

IN THE MATTER OF : BEFORE THE
VCA LEWIS ANIMAL HOSPITAL : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
: HEARING EXAMINER
: BA Case No. 11-005N

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DECISION AND ORDER

On May 2, 2011, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of VCA Lewis Animal Hospital for confirmation and enlargement of a nonconforming use for an Animal Hospital in an R-20 (Residential-Single) Zoning District, filed pursuant to Sections 129.D & E of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to complying with the notice, posting, and advertising requirements of the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

Andrew Robinson, Esquire, represented the Petitioner. Katie Yeiser, Dennis Ream and Richard Renschem testified on behalf of the Petitioner. Patricia Washington testified as an adjoining property owner.

The Petitioner introduced the exhibits as follows into evidence.

1. State of Maryland Sales & Use Tax License for 2004, 2005, Maryland tax location report for 2006, 2007, 2008, 2009

2. 2002, 2003, Maryland State Department of Health Controlled Substances Registration/Certificate
3. 1898, 2000, 2001 U.S. Drug Enforcement Administration Controlled Substance Order Forms
4. USA Today 2005 interview with Dr. Elizabeth Krug (internet)
5. USA Today 2006 interview with Dr. Elizabeth Krug (internet)
- 6A. Existing and proposed floor plan
- 6B. Existing and proposed floor plan, enlargement
- 7A-L Photographs of existing structure and property
8. SDP 90181, Lewis Veterinary Hospital, March 16, 1990
9. Board of Appeals Case No. 88-55E
10. November 1, 2010 email correspondence between Andrew Robinson and Department of Planning and Zoning's Bob Lalush, discussing front setback on unrecorded plat
11. Computer simulation of proposed expansion

FINDINGS OF FACT

Based upon the TSR, the petition, and site visits, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is situated on the south side of MD 108 (Clarksville Pike) about 115 feet west of Eliots Oak Road and is known as 10665 Clarksville Pike (the "Property.") The Property is located in the 4th Election District and is identified as Tax Map 29, Grid 12, Parcel 83.

2. Property Description. The Property is accessed from a 26-foot wide driveway extending about 50 feet south to a paved parking lot. The existing animal hospital is located to the driveway's east and 24 feet from the east, side property line. There are four parking spaces and two disabled spaces in front of the hospital. The hospital front façade is oriented to the west. A small trash receptacle is located next to the southwest corner of the building. A landscape buffer runs along the east and south rear sides of the Property. The remainder of the generally level Property is in lawn.

3. Vicinal Properties. To the Property's north, across MD 108, is the RC-CEO (Rural Conservation: Density Exchange Option) Parcel 337, a farm encumbered with an agricultural preservation easement. To the Property's east are the NT (New Town) lots of the Village of Harper's Choice Section 1, Area 1 subdivision (Longfellow), each of which is improved by a single family detached dwelling fronting on Eliots Oak Road. To the south is the R-20 zoned Parcel 137, the Howard County Cedar Park. The R-20 zoned Parcel 76 to the west appears to be improved by two single-family detached dwellings.

4. Roads. MD 108 in the Property's front has one westbound travel lane, one eastbound travel lane, and an eastbound right turn lane. There is about 40 feet of paving within a variable right-of-way. The posted speed limit is 45 MPH. Sight distance from the driveway entrance is good, with a sight distance of more than 600 feet. The existing driveway was approved in a previous site development plan (SDP). State Highway Administration data reports the traffic volume on MD 108 west of US 29 as 38,931 average annual daily trips as of 2010.

5. Water and Sewer Service. The Property is served by public water and sewer facilities.

6. General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as "Residential." The General Plan Transportation Map depicts MD 103 as a Minor Arterial.

7. Zoning History.

A. BA 88-55E, Special Exception granted to expand an existing veterinary hospital, March 23, 189 subject to three conditions.

