

IN THE MATTER OF	:	BEFORE THE
<b>ELISA KAMENS</b>	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 17-020C

.....

### DECISION AND ORDER

On March 3, April 9, and May 24, 2018, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the Conditional Use petition of Elisa Kamens (Petitioner) for a Pet Day Care Facility in an RC-DEO (Rural Conservation: Density Exchange Option) zoning district, filed pursuant to § 131.0.N.39 of the Howard County Zoning Regulations (HCZR).

Petitioner certified to compliance with Howard County Code hearing notice and advertising compliance. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Thomas Coale, Esquire, represented the Petitioner. Thomas Meachum, Esquire, represented Protestants James and Verity Truby, Suzanne Hoffman, Marianne and Duane Alexander, Sara Via, and Yovonda Brooks. Sarah Via, James Truby, Suzanne Hoffman, Harry Hoffman, Christian Domerchie, and Joan Pontius testified in opposition.

Petitioner introduced into evidence the exhibits as follows.

1. Daily schedule

Protestants introduced into evidence the exhibits as follows.

1. A-N. Exhibits, Sara Via, location and subject property, data
2. A-I Photographs, Yovonda Brooks, view from her property, Manor Lane, Countryside Doggie Day Care entrance and site
3. BA 14-018C, BOA decision and order denying pet dare care CU

4. A-D, Joan Pontius, location of vicinal historic sites
5. Definition of "Business Function"
6. "Outside" pet time + property configuration graphics

### FINDINGS OF FACT

1. Property Identification. The RC-DEO (Rural Conservation: Density Exchange Option) zoned subject property is located in the 2nd Election District on the eastern side of Manor Road about 1,700 feet north of Clarksville Pike. The property is referenced as Tax Map 29, Grid 11, Parcel 327, Lot 6, and is known as 4807 Manor Lane (the Property).

2. Property Description. The 2.902-acre Property is improved with a one-story single-family detached L-shape dwelling with an attached garage and sits about 170' from the Manor Lane front lot line. To the dwelling's east is a fenced pool and concrete pad. A board-on-board fence runs along the northern, western, and eastern property lines. A driveway in the central portion of the Property provides access and ends in a circular turnaround and parking area in front of the dwelling. Close to the front lot line are multiple deciduous and evergreen trees and bushes. A row of Leyland Cypress trees runs along the southern lot line in front of a 5' board fence located about 5 feet from the lot line. The rear section of the Property is mostly lawn enclosed by fencing.

3. Vicinal Properties. All vicinal properties are zoned RC-DEO. The northern and eastern lots are Agricultural Land Preservation Program properties. To the south are two pipestem driveways for Lots 8 and 9, and beyond these driveways, the residential property of Yovonda Brooks. To the west, across Manor Lane, is a Non-Buildable Agricultural Preservation Parcel. To

the north is an Agricultural Preservation Parcel.

4. Roads. Manor Lane Manor Lane has 2 travel lanes and about 20 paving feet within a variable width right-of-way (ROW). The speed limit is 30MPH. DPZ reports in its technical staff report (TSR) that visibility from the driveway entrance onto Manor Lane appears to be acceptable, with estimated sight distance of at least 800 feet to the north and 700 feet to the south. However, precise sight distance measurements may only be determined by a detailed sight distance analysis. There is no traffic volume data for Manor Road.

5. Water and Sewer. The proposed use will be served by private well and septic.

6. The General Plan. PlanHOWARD 2030 designates the Property as "Rural Resource" on the Designated Pace Types Map. Manor Road is a Local Road.

7. The Proposed Conditional Use. Petitioner seeks approval for a Pet Day Care Facility in association with the residential use of the Property for one resident. The petition narrative supplement (pgs. 1-2) includes this information about the proposed use.

The pet day care is proposed to serve a maximum of 15 pets, all of which will be dogs aged one year or younger. The pet care operation will be primarily conducted in the Dwelling's basement and garage areas, which will be specifically designated for the pet day care use.

