

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18669 of Shiao Feng Chen, pursuant to 11 DCMR § 3104.2, for a special exception to establish a dog boarding establishment under § 735, in the C-2-A District at premises 4824 MacArthur Boulevard, N.W. (Square 1388, Lot 25).

HEARING DATE: December 18, 2013

DECISION DATE: February 25, 2014

DECISION AND ORDER

Shiao Feng Chen, the owner of the subject premises (the “Owner” or the “Applicant”), filed an application with the Board of Zoning Adjustment (the “Board” or the “BZA”) on September 19, 2013, for a special exception under § 735 of the Zoning Regulations, to add a dog boarding use to an existing dog grooming business at premises located at 4824 MacArthur Blvd., N.W. Following a public hearing and public meeting, the Board voted on February 25, 2014 to deny the application.

PRELIMINARY MATTERS

The Application

The application was self-certified pursuant to 11 DCMR § 3113.2. (Exhibit 5.)

Authorization

The Applicant authorized David Cumins Mitchell, an architect, to act as his agent during the Board proceedings. (Exhibit 6.)

Notice of Public Hearing

Pursuant to 11 DCMR § 3113.13, notice of the hearing was sent to the Applicant, all owners of property within 200 feet of the subject site, the Advisory Neighborhood Commission (“ANC”) 3D, and the District of Columbia Office of Planning (“OP”). The Applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect. (Exhibit 31.)

ANC Report

In its report dated December 9, 2013, the ANC 3D indicated that, at a regularly scheduled monthly meeting with a quorum present, the ANC voted (6-3-1) to oppose the special exception. (Exhibit 33.) The ANC filed a revised report on December 21, 2013 that also recommended

denial of the application, but corrected the recorded vote to read (6-1-3). (Exhibit 39.) The ANC stated that the proposed dog boarding establishment did not meet the special exception criteria because it would abut a residence zone in violation of § 735.2 of the Zoning Regulations.

Requests for Party Status

The Board received two requests for party status, both in opposition to the application:

- (1) Alan Hernandez and Mary Rodriguez, property owners at 4823 Reservoir Road, N.W., whose rear yard is separated from the rear of the Applicant's property by an alley. (Exhibit 28.) Mr. Hernandez and Ms. Rodriguez (husband and wife) assert, among other things, that the proposed dog boarding establishment will cause "excessive noise", and "unsanitary conditions", and will negatively impact the quiet enjoyment of their home and decrease the value of their property.
- (2) Eugene and Carolyn Ulm, property owners at 4843 Reservoir Road, N.W., who claim to be 175 feet from the proposed dog boarding establishment. (Exhibit 32.)¹ The Ulms assert, among other things, that the proposed use will negatively impact the quiet enjoyment of their home and their property values. They also assert that the dog boarding establishment, which they describe as an "unregulated kennel", is already operating without Board approval.

The Board granted both requests for party status and directed them to combine as one party during the public hearing. The combined party was represented by Mary Rodriguez during the hearing, and will be referred to hereafter as "the Opposition Party" or "the Opposition". The Opposition fully participated in the public hearing, providing testimony, cross-examination of the other parties, and the submission of additional filings. (See, Exhibit 34.)

Persons in Support

Michelle Simoneau, a tenant in an apartment building located at 4840 MacArthur Boulevard, N.W., testified in support of the application. Ms. Simoneau testified that the subject property (where the pet grooming business was operating) was kept very clean and was a "good service"; further, there was a community need for the proposed dog boarding service.

Government Reports

Office of Planning ("OP") Report

OP prepared a written report supporting the application, on condition that the Applicant provide additional information regarding noise mitigation and odor control, and a commitment from the Applicant that (a) the animals only enter and exit the business through the front door facing MacArthur Boulevard, and (b) that the rear facing rooms in the building's basement and second floor would not be occupied by animals. (Exhibit 30.) OP also noted that the criterion contained in § 735.2 is met, explaining that the property does not "abut" a residence zone because the nearby R-1-B zone district is "across an alley". Paul Goldstein, the OP representative who

¹ Eugene Ulm also submitted a letter summarizing their objections to the proposal. (Exhibit 32.)

prepared the report, also testified at the hearing. Mr. Goldstein noted that he spoke with the Zoning Administrator (“ZA”) regarding the interpretation of § 735.2, and the ZA stated that when “separated by an alley”, the property “confronted” a residence zone, but did not “abut” a residence zone. OP submitted an email from the ZA corroborating this interpretation. (Exhibit 35.)

Department of Transportation (“DDOT”) Report

DDOT prepared a written report stating it had “no objection” to the application. (Exhibit 25.)