1. The Petitioner shall comply with all applicable federal, state and local laws and regulations
 2. All outdoor lighting shall be directed downward and inward, and shall not onto (sic) any adjacent residential property
 3. The Petitioner shall submit a site development plan including any required traffic analysis.
 4. The Petitioner strictly comply (sic) with all laws and regulations regarding the disposal of needles, infectious material and special waste.
- B. BA 870C, special permit to add a 600-square foot addition, a two-car garage and a radio antenna to an animal hospital, June 21, 1974
- C. BA 772C, special permit to erect and operate an animal hospital (previous approval lapsed), January 2, 1976
- D. BA 572C, special permit to erect and operate an animal hospital, February 8, 1967

8. Nonconforming Use Confirmation. The Petitioner requests confirmation of a nonconforming use for the animal hospital facility, which is stated as comprising a one-story 6,903.18 square foot brick building and a paved parking lot with 45 parking spaces. The petition supplement states the interior contains four examination rooms, three animal wards for incidental boarding, two recovery rooms, a surgery room, a treatment room, an x-ray room, a dental cleaning room, a recovery room, a grooming room, and office, restroom waiting, storage and preparations areas. There are also indoor runs. Six veterinarians are employed and 22 employees. The hours of operation are 8:30 a.m. to 8:00 p.m. Monday-Friday, and 8:00 to 4:00 p.m. on Saturday. Emergency services are available 24 hours a day, seven days a week.

9. Date of Nonconformance. The petition states that the subject use became nonconforming on April 13, 2004, the effective date of the CB 75-2003-2004 Comprehensive Zoning). According to the Technical Staff Report (TSR), the animal hospital use became nonconforming on July 12, 2001, the effective date of ZRA-30, which changed the old special exception section of the Zoning Regulations to the current conditional use section. ZRA-30 also

removed property in the R-ED and R-20 districts from being eligible for the Animal Hospital Conditional use category.

10. Documentation provided to establish existence of the use on the date it became nonconforming. The items submitted with the petition included Maryland Sale and Use Tax License information for the years 1995 and 2004-2011. At the hearing the Petitioner introduced into evidence 2002, 2003 Maryland State Department of Health Controlled Substances Registration/Certificates (Petitioner Exhibit 2), and 1999, 2000, 2001 U.S. Drug Enforcement Administration Controlled Substance Order Forms (Petitioner Exhibit 3).

11. Proposed Expansion. The Petitioner is proposing to enlarge the alleged nonconforming use with a 1,354.29-square foot addition onto the north side of the building. With the addition, the total floor area would increase to 8,257 square feet and the parking would be reduced by three spaces (41 total). The addition represents a 19.6% increase in the existing floor area, which is stated to be 6,903.18 square feet. The Petitioner is also proposing to renovate the interior for needed office and lobby space, reconfigured examination, surgical, office and waiting areas, one additional minor surgery room and four examination rooms.

The Petitioner may add an additional veterinarian (seven total) and one additional employee (23 total). The hours of operation would not change. The petition also states the existing mature evergreen trees and vegetation along the east lot line will provide buffering.

12. Responding to a TSR comment about the difference in square footage stated on the petition and that shown on SDP 90-181, Dennis Ream testified the difference is the result of how building coverage was calculated in 1990. He explained the 1990 square footage, stated as

5,983 square feet on the SDP and as 6,903 square feet on the current petition, is based on a staff report addressing parking requirements based on building coverage, minus storage and utilities. He also testified that there might be security lighting on the addition.

13. During the hearing, the Hearing Examiner took notice of an entrance/exit door in a minor procedure room. The door is depicted on the east façade of the proposed addition. Dennis Ream testified the door and façade are 24 feet from the side property line. He also testified that the side yard setback is ten feet and that the front setback is 50 feet.

14. Architect Richard Renschem testified to preparing the floor plan. Discussing the doorway/egress on the east façade, he stated it would provide an outdoor area for animals in the isolation area, so they would not be around other animals. They would be relocated from an existing outdoor area. Staff would be walking animals on a leash. He further opined that this outdoor area for walking would be no different from the one currently in use.

15. Katie Yeiser, hospital manager, testified that the Petitioner is not proposing any outdoor uses. On recall, she testified that the proposed doorway on the east side of the building was to permit staff to walk very sick animals in isolation in a different area than the one already in existence. She explained that staff walks animals on leashes outdoors to obtain urine or fecal samples.