The proposed hours of operation are from 7:00am – 6:00pm, Monday through Friday. On Saturdays from 9:00am – 2:00pm, the Petitioner proposes to schedule time for one-on-one client visits to review what their pets have been taught over the previous week. There will be no more than five client visits per Saturday and no more than two dogs on the site at any given time.

A maximum of three employees, including the Petitioner, would be onsite at any one time on weekdays and only one employee would be onsite for the Saturday appointments. No material storage is proposed and there will be no deliveries of commercial equipment or supplies to the Property.

Outdoor lighting will consist of the lighting currently on the dwelling and potential ground level lighting in the parking area to ensure the safety of employees.

On pgs. 3-5 of the supplement, Petitioner describes the proposed use – the operational

characteristics of the facility - and its compliance with HCZR § 131.0.39.g, which regulates the use of "outdoor areas for walking or exercising pets."

The primary purpose of the outdoor area is for toileting, which will occur in 15-minute increments, five pets at a time.

Petitioner will provide outdoor exercise to the pets on a one-to-one basis. The pets will be permitted to swim in the pool [] or exercise in the area marked "Outdoor Area B."

Outdoor exercise will include training exercise based on the specific requests of the pet's owner.

Petitioner intends to limit outdoor use of the Property to 4 hours per day.

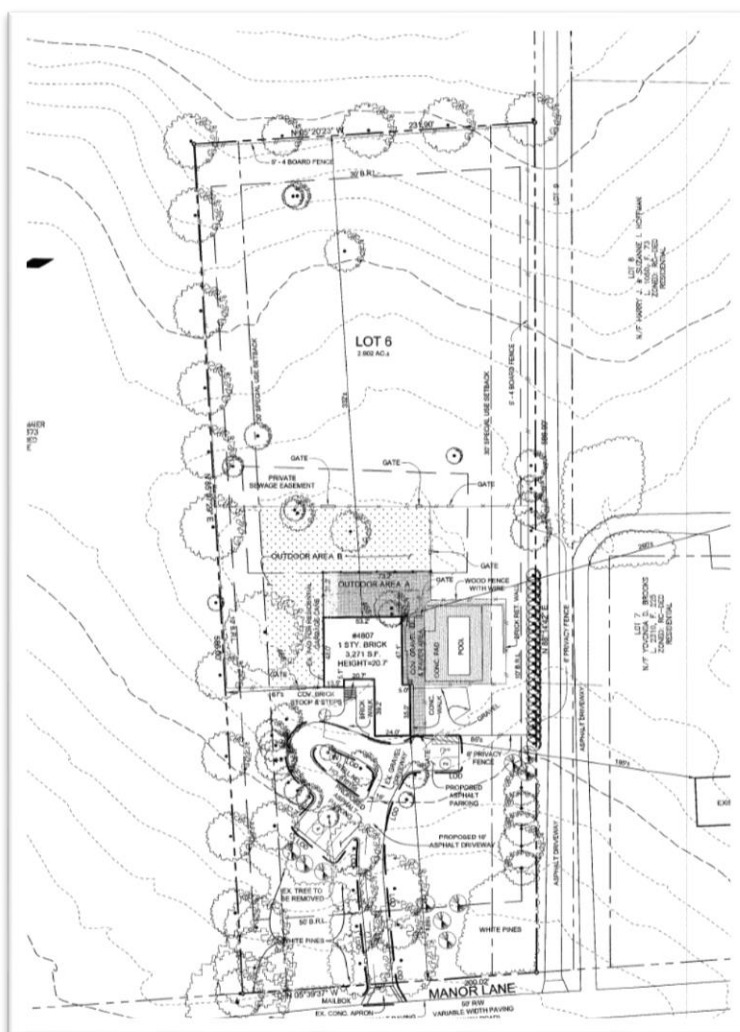
The outdoor area proposed for the pet day care facility will be confined to a relatively small area of the rear yard and northern side yard. As shown on the Conditional Use Plan, this outdoor area will be enclosed by several sections of fencing for containment.

