

**IN RE: PETITIONS FOR SPECIAL HEARING *
AND SPECIAL EXCEPTION &
VARIANCE ***

(1913-1915 Greenspring Drive)
8th Election District
3rd Council District
Michael Arnold
Legal Owner
Charles Wagandt, Blair Taylor
Contract Purchaser/Lessee

BEFORE THE
OFFICE OF
ADMINISTRATIVE HEARINGS
FOR BALTIMORE COUNTY
Case No: 2021-0352-SPHXA

Petitioners

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (“OAH”) for consideration of Petitions for Special Hearing, Special Exception and Variance filed on behalf of Michael Arnold legal owner, and Charles Wagandt and Blair Taylor, Contract Purchasers/Lesseees (“Petitioners”). The Special Hearing was filed under Baltimore County Zoning Regulation (“BCZR”) seeking a waiver of the conditions required by BCZR § 253.2.C. In addition a waiver is requested from Parts 123, 124, and 125 of the Baltimore County Building Code (“BCC”), and from BCC §§ 32-4-107(a)(2), 32-4-404, 32-4-414 and 32-8-301 to permit exercise areas and dog runs in a riverine floodplain. Finally, a modified parking plan is requested pursuant to BCZR § 409.12. Next, a Special Exception is requested under BCZR § 253.2.C.3., to permit a commercial kennel. The following Variance relief is also requested: a Variance from BCZR § 421.2 to permit the commercial kennel within zero (0) ft. of the nearest property line or lease line in lieu of the 200 ft. minimum requirement; from BCZR § 409.6.A.2 to permit 19 parking spaces in lieu of the required 39 parking spaces; and from BCZR § 409.8.A to permit no screening or landscaping along all sides of the existing parking area and driveway in lieu of the design, screening and landscaping

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By Dr. Wagner

the east and lies partially within flood zones X and AE, as shown on the Site Plan. Mr. Doak explained that the only structures proposed within the riverine floodplain are the fenced dog runs on the east side of the building. There is a steep bank running down from the parking lot to Roland Run; however there is a curb and gutter of sorts along the edge of the parking lot and there is between 20 and 30 ft. of vegetative buffer between the parking lot and the stream. Although, as described by Ms. Shaw, in the southeast corner of the lot there is an opening in the curbing to allow runoff from the parking lot and there is only "rip rap" type stone buffering there. Mr. Doak explained that the dog runs could not be located on the north or south sides of the building due to the need for parking and the narrowness of the site. He noted that the footprint of the existing building occupies a large percentage of the site. Mr. Doak explained that this also causes the need for the parking variance because there is simply not room for the 39 spaces required for this "personal services" business under BCZR § 409.6.A.2. However, he and the Petitioners explained that there will only be between five and ten employees there at any given time and that the clients will simply be dropping their dogs off and picking them up, and will only be parked for a minute or two at a time. Mr. Wagandt explained that their lease authorizes them to use up to 19 parking spaces, and that based on other similar size "Camp Bow Wow" franchises that this should be more than adequate for their parking demands. Mr. Doak further explained that the provisions of BCZR § 253.2.C can be waived without harm to the public health, safety or welfare because this facility is served by public water and sewer, and further, the waste generated by the dogs will not be disposed of in the public sewer, it will be collected and hauled away. Upon questioning by counsel Mr. Doak explained that in his opinion the site plan satisfies all the special exception factors of BCZR § 502.1.

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Mr. Doak next explained the need for the assorted variances. In short, the configuration of the existing site, with the building occupying most of it, triggers the need for the variance relief. Like the surrounding sites, this site is entirely paved, and paving would have to be excavated in order to plant any landscaping. Further, any landscape buffers would consume space needed for parking and travel lanes. Finally, variance relief is needed from the 200 foot kennel setback required under BCZR § 421.2 because the nearest property shares a party wall with this proposed kennel.

On cross-examination Mr. Doak acknowledged that there is room for only one travel lane on the south and east sides of the site; however, Mr. Wagandt explained that there is room on the north side of the building for cars to turn around, and that this is where clients will drop off and retrieve their dogs.

