IN RE: PETITION FOR SPECIAL EXCEPTION (2012 Far Out Lane)	*	BEFORE THE
5th Election District 3rd Councilman District	*	OFFICE OF
Catherine H. Robinson *Legal Owner*	*	ADMINISTRATIVE HEARINGS
Petitioner	*	FOR BALTIMORE COUNTY
	*	**Case No. 2015-0092-X**

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OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County as a Petition for Special Exception filed for property located at 2012 Far Out Lane. The Petition was filed on behalf of the legal owner of the subject property, Catherine H. Robinson. The Petition seeks approval for a private kennel (not commercial) in an R.C. 2 zone. The subject property and requested relief are more fully described on the site plan which was marked and accepted into evidence as Petitioner's Exhibit No. 1.

Appearing at the hearing in support of the requests was Catherine H. Robinson. Michelle J. Dickinson, Esquire represented the Petitioner. Andrew and Noreen Krause (neighbors) attended the hearing and opposed the petition. The Petition was advertised and posted as required by the B.C.Z.R.

Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. The only substantive comment was from the Department of Planning (DOP), dated November 12, 2014. That agency did not oppose the relief, and opined that the kennel use would not be detrimental to the surrounding community.

The subject property is approximately 5.4 acres and is zoned R.C.2. The property is improved with a large single family dwelling (approximately 2,700 square feet) constructed in

1921, and is located in a rural setting in northern Baltimore County. The Petitioner is a horse trainer who also operates what under the B.C.Z.R. is a "private kennel," which essentially means that "more than three dogs" are kept on the premises. A private kennel is permitted in an R.C. 2 zone (B.C.Z.R. §1A01.2.C.2) by special exception, hence the petition filed in the above case.

Petitioner appears to concede she is operating a kennel, although a credible argument could be made she is not. The definition of "private kennel" includes a structure where more than three dogs are kept "for the purposes of show, hunting, practice tracking, field or obedience trials, or as pets." As noted below, Petitioner considers only three of the dogs to be her "pets"; the remainder are being fostered or kept for adoption, and it could be argued they are therefore not "pets."

Ms. Robinson testified that she owns 3-4 dogs that she considers her pets, 2-3 elderly dogs that are too old and/or infirm for adoption (she indicated these dogs would likely die in the near future while living with her, and in that sense she equated it to an animal hospice) as well as several other dogs that she keeps or fosters awaiting adoption. Though she initially stated that she would like to keep as many as 12 dogs on the property, she later testified that while she enjoys good health, she is getting older and "does not really want 12 dogs."

Ms. Robinson works at Pimlico race track, and is gone from home between the hours of 5:30 a.m.-10:00 a.m. Kawana Swank and her son also reside with the Petitioner, and Ms. Swank works in a hospital E.R. three days a week from 7 a.m.-7 p.m. Ms. Robinson testified she considers her operation to be a rescue-type organization, and she said her adoptions (for which no fee is charged) are done by word-of-mouth, and that she does not have any signs or advertisements in connection with the kennel. The Petitioner testified she has been operating the "kennel" at the subject property for several years, and counsel introduced a recent edition of Mid-Atlantic

Thoroughbred magazine, featuring Ms. Robinson on the cover in recognition of (among other things) her animal rescue service.

Ms. Robinson acknowledged she has received complaints from one neighbor regarding barking, and on those occasions she planted vegetative buffers and relocated the "invisible dog fence" to minimize the impact upon the Krauses. Mr. and Mrs. Krause both indicated they are extremely fond of the Petitioner, and stated she has always been responsive to their concerns. Even so, the Krauses identified four potential problems with the kennel: noise, sanitation, safety and negative impact upon property values.

Following the hearing, both parties submitted lengthy papers outlining various arguments and counter-arguments regarding the case. It is apparent that things have deteriorated since the date of the hearing, and there is a great deal of mistrust and animosity between the parties. I am of course required to decide this case based on the law and the evidence, although it is unfortunate to see neighbors at odds with each other.

