes contained in the Comprehensive Plan;
 - (f) encourage the development of publicly accessible open space;
 - (g) encourage the development of housing, including the development and preservation of affordable housing, in Central Washington consistent with the policies of the Central Washington Element and other relevant elements of the Comprehensive Plan;
 - (h) provide incentives and flexible mechanisms for achieving the retail, residential, historic, and open spaces goals through the generation and use of density credits that can be traded within defined areas;
 - (i) ensure a continued mix of retail and residential development in the Comprehensive Plan's Chinatown policy focus area;
 - (j) promote the growth of a well-designed mixed-uses and streetscapes on portions of M Street, S.E., South Capitol Street, and properties now devoted to federal offices in Southwest, including a mechanism for selective design review by the Zoning Commission; and
 - (k) provide for adequate and visually acceptable parking and consolidated loading facilities that do not interfere with active, pedestrian-oriented sidewalks and the flow of vehicular traffic. (Subtitle I § 100.2.)
17. The purpose of the D-4-R zone is to promote the development of high-density residential and mixed-use neighborhoods on Massachusetts Avenue between Thomas Circle and New Jersey Avenue, N.W.; the Mount Vernon Triangle neighborhood located between New York, New Jersey, and Massachusetts Avenues, N.W.; and the blocks between Massachusetts Avenue, N.W. and Judiciary Square. (Subtitle I § 530.)

CONCLUSIONS OF LAW AND OPINION

The Applicant requested a special exception under Subtitle I § 303.1 and Subtitle U § 513.1(a) and a variance from the requirements of Subtitle U § 513.1(a)(2) to allow an animal care and boarding use in an existing mixed-use building, without the required separation from residential use, in the D-4-R zone at 450 Massachusetts Avenue, N.W. (Square 517, Lot 50)

Special exception. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.), to grant special exceptions, as provided in the Zoning Regulations, when, in the judgment of the Board, the special exception will be in harmony with the general

BZA APPLICATION NO. 20201
PAGE NO. 5

purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions. (*See* 11 DCMR Subtitle X § 901.2.)

The Board is authorized under Subtitle I § 303.1 to approve, as a special exception, an animal boarding use in the D-4-R zone subject to certain requirements, including those stated in Subtitle I § 513.1(a). The Applicant proposed to provide an animal boarding use in a commercial space on the ground floor of an existing apartment house, which met the requirements of Subtitle I § 303.1(a) in that the proposed animal boarding use would be provided on the ground floor of the building and would not involve a pet grooming establishment or pet shop use.

In accordance with Subtitle U § 513.1(a)(1), the proposed use would be located on a property in a Downtown zone and not abutting or within 25 feet of any property line of an existing residential zone or residential use (except for the apartments in the same building as the planned use). Pursuant to Subtitle I § 513.1(a)(2), an animal boarding use located in a mixed-use building is not permitted on the same floor as a residential use and must be horizontally separated from any residential use by at least one floor of nonresidential use. As discussed below, the Applicant has requested an area variance from this requirement, which would not be met at the subject property.

Pursuant to Subtitle I § 513.1(a)(3), an animal boarding use must be located and designed to create no objectionable conditions to adjacent properties resulting from animal noise, odor, or waste, and the use must utilize industry standard sound-absorbing materials, such as acoustical floor and ceiling panels, acoustical concrete and masonry, and acoustical landscaping. The application demonstrated that the proposed animal boarding use would be located in ground-floor commercial space of a building that has street or alley frontage on all sides. Thus, the planned use would be at a substantial distance from other buildings and would not likely create objectionable conditions resulting from animal noise, odor, or waste. However, the Board notes that the proposed use would be in a mixed-use building, where residential apartments would be on the same floor and on the floor immediately above the animal boarding use.

Pursuant to Subtitle I § 513.1(a)(4), an animal boarding use may not use any external facilities for the keeping of animals. The Applicant did not propose any yard or other external facilities in connection with the planned animal boarding use.

Pursuant to Subtitle I § 513.1(a)(5), all animal waste associated with an animal boarding use must be placed in closed waste disposal containers, and a qualified waste disposal company must be utilized to collect and dispose of all animal waste at least weekly. Odors created by the use must be controlled by means of an air filtration system (such as high efficiency particulate air (“HEPA”) filtration) or other effective odor control system. The application described the measures the Applicant intended to implement to store and dispose of animal waste, and to address potential odors.

Subtitle X, Chapter 9. Pursuant to Subtitle X § 901.2, the Board is authorized to grant a special exception where, in the judgment of the Board, the special exception (a) will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map, (b) will not tend to

affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, and (c) will meet the conditions specified in the Zoning Regulations for the particular special exception. In this case, the Board concludes that the application failed to meet the requirements of Subtitle X § 901.2 because the Applicant's proposal would not meet all the requirements specified in the Zoning Regulations for approval of a special exception under Subtitle U § 513.1(a) or, as discussed below, satisfy the requirements for a variance from those requirements. Therefore, approval of the application would not be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map.