16. Adjoining property owner Patricia Washington testified to regularly observing owners walking their animals along the open area between the pine trees and the building's east side.

17. During the hearing, the Hearing Examiner noted she had not observed the

outdoor area during her site visit. Because the photographs of the existing use do not depict the southern façade and property area where the "outside area" is located (Petitioner's Exhibit 7A-L), the Hearing Examiner revisited the site, where she observed a staff member (apparently) in a hospital top walking a dog in a fenced area on the south side of the animal hospital building. The wire fence appeared to be about six feet high.

CONCLUSIONS OF LAW

I. A Background Issue – Outdoor Use

An important background issue in this case is the animal hospital operation's current and proposed outdoor use of the site. Hospital manager Katie Yeiser testified that no outdoor uses were proposed and later stated that staff walks animals outside on leashes to obtain urine and fecal samples. Based on the Hearing Examiner's observation at a site visit and the evidence of record, the Petitioner is apparently using an outdoor fenced portion of the Property next to the south side of the animal hospital to walk animals for diagnostic purposes. The Petitioner is also proposing an entrance/exit door off the minor procedure room next to the proposed isolation room (in the addition) for an outdoor use area along the east property line where staff could walk very ill animals on leashes. Adjoining property owner Patricia Washington testified that owners walk their animals along the open area between the pine trees and the building's east side.

Such existing and proposed outdoor uses are not permitted as part of an animal hospital conditional use category in the R-20 zoning district, nor were they permitted by its special exception predecessor. The mark-up revisions to the ZRA 30, 2001 conditional use amendments

to the animal hospital use (which allegedly made the Petitioner's animal hospital operation nonconforming in 2001) make this clear. These revisions provided as follows.

3. Animal Hospitals

A [[special exception]] CONDITIONAL USE may be granted for an animal hospital in the RC[[[,] OR RR[[[, R-ED or R-20]] Districts, provided that: [[all pens and runs must be enclosed within buildings.]]

A. IF OUTSIDE PENS OR RUNS ARE INCLUDED, THEY WILL BE AT LEAST 200 FEET FROM ANY LOT LINE AND SCREENED FROM ROADS AND RESIDENTIAL PROPERTIES. INCLUDED:

(1) THEY WILL BE AT LEAST 200 FEET FROM ANY LOT LINE AND SCREENED FROM ROADS AND RESIDENTIAL PROPERTIES; AND

(2) THEIR HOURS OF OPERATION WILL BE ESTABLISHED BY THE BOARD OF APPEALS.

B. BUILDINGS WHERE ANIMALS ARE KEPT OR TREATED WILL BE LOCATED OR SOUNDPROOFED SO THAT NOISES ARE NOT DETECTIBLE AT THE LOT LINES.

C. DISPOSAL OF WASTES WILL BE SUCH THAT ODORS OR OTHER EMISSIONS ARE NOT PERCEPTIBLE AT LOT LINES.

According to this mark-up language, prior to 2001 animal hospitals were permitted as a special exception in the R-20 district subject to the restriction that all "pens and runs must be enclosed within buildings." No outdoor uses (excluding parking) were permitted as part of the use.¹ The Petitioner cannot therefore claim the current outdoor use is part of a lawfully noncomplying use.

The Petitioner generally suggested this outdoor use might be permitted pursuant to one or two Board of Appeals (or judicial decisions) that allegedly addressed the definition of a pen or exercise area in relation to an appeal concerning a kennel conditional use. However, kennels and animal hospitals conditional uses in rural zones may have outdoor pens and runs as part of

¹ The Hearing Examiner takes notice that the Zoning Regulations also did not permit outdoor uses such as pens or runs as part of an animal hospital use in a pre-R-20 district.

the use subject to significant setback and screening requirements intended to reduce their impact on adjoining properties. The Hearing Examiner also finds persuasive the Board of Appeals conclusions concerning a request for clarification about a condition prohibiting outdoor pens or runs as part of an animal hospital special exception on rural residential zoned property in Board of Appeals Case No. 920C. In its clarification order, the Board rejected a veterinarian's argument that in the veterinary trade, a pen for exercising animals is a substantial structure, not a delineated pen or run. It instead concluded a "pen" or "run" includes any fenced enclosure for animals used for the purpose of exercise or confinement.² In this case, the confinement of animals is for diagnostic purposes, which is an impermissible outdoor use.