Mr. Wagandt testified next. He explained that he and Dr. Taylor conducted extensive market research before selecting this site. He believes there is substantial need for a kennel like this in the Lutherville-Timonium area. He described this site as being "convenient yet out of sight." He and Dr. Taylor explained that they also did a great deal of research into a variety of national kennel franchisors before deciding to become a "Camp Bow Wow" franchise. They described the "best practices" models Camp Bow Wow uses for the kennel design and daily operations, including noise abatement and dog waste collection and disposal. He noted that they are investing approximately \$1,500,000 in retrofitting and furnishing the building, and in other start-up costs. The initial design will have 76 "cabins" housing one dog each, with numerous indoor communal play and exercise areas for the dogs. In addition, as noted above, two outdoor dog runs are proposed. He further explained that the square footage of this building can accommodate up to 120 "cabins" and that expansion is possible, based on demand.

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Dr. Taylor explained that she is an IT professor at Towson University and that she oversees the new business incubator program that is housed in the old Towson Armory. She described in great detail the business and operations plan for this proposed kennel, including the extensive sound proofing measures. She also described how the dog waste will be immediately cleaned up, and that it will be collected and hauled off site by a third party contractor. She also submitted and explained an Economic Impact Study that she did (Petitioners' Exhibit 10) that shows the myriad positive impacts this business will have, including the creation of up to 20 full and part time positions.

Mr. Bathurst testified next. He is a civil engineer with Century Engineering and specializes in water resources and flood safety and design. He explained that he has been working with Terry Curtis in DPW&T concerning the riverine floodplain issue at this site. He stated that Mr. Curtis is reviewing a "no rise certification" letter that he provided at Mr. Curtis' request in lieu of a full floodplain study.¹ He described the design of the dog runs and fencing, explaining that the fencing is designed to collapse in the event of a 100 year flood and would therefore not increase flood levels or otherwise threaten public safety. He noted that FEMA allows the construction of fences of this design in not just the floodplain, but even within the floodway.

Mr. Purcell was Petitioners' last witness. He is an environmental engineer with over 30 years of experience. He submitted and described an environmental impact study (Petitioners' Exhibit 11) that he performed concerning the impacts of the kennel on Roland Run. He described in detail the Camp Bow Wow cleaning and maintenance protocols for dog waste. These include a 3 step process by which: 1. the waste is immediately collected and that area spot cleaned, 2. a daily

¹ This and other correspondence between Mr. Bathurst and Mr. Curtis concerning the flood-plain issue have been placed in the file. Some of this correspondence post-dates the hearing date and the issue remains unresolved. It is therefore the subject of a Condition of this Order.

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foam cleaning is conducted of the entire dog run areas, and, 3. a weekly "wet vac" type cleaning is done. He explained that the recommended cleaning agent is made up primarily of hydrogen peroxide, which is not harmful to the environment. In his expert opinion these proposed dog runs will not adversely impact Roland Run. He did, however, acknowledge during cross-examination that he had not studied the impacts of the dogs' urine. He also acknowledged the practical difficulty of removing 100% of the fecal matter from the proposed astro-turf surface, but confirmed that, in his expert opinion, this facility's operations will have a negligible impact on the stream.

Mr. Rockel and Ms. Shaw then explained their concerns and opposition. In response to questions by the undersigned, Mr. Rockel explained that he believes he has standing to be a party to this case because he lives downstream from this site and his property abuts Roland Run. Under these circumstances I agree that he has standing. Mr. Rockel then explained that his only concerns about the proposed kennel are the impacts that the dog runs may have on Roland Run. In his opinion a full flood plain study should be required prior to the issuance of any permits. He also noted that under the County's development regulations a 75 foot forest buffer is required from Roland Run, and animals are not permitted to be housed within that buffer area. *See*, BCC Sec. 33-3-111 (concerning forest buffers around streams).