The Krauses have raised in their post-hearing submission several issues that are not germane to the resolution of this case. There is some dispute concerning the location of a septic system, a portion of which is allegedly on the Krause's property. This is a private civil matter, and the OAH has no authority to resolve issues of title or boundary disputes. The Krauses also seek to compel the production of certain documents, but the only mechanism for doing so would be a subpoena, which would have been required to be served at least five business days prior to the hearing. Zoning Commissioner's Rules, Rule 4C. Likewise, issues pertaining to construction without permits, or violations of County environmental regulations, cannot be resolved in a zoning hearing. Instead, the Departments of Environmental Protection and Sustainability and Permits, Approvals and Inspections both have code enforcement officials who will, upon receiving a

complaint, conduct a site visit and inspection to determine if violations exist. Hearings concerning such alleged violations are conducted before a different ALJ, outside of the zoning context.

The neighbors also contend that B.C.Z.R. § 421.1 applies in this case, and I concur. That regulation concerns "…kennels in residential zones." Under the B.C.Z.R (§101.1), a "residential zone" includes a "zone classified as R.C." While an applicant can seek variance relief with respect to the requirements set forth in B.C.Z.R. § 421, such a petition was not filed in this case. As such, that regulation is applicable, and imposes certain setback requirements that will be discussed in the Order which follows. Most significantly, a "private kennel" is defined to include a "dwelling," and it does not appear based on the scaled site plan (Petitioner's Ex. No. 1) that Petitioner's dwelling can satisfy the necessary setback. As such a garage or other structure would need to be constructed for housing the dogs, or at least any dogs in excess of three which can be kept in the home.

Special Exception Law in Maryland

A use permitted by special exception (here, a private kennel) is presumed under the law to be in the public interest, and to defeat such a petition an opponent must establish that the inherent adverse effects associated with the use would be greater at the proposed location than at other similar zones throughout the County. People's Counsel for Baltimore County v. Loyola College, 406 Md. 54 (2008). Stated more eloquently, the court in Schultz stated the applicable test in this fashion:

> We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

Schultz v. Pritts, 291 Md. 1, 22-23 (1981).

The neighbors expressed concern with noise, sanitation, safety and property values. These are the types of inherent adverse effects that the legislature anticipated when it allowed kennels (even commercial kennels) in the R.C.2 zone by special exception. Indeed, most uses for which a special exception is required are regarded as "potentially troublesome because of noise, traffic, congestion…." Montgomery County v. Butler, 417 Md. 271, 297 (2010). Any kennel with ten or more dogs will raise concerns for noise, sanitation, safety and property values, regardless of where that kennel is located in the R.C.2 zone.

In the case of commercial kennels (and unlike the private kennel requested herein) many more dogs are kept on site and their owners will come and go dropping off and retrieving their pets. Such businesses, which are also permitted by special exception in the R.C.2 zone, would generate a large volume of traffic and much more noise than would the modest operation proposed by the Petitioner. In any event, I believe--and no evidence to the contrary was presented--that a private kennel with twelve or fewer dogs would generate the exact same noise, sanitation, safety and property value impacts at any R.C.2-zoned property as it would at the present site. As shown in the photographs admitted as Petitioner's Ex. No. 4, the subject property is located in a rural, wooded, sparsely populated setting. This site provides at least as much seclusion as would other five acre parcels in the R.C.2 zone.

In my opinion, the concerns identified by the Protestants are inherent in the operation of a private kennel, and are of the sort which were contemplated by the County Council when it permitted the use by special exception. Dogs will bark, and there was no evidence presented which would indicate that Petitioner's dogs bark more frequently or louder than typical dogs. There was no testimony presented that the dogs bark "continuously" or late at night. As explained

at the hearing, Baltimore County law defines as a "nuisance animal" any animal that "excessively make disturbing noises." Baltimore County Code (B.C.C.) § 12-3-109(a)(3). This prohibition is enforced by the Baltimore County Department of Health and the Animal Hearing Board, not the Office of Administrative Hearings (OAH).

As such, a distinction must be drawn between dogs that bark (i.e., all dogs) and those that bark so much they become a "nuisance." Courts that have considered similarly worded statutes recognize that it is impossible to define with precision what is "excessive barking," as well as the impracticality of requiring animal control officers to carry decibel meters to "scientifically test the loudness of a yip, yowl or bark." City of Belfield v. Kilkenny, 729 N.W.2d 120 (N.D. 2007).