The law of nonconformances requires that all of a property must have been used in a permissible means before a zoning change was enacted. See, e.g., Maryland Reclamation Associates, Inc. v. Harford County 414 Md. 1 994 A.2d 842 (2010). In Howard County, Section 129.E.1.b of the Zoning Regulations permits a lawfully noncomplying animal hospital use to expand its physical facility beyond the area occupied at the time ZRA 30 became effective, subject to the restriction that the enlargement may not exceed 100 percent of the gross floor area of structures. (Emphasis added.) As discussed above, an outdoor use area, even fenced, is not a physical facility, especially considering that Section 129.E.1.c additionally restricts the enlargement of any *outdoor land area* occupied by a nonconforming use to expansions of parking areas (Emphasis added.)

² A Hearing Examiner applied this definition in Board of Appeals Case No. 06-007C, a petition for an animal hospital, dog kennel and pet grooming conditional uses.

For the reasons discussed herein, the Hearing Examiner's approval of the Petitioner's petition to expand the lawfully noncomplying use is conditioned in part on the Petitioner removing the doorway/entrance depicted off the proposed minor procedure room in the proposed addition, the Petitioner's discontinuance of the use of the existing fenced outdoor area, and the Petitioner's removal of the fencing associated with this outdoor use.

II. Confirmation of Nonconforming Uses (Section 129.D)

The Hearing Authority may confirm the factual existence of a nonconforming use through petition. The petition must include the following proof of nonconformance.

a. A statement and plans or other illustrations fully describing the magnitude and extent of the nonconforming use.

The petition states the use currently comprises a 6,903-square foot building. According to the testimony of Dennis Ream, the difference between this building coverage and the 5,983 square foot area noted on SDP 90-181 is based on the building coverage area minus the storage and utility area used to calculate the requisite number of parking spaces in BA 88-55E.³ Also included in the petition is a copy of Site Development Plan SDP 90-181.

b. A statement identifying the date the use became nonconforming to the use provisions of the Zoning Regulations.

The petition incorrectly states the use became nonconforming as April 13, 2004, the effective date of the CB 75-2003-2004 Comprehensive Zoning. According to the TSR, however,

³ The Hearing Examiner notes the Petitioner did not include the square-footage of the outdoor fenced area in describing the extent of the alleged nonconforming use.

the July 12, 2001 effective date of ZRA-30 is the correct date. ZRA-30 eliminated the animal hospital conditional use in the R-20 district.

c. Documentation substantiating the existence of the use on the date it became nonconforming and clearly demonstrating the continued and uninterrupted use or operation thereof from the specified date to the time of filing the application. The burden shall be on the property owner to establish the existence of the nonconforming use.

The documentation submitted with the petition included Maryland Sale and Use Tax License information for the years 1995, and 2004-2011. At the hearing the Petitioner introduced into evidence Maryland State Department of Health Controlled Substances Registration/Certificates for 2002 and 2003 (Petitioner Exhibit 2), and U.S. Drug Enforcement Administration Controlled Substance Order Forms for 1999, 2000, and 2001 (Petitioner Exhibit 3). The Hearing Examiner concludes the Petitioner meets its burden of establishing the existence of the nonconforming use on July 12, 2001 and clearly demonstrating the continued and uninterrupted use or operation from this date (exclusive of the outdoor fenced diagnostic area).