Ms. Shaw is the President of the Lutherville Community Association and appeared on its behalf. She explained that Roland Run is a "pet project" (presumably no pun intended) and that she and other members of her Community Association have invested substantial time and effort in rehabilitating and maintaining this stream. She noted that this stream runs through numerous neighborhoods and parks and ultimately flows into Lake Roland. She does not believe that Camp Bow Wow's cleaning protocols will be sufficient to keep the pollutants from dog waste from impacting this stream. She pointed out that there is a gap in the curbing at the southeast corner of

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the parking lot where runoff flows essentially unencumbered into the stream except for a "rip rap" stone embankment. She also noted that there is a relatively narrow strip of vegetation between the parking lot and the stream, and even during the growing seasons it does not, in her opinion, provide adequate buffer as it is. Like Mr. Rockel, the potential stream impacts are the only real concerns she has about the proposed kennel.

SPECIAL HEARING

A special hearing request under BCZR § 500.7 is in the nature of a request for a declaratory judgment. *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005). It is a means by which "interested persons" can obtain a determination as to "any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations." Petitioners in this case ask for a determination of whether they are entitled to a modified parking plan and a waiver of certain floodplain regulations. The standard that has historically been employed in deciding such cases is whether the requested relief is within the spirit and intent of the BCZR, and whether the relief is consistent with the public health, safety and welfare.

Based on the record evidence I am convinced that the modified parking plan meets those standards. Based on Petitioners' testimony their clients will not normally even be parking their vehicles when they drop off or pick up their dogs; they will simply be idling for a minute or two at the entrance and then turning around and leaving. The 19 spaces therefore appear to be more than sufficient for visitor and employee parking.

The more difficult question concerns the dog runs within the floodplain area. Mr. Bathurst, Petitioners' engineering expert, testified that the only structures that will be built are ground level astro-turf dog runs with flood tolerant fencing. The fencing will be designed in accordance with FEMA standards so as to allow water to flow freely over and through the dog runs and fencing

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during normal rain events, but to collapse in the event of a severe flood. His expert opinion was that this design will ensure that there is minimal risk to public health, safety and welfare. Further, he has opined that the dog runs, designed in the manner described above, will not increase the Roland Run water surface elevation on upstream, downstream, or neighboring properties during 2, 10, or 100 year frequency flood events.

Under BCC Sec. 32-8-301 I am authorized to grant a waiver of certain floodplain regulations under certain conditions, as spelled out in BCC Sec. 32-8-207 and BCC Sec. 32-8-303. Under Sec. 32-8-304, there are only two circumstances in which waivers are absolutely prohibited: (1) the placement of fill or any development in the floodway; and (2) the construction of a new building in a riverine floodplain. Neither of these prohibitions apply here, since nothing is proposed in the floodway, and the astro-turf dog runs and fencing are not buildings. So the waiver can be granted if the other regulations are satisfied.

Section 32-8-303 states as follows:

§ 32-8-303. REASONS FOR GRANTING A WAIVER.

- (a) *In general.* Waivers may only be issued upon:
- (1) A showing of good and sufficient cause;
 - (2) A determination that failure to grant a waiver would result in exceptional hardship, other than economic hardship, to the applicant; and
 - (3) A determination that the granting of a waiver will not increase flood heights, impact public safety, incur extraordinary public expense, create nuisances, cause fraud or victimization of the public, or conflict with existing local and state laws and ordinances.
- (b) *Minimum necessary.* The waiver action shall be the minimum necessary, considering the flood hazard, to afford relief.
- (c) *Comments.* In considering a waiver action, comments from the state coordinating office and the County Department of Public Works and Transportation shall be taken into account and maintained with the permit file.

In this case I find that Petitioners have shown good cause for the grant of a waiver. The un rebutted expert testimony of Mr. Bathurst is that the dog runs and fencing will be constructed in

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Section 32-8-207 states as follows:

- (2) The lowest floor elevations of all new or substantially improved structures shall be those elevations required by the Building Code of Baltimore County.
- (3) Basements are not permitted in the floodplain area.

As a condition of this Order the Petitioners will be required to comply with the permitting process described above, and I believe this will adequately protect the public health, safety and welfare from flood damage risk. I note that a floodplain waiver was granted to a similar kennel operation in Hunt Valley in Case No. 2012-0196-SPHXA, and that as far as I am aware there have been no resulting adverse consequences.