Variance. The Applicant requested an area variance from Subtitle U § 513.1(a)(2), which requires that, when an animal boarding use is located in a mixed-use building, the use must not be on the same floor as a residential use and must be horizontally separated from any residential use by at least one floor of nonresidential use. The Applicant proposed an animal boarding use that would be located on the same floor as a residential use and would not be separated horizontally from a residential use by at least one floor of nonresidential use. The proposed use would be located on the ground floor of a building that contains ground-floor residential units as well as residential units on the floor immediately above the proposed use. The Board is authorized under § 8 of the Zoning Act to grant variance relief where, "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can 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. (See 11 DCMR Subtitle X § 1000.1.)

The Board has the flexibility to consider a number of factors when deciding whether to approve an application for a variance, including the weight of the burden of strict compliance, the severity of the variance requested, and the effect the proposed variance would have on the overall zone plan. *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990); see also *Washington Canoe Club v. District of Columbia Zoning Com'n*, 889 A.2d 995, 1001 (D.C. 2006). In this case, the Applicant's proposal would require a significant degree of variance relief, given that the proposed animal boarding use would be both on the same floor as a residential use and not horizontally separated from a residential use by at least one floor of nonresidential use; that is, the proposed use would be located directly contrary to zoning requirements in both respects. Based on the findings of fact, and having given great weight to the recommendation of the Office of Planning and to the report of ANC 2C, the Board concludes that the application failed to satisfy the burden of proof with respect to the requested variance.

The Board does not find that the subject property is faced with any exceptional situation or condition that would warrant approval of the requested variance. The Applicant asserted that the subject property was characterized by an exceptional situation in that the Applicant leased space on the ground floor of a large apartment house, which has both residential and non-residential uses on the ground floor and is located along a large commercial street; that the planned use would be in a small space; and that the Applicant did not control the use of the floor immediately above the

planned use. However, the subject property is located in an area with a number of mixed-use buildings configured in a variety of ways. The inability of the Applicant, as a commercial tenant within a primarily residential building, to control other uses within the same building does not provide a basis to approve the requested variance. Tenants typically do not exert control over other portions of a building that contain the leased premises.

Generally, an applicant's desire to utilize property for a certain use is not by itself sufficient to create an extraordinary or exceptional situation or condition under the zoning regulations. *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 540 (D.C. 1972). The Applicant argued that the exceptional aspects facing the subject property were not related to the proposed use but to other factors, such as that other mixed-use buildings in the vicinity do not have ground-floor residential space, that the commercial space at the subject property was designed to be smaller than similar space in newer buildings and therefore would provide greater separation from residential units, and that the Applicant leased space in a building located near "multiple parks frequented by dog owners." (Exhibit 40.) The Board does not agree, because none of the factors cited by the Applicant reflected the existence of an exceptional situation except to illustrate that the space at the subject property did not meet zoning requirements for the proposed animal boarding use despite its location near dog owners.

The Board does not find that the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to the owner of the subject property. The Applicant asserted that the commercial space would be ideal for an animal boarding use in light of the number of dog owners in the building (as well as in the surrounding neighborhood), thereby benefitting the owner by providing an attractive amenity for building residents, and because the owner had encountered difficulties in finding potential tenants for the commercial space. The application described the Applicant's space as smaller than similar space in other buildings and stated that the space now leased to the Applicant had been vacant for an extended period. However, the application did not demonstrate that the potential "underutilization" of the space leased by the Applicant was due to the strict application of the Zoning Regulations. Moreover, the application reflected that the Applicant was planning to occupy a relatively large area of commercial space, which had been occupied by two separate uses previously, and that only one portion was currently vacant while the other contained a commercial use.

Approval of the requested variance would not likely cause substantial detriment to the public good, given that the application addressed the Applicant's compliance with the other requirements for approval of the requested special exception. However, approval of the variance would substantially impair the intent, purpose, and integrity of the zone plan, because the application did not provide an adequate basis to support the location of the animal boarding use in such close proximity to a residential use.

Great weight. The Board is required to give "great weight" to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2012 Repl.).) For the reasons discussed above, the Board did not agree with OP's recommendation that the application should be approved.

BZA APPLICATION NO. 20201
PAGE NO. 8

The Board is also required to give “great weight” to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976. (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(3)(A) (2012 Repl.)).) In this case, ANC 2C indicated its support for the Applicant’s proposal but, for the reasons discussed above, did not provide persuasive advice with respect to how the application met the requirements for the requested variance relief.

Exceptions to the Proposed Order. Because a majority of the Board members participating in the issuance of this order did not personally hear the evidence in this appeal, a proposed order was provided to the parties to afford them an opportunity to present written exceptions, in accordance with D.C. Official Code § 2-509(d).

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has not satisfied the burden of proof for a special exception under Subtitle I § 303.1 and Subtitle U § 513.1(a) or for an area variance from Subtitle U § 513.1(a)(2) to allow an animal care and boarding use in an existing building in the D-4-R zone at 450 Massachusetts Avenue, N.W. (Square 517, Lot 50). Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: 3-0-2 (Carlton E. Hart, Lorna L. John, and Michael G. Turnbull voting to deny; Frederick L. Hill not participating; one Board seat vacant)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX

DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.