II. Extension, Enlargement, or Alteration of Nonconforming Uses (Section 129.E)

The Hearing Authority may authorize the extension or enlargement of a nonconforming use or the alteration of a structure containing a nonconforming use, with or without conditions, provided the Petitioner demonstrates compliance with five standards.

a. That any changes or additions to the activities taking place in connection with the nonconforming use will not change the use in any substantial way;

The proposed addition, loss of three parking spaces and the reconfiguration of the existing interior space is intended to provide for needed office and lobby space, reconfigured examination, surgical, office and waiting area, one additional minor surgery room and four examination rooms. One veterinarian and one additional staff employee may be hired. These proposed intensifications and extensions of use will not change the use in any substantial way, in accordance with Section 129.E.1.a.

b. That an enlargement may not exceed 100 percent of the gross floor area of structures or 100 percent of the gross acreage in the case of nonconforming land, above that which legally existed at the time the use first became nonconforming;

The Petitioner is proposing a 1,354.29-square foot addition onto the north side of the existing 6,903.18 square foot brick building, which represents a 19.6% increase in the existing floor area, and the elimination of three parking spaces, in accordance with Section 129.E.1.b.

c. That the outdoor land area occupied by a nonconforming use may be enlarged only to provide additional parking area;

As discussed above, the Petitioner is not permitted to use the existing fenced area as part of the use or to enlarge the outdoor land area occupied by the animal hospital so that staff may walk animals on leashes and these uses are prohibited as a condition of approval. There being no other outdoor uses proposed, the petition accords with Section 129.E.1.c.

d. That an enlargement would not cause a violation of the bulk regulations for the zoning district in which the property is located;

The proposed expansion through the construction of an addition on the north side of the existing hospital will comply with the 10-foot structure side setback and the fifty-foot front setback, in accordance with Section 129.E.1.d.

e. That the extension, enlargement or structural alteration would not cause an adverse effect on vicinal properties.

Adjoining property owner Patricia Washington testified animal owners currently walk their animals along the common east property lines and, absent conditions to prevent same, the Hearing Examiner anticipates this activity would occur along the addition, causing an adverse effect on vicinal properties. The evidence of record also indicates that the pine tree landscape buffer no longer provides adequate screening for the use or the proposed addition, another adverse effect. The Petitioner agreed to install a privacy fence along the common property line to screen the current and proposed addition in part to deter this use and to screen the addition. Subject to the condition that the Petitioner install a privacy fence along the common property line, and that the Petitioner work with the adjoining property owners in the selection of a reasonable privacy fence, the Hearing Examiner concludes the proposed enlargement accords with Section 129.E.1.e.

ORDER

Based upon the foregoing, it is this **12th day of May 2011**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of VCA Lewis Animal Hospital for confirmation and enlargement of a nonconforming use for an Animal Hospital in an R-20 (Residential-Single) Zoning District is **GRANTED**;

Provided, however, that:

1. The Petitioner shall cease using the fenced outdoor area as part of the animal hospital use and remove the fencing.

2. The Petitioner shall eliminate the doorway/entrance off the Minor Procedure Room and leading to the east side of the animal hospital. The Hearing Examiner has marked the doorway/entrance to be removed on Petitioner Exhibit 6B.

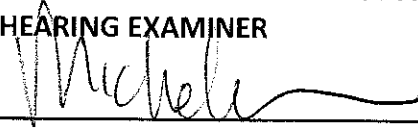
3. There shall be no doorways or entrances on the east side of the proposed addition, nor shall the Petitioner install a new doorway/entrance on any part of the existing east façade.

4. The Petitioner shall install a lawful privacy fence along the east property line, beginning at the northernmost section of the proposed addition and continuing to the southern end of the existing structure. The fencing, including any required gates, shall also extend to the structure itself to deter animal owners from walking their animals in this area. The Petitioner shall consult with Patricia Washington and adjoining property owners on the reasonable design of the fence. The fence and agreed above design shall be depicted and noted on the Site Development Plan.

4. The Petitioner shall hire no more than one additional veterinarian and one additional staff employee.

5. The nonconforming enlargement shall apply only to the land area, uses, and structures as described in the petition and plan submitted, and as conditioned, and not to any other activities, uses, structures, or additions on the Property.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER



Date Mailed: 5/12/11

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.