SPECIAL EXCEPTION

Under Maryland law, a special exception use enjoys a presumption that it is in the interest of the general welfare, and therefore, valid. *Schultz v. Pritts*, 291 Md. 1, 11 (1981). The *Schultz* standard was revisited in *Attar v. DMS Tollgate, LLC*, 451 Md. 272 (2017), where the court of appeals discussed the nature of the evidentiary presumption in special exception cases. The court again emphasized a special exception is properly denied only when there are facts and circumstances showing that the adverse impacts of the use at the particular location in question would be above and beyond those inherently associated with the special exception use.

Although I share the community's concerns about the kennel's potential impact on Roland Run, I believe that on balance the record evidence establishes Petitioners' right to the special exception under these controlling legal principles. The largely un rebutted expert testimony of Mr. Purcell is that if the strict cleaning protocols are followed as described there will be negligible impacts on the stream. In his report Mr. Purcell also notes the many other uses that already impact Roland Run as it traverses the suburban areas of the County. Indeed, it does not flow through Yellowstone or Yosemite, it flows through a densely populated area that is also the site of a variety

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of industrial uses. And weighed against these environmental concerns are the positive economic impacts that this proposed use will have – the rehabilitation and repurposing of an empty commercial building, and the creation of numerous jobs – not to mention the taxes that Petitioners will pay the County and State each year. In sum, I find that the proposed special exception is within the spirit and intent of the zoning regulations and that with the conditions imposed below will not harm the public health, safety or welfare.

VARIANCES

A variance request involves a two-step process, summarized as follows:

- (1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

Cromwell v. Ward, 102 Md. App. 691 (1995).

As described above, the site is unique for a variety of reasons, including that the existing building occupies a large percentage of the site. This fact drives the need for all of the requested variances, and if the variance relief were denied the Petitioners would indeed suffer practical difficulty and hardship because they would be unable to operate the proposed kennel. Again, I believe that the variance relief is within the spirit and intent of the zoning regulations and that it will not harm the public health, safety, or welfare.

THEREFORE, IT IS ORDERED this 30th day of **June 2022**, by this Administrative Law Judge that the Petition for Special Hearing, request a waiver of Baltimore County Zoning Regulations (“BCZR”) § 253.2.C; and a waiver to permit exercise areas and dog runs in a riverine floodplain pursuant to BCZR § 500.7, Parts 123, 124, and 125 of the Baltimore County Building

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By

DR Wagner

Code ("BCC"), and BCC §§ 32-4-107(a)(2), 32-4-404, 32-4-414 and 32-8-301; and for a modified parking plan under BCZR § 409.12 are hereby **GRANTED**.

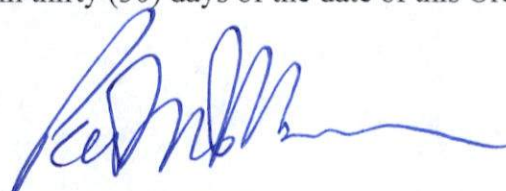
IT IS FURTHER ORDERED, that the Petition for Special Exception filed pursuant to BCZR § 253.2.C.3., to permit a commercial kennel (doggie day care) in an ML-IM zone is hereby **GRANTED**.

IT IS FURTHER ORDERED, that the Petition for Variance from BCZR § 421.2 to permit the use within zero (0) ft. of the nearest property line or lease line in lieu of the 200 ft. minimum requirement; from BCZR § 409.6.A.2 to permit 19 parking spaces in lieu of the required 39 parking spaces; from BCZR § 409.8.A to permit no design screening and landscaping along all sides of the existing parking area and driveway are hereby **GRANTED**.

The relief granted herein shall be subject to the following:

- Petitioners may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioners are hereby made aware that proceeding at this time is at their own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioners would be required to return the subject property to its original condition.
- Petitioners shall apply for and obtain a permit for the dog runs and fencing in accordance with BCC § 32-8-207.
- Petitioners or any successors operating a kennel at this site shall have no more than 100 dogs on the premises at any time.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.


PAUL M. MAYHEW
Managing Administrative Law Judge
for Baltimore County

PMM:dlm

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