Without in any way diminishing the concerns expressed by the neighbors, it is at the same time true that life in a rural, bucolic area like this brings with it certain inconveniences that must be borne by homeowners. In Baltimore County, R.C.2 is the only zone expressly declared to be "Agricultural." B.C.Z.R. §1A01. Large and loud farm equipment, fertilizers, manure and chemicals being sprayed on fields, and noisy roosters and other farm animals are all facts of life in a rural, agricultural setting. Based on the testimony and evidence in this case, I do not believe that it could be reasonably argued Petitioner's dogs "excessively make disturbing noises." While the Krauses have complained about Petitioner's dogs, there was no testimony or evidence presented at the hearing indicating that other neighbors have made similar complaints, and there is no evidence that excessive barking complaints have been made to the County Department of Health. Comparing the facts in this case with those from other cases in sister states is instructive on this point.

In Van Deusen v. Seavey, 53 P.3rd 596, 599 (Alaska 2002), the property owner conducted a tour business with 75 sled dogs that barked incessantly, which the court found to be in violation

of the applicable ordinance. In Broadcom West Co. v. Best, 889 N.Y.S.2d 881 (2009), the court held a tenant could be evicted based on "constant dog barking." In Dobbs v. Wiggins, 929 N.E.2d 30 (Ill. 2010), the court found a kennel with "69 barking dogs" to be a private nuisance. In that case, neighbors testified that "the barking was constant, day and night" and "there was never any extended period of time in which they completely quit barking." Id. In Patterson v. City of Richmond, 576 S.E.2d 759, 761 (Va. 2003), the court found that "excessive barking" was established by testimony that the owner's five dogs were outside on many occasions barking constantly "for three or four hours." While dog barking can no doubt be disruptive and impacts one's ability to enjoy her home, the level of disturbance experienced by the neighbors here falls well short of that identified in the above cases.

With regard to sanitation, the Petitioner testified she installed on her property a "doggie septic" system, and she employs a groundskeeper who routinely removes the dog waste. Thus, there is no reason to believe that unsanitary conditions will prevail, much less that the potential for such an impact would be greater here than at other R.C.2 parcels. Mr. Krause indicated his dogs were attacked some time ago by another dog which may have belonged to the Petitioner, but no other evidence was presented to establish that the kennel would present a safety concern for the community. In addition, the Petitioner testified she will not keep as a pet or for adoption any dog that is aggressive. Similarly, though the Krauses stated they feared their property value would decline, no cognizable evidence was presented on this point.

After reviewing the evidence and testimony, I do not believe the Protestants have presented sufficient evidence to rebut the presumption under Maryland law, and the petition will be granted. I will impose conditions in the Order which follows, as permitted under B.C.Z.R. §502.2, for the "protection of surrounding and neighboring properties."

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County, this **18th** day of December, 2014, that the Petition for Special Exception to use the herein described property for a private kennel (not commercial) in an R.C. 2 zone, be and is hereby GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioner may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioner is hereby made aware that proceeding at this time is at her 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, Petitioner would be required to return the subject property to its original condition.

2. Petitioner may keep on the premises at any one time no more than ten (10) dogs. To the extent Petitioner now has more than 10 dogs, she shall be permitted to keep such dogs until such time as they are adopted or die, but must thereafter have no more than 10 dogs on the property.

3. The special exception granted herein will terminate automatically if and when Ms. Robinson and/or Kawana Swank no longer own or reside at the subject premises.

4. Petitioner shall on or before June 30, 2015 secure necessary permits and commence construction of any building to be used for housing the dogs in compliance with B.C.Z.R. § 421.1, which structure must be completed on or before August 30, 2015. The outside areas used for exercise and/or dog runs may not be located within 200 feet of the nearest property line, as required by B.C.Z.R. §421.1. This outside area must also be fully enclosed by a fence or underground electric fence to contain the dogs on Petitioner's property.

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

_____Signed_____
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/sln