The Applicant’s Case

The Applicant claimed that he had demonstrated compliance with the conditions contained in § 735, emphasizing that the proposed use was a small scale facility, with a maximum of six dogs. He presented testimony regarding the use of “sound absorbing foam” or “egg crate” to insulate the exterior walls and mitigate any sounds from barking dogs. The Applicant also stressed that, contrary to the position of the ANC and the Opposition Party, the subject property did not “abut” a residence zone. The Applicant stated that, like OP, he had also discussed this issue with the ZA prior to the BZA hearing. However, so as not to disturb the residential neighbors to the rear, the boarding would occur only in the front rooms of the second floor and the basement, and dog walking would not take place on Reservoir Road where several residential properties are located. In compliance with other criteria, the dogs would not be allowed in the rear yard, and the windows and doors at the property would remain closed.

The Opposition Party’s Case

The Opposition maintained that the Applicant had not met its burden of proof in establishing compliance with the specific conditions enumerated in § 735 of the Zoning Regulations. In particular, the Opposition claimed that the proposed boarding use abuts a residence zone in violation of § 735.2 of the Regulations. In addition, the Opposition argued, among other things, that the dog boarding use would be only 16 feet away from the nearest residential property, that the offer to confine the dogs to the front of the building is not practical and not enforceable, and that the offer to limit the number of dogs to six is not reliable in light of the Applicant’s inconsistent statements and the fact that boarding had already taken place without Board approval.

Closing of the Record

The Board completed its public hearing on December 18, 2013, and scheduled its decision for February 25, 2014. The record was closed except for the following additional information requested by the Board: (1) sound study from the Applicant for the proposed use, including the “acoustical level of the windows”; (2) also from the Applicant, photographs of the windows at the subject building; and (3) responses, if any, from the Opposition Party.

Post-Hearing Submissions

The Applicant submitted a letter discussing proffered conditions, as well as a sound study prepared by an “acoustical consultant”, George Spano. Mr. Spano’s resume was also attached.

(Exhibit 40.) The report concludes that barking at the dog boarding facility would have no impact on neighbors and would comply with District regulations for noise control. (Exhibit 40.) The Applicant did not submit photographs of the windows.

The Opposition Party submitted a detailed response refuting many of the Applicant's claims. In particular, the Opposition argued that the sound study purporting to measure the impact of dog barking was flawed because it measured the impact of barking from only one dog. (Exhibit 41.)

FINDINGS OF FACT

The Site and Surrounding Area

1. The subject property is located at 4824 MacArthur Boulevard, N.W., Square 1388, Lot 25, in the C-2-A zone district.
2. The site is roughly rectangular in shape and measures a total of 1,698 square feet.
3. The site fronts onto MacArthur Boulevard.
4. To the rear of the property is a 16-foot wide public alley.
5. A zone boundary line runs through the middle of the alley, so that one half of the alley and the adjacent lots, including the Subject Property, are zoned C-2-A while the other half of the alley and the adjacent lots are zoned R-1-B.
6. The site is developed with a two-story, plus basement, row building of approximately 2,000 square feet across three levels.
7. The building is substantially brick and block construction that is designed to trap some noise internally.
8. The building is used for an existing dog grooming business, approved by the Board in a Summary Order, BZA Order No. 18572, entered on July 1, 2013, pursuant to the criteria in § 736 of the Zoning Regulations.
9. At the time of the public hearing, the dog grooming business operated in the building's first-floor and basement, and the second floor was vacant.

The Proposal

10. The Applicant proposes to operate a dog boarding use primarily in the front room of the building's basement.
11. The front room of the second floor would be used as an area for waiting, pick-up, and day-care, and some overnight boarding that is ancillary to the grooming operations.

12. The first floor would remain in use for the dog grooming business.
13. A maximum of six dogs would be boarded at any time, typically for no more than one or two days.
14. Rear outdoor waste disposal containers would contain dog waste. The containers would be removed weekly by a contracted vendor who would access the property via the alley.
15. Windows and doors at the building would be kept closed, but are more than 80 years old.

The Potential Impact of the Proposed Use

16. There are 13 residential properties within the 4800 block of Reservoir Road, N.W., all within 200 feet of the proposed dog boarding use.
17. The residential property closest to the proposed dog boarding use is located at 4823 Reservoir Road, N.W. (Lot 34, Square 1388). The residence is located across the alley directly behind the proposed dog boarding use, and occupies the same square – Square 1388 – as the subject property.
18. The property at 4823 Reservoir Road is separated from the subject property by the width of the 16-foot public alley.
19. Because of the age of the windows and the proximity of nearby residential uses, it is likely that objectionable levels of noise and odor would be released from the subject property and cause adverse impacts on the nearby residential properties.
20. At the Board's request, the Applicant provided a report to evaluate the noise level emanating from dog barking at the proposed use.
21. The report was prepared by Mr. George Spano, a Senior Acoustical Consultant retained by the Applicant.
22. The report states that testing was done at the subject property to evaluate dog barking and its potential impact on residences behind the building and across the alley.
23. The report explains that "[a] medium size dog was induced to bark" inside the building and the sound level was measured in decibels.
24. The testing was done at approximately 2:30 pm and the ambient noise took into account a combination of traffic, children playing at the nearby River School, and the ventilation equipment on the roof of other buildings.
25. The report concludes that the barking would have "no impact on the neighbors" and would comply with District regulations for noise control.

26. The methodology employed by Mr. Spano was flawed because the study did not test the barking noise from six dogs – the maximum number of dogs that were proposed for boarding. In addition, the sound study did not test the noise level at night, when, as Mr. Spano acknowledged, there is much less ambient noise and any barking would have more impact.

CONCLUSIONS OF LAW

The Applicant seeks a special exception under § 735 to add a dog boarding use, with a maximum of six dogs, to an existing pet grooming business within the C-2-A zone district at 4824 MacArthur Boulevard, N.W. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code §6-641.07(g)(2) (20012 Repl.), to grant special exceptions, as provided in the Zoning Regulations. Subsection 3104.1 of those regulations generally authorize the Board to grant a special exception if the use will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to adversely affect the use of neighboring property, subject to specific conditions.

The specific conditions applicable to the grant of a special exception for a dog boarding establishment in the C-2-A zone district are set forth at 11 DCMR § 735. The relevant provisions of that section require that:

- The dog boarding use shall not abut a residence zone (§735.2);
- The dog boarding use shall take place entirely within an enclosed and sound proofed building in such a way as to produce no noise or odor objectionable to nearby properties; and the windows and doors of the premises shall be kept closed and no dogs shall be permitted in an external yard of the premises (§ 735.3);

The Board is not persuaded that the proposed dog boarding establishment at the subject property would satisfy the provisions of § 735 for two reasons. First, the Board finds that the proposed use “abuts” a residence zone. Therefore, the Applicant cannot satisfy the requirement of § 735.2 which prohibits this. Second, the Board is not persuaded that the proposed use would *not* create objectionable noise for nearby properties. Therefore, the Applicant cannot satisfy the requirement of § 735.3.

Compliance with § 735.2

Subsection 735.2 states that a “[dog]² boarding use shall not abut a residence zone”. The term “abut” is not defined in § 199.1 of the Zoning Regulations. Pursuant to § 199.2(g) of the Regulations, words not defined in § 199.1 shall have the meaning given in Webster’s Unabridged Dictionary. Merriam-Webster Unabridged Dictionary defines “abut” as follows:

intransitive verb – to touch (as of contiguous estates) along a border or with a projecting part; terminate at a point of contact (as with an adjacent structure); lean or rest for support (as upon another structure); transitive.

² Section 735 actually regulates boarding facilities for “animals” and is not limited to dog boarding establishments.

verb – 1.to border on: reach or touch with an end 2.To cause to abut.

The Applicant's position, supported by OP, is that the subject premises (in the C-2-A zone) does not "abut", but rather "confronts" the residence zone because it is separated from the residential (R-1-B) zone by an alley. Because of the separation, the Applicant reasons that the property does not "touch" or "abut" a residence zone. This interpretation is incorrect. It assumes that the alley which separates the two zone districts is an un-zoned buffer area. But that is not the case. The alley is zoned. In fact, the boundary line between the commercial and residence zones runs through the middle of the alley. *See*, 11 DCMR § 107.5. (zone district boundary lines shall follow center lines of alleys). The boundary line is shown in a relevant portion of the District's Zoning Map.

The Board disagrees with the ZA's and OP's view that the eight feet of alley that separate the Subject Property's rear lot line from the zone boundary line somehow causes the use to confront rather than abut the residence zone. The interpretation suggests that the only time a use would abut a different zone district is when the building that houses the use actually touches the zone boundary line. Thus, under the OP and ZA interpretation, even if the zone boundary line in this instance ran along the Subject Property's rear property line, the use would still not abut the adjacent zone because of the space between the rear of the building and that lot line. This is an unduly restrictive view.

Therefore, while a use would certainly abut an adjacent zone when its building touches the boundary line, the Board concludes that a use also abuts an adjacent zone when there is open space between the rear of the building that houses the use and a zone boundary line. In this case, that space extends from the rear of the building to the zone boundary line in the middle of the alley.

To hold otherwise would effectively negate the rule, since almost all zone boundary lines run through the middle of alleys or streets. Thus to hold that no animal boarding use abuts a residence zone boundary line that runs in the middle of an alley or street would mean that almost no dog boarding use could be found to abut a residence zone. Such a result is unreasonable.

Finally, the Board notes that a dog boarding use, in general, involves not only the use of the specific property, but also ingress and egress for dogs and disposal of waste products using exterior space. The Applicant confirms that the dogs would not be allowed in the rear yard; however, the dog waste would be stored in the rear yard and would be removed using the alley. (Finding of Fact 14.) Thus, while the subject property extends only to the rear lot line, activities associated with the use extend into the 16 foot wide alley. As such, the Board finds that the proposed use would "touch" or "border on" that portion of the residence zone that extends into the alley. In other words, when a boundary of a residence zone runs through the middle of an alley, a proposed use in the adjacent non-residence zone is deemed to abut the residence zone.

Compliance with § 735.3

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

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

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: October 15, 2014

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.