The vast majority of outdoor time will be spent in the northern section of the [outdoor area], away from residential properties.

Animal waste will be stored in a residential-style metal garbage can located on the north side of the house, and will be taken to the landfill one or two times each week.

Map 1 shows the entire Property, which is about 580 feet deep. The front lot line along Manor Lane is about 200 feet wide. The rear lot line is about 232 feet wide. Running along the southern lot line are two private pipestems driveways providing access to residential properties owned by Protestants Harry Hoffman and Suzanne Hoffman and Dr. Sara Via. On the south side of these driveways is the residential property owned by Protestant Yovonda Brooks.

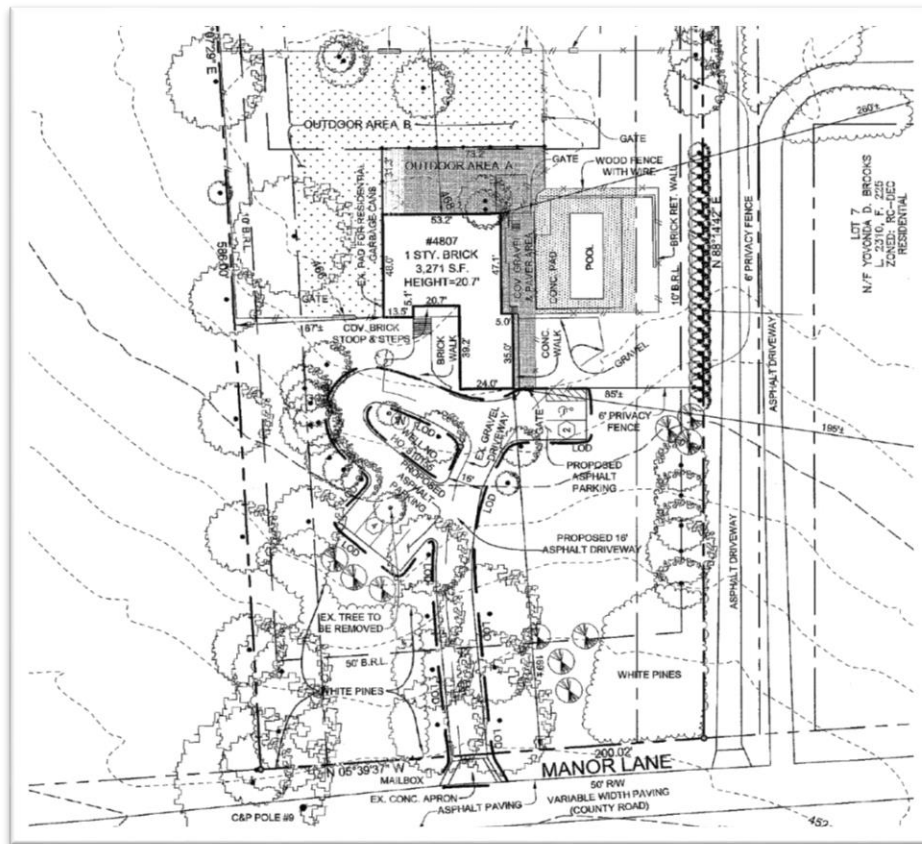
Map 2 is the proposed conditional use site (CUS), which will be located in the front section of the Property. Access to the facility will be from a 16-foot wide driveway extending east from Manor Lane to a driveway loop in front of the house. Six parking spaces will be provided on the south and west sides of the driveway loop. Also shown on this plan is the proposed landscaping for the parking and outdoor areas.



**Map 1. 4807 Manor Lane**

The proposed Pet Day Care Facility would operate primarily within the existing residence and the attached garage in front of the dwelling. The pool to be used for puppy exercise can be seen on the south side of the dwelling. Two "outdoor areas" are proposed. Outdoor Area A directly behind the dwelling would be used as a potty training and exercising area. The larger Outdoor Area B on the north and rear sides of the dwelling (behind Area A) would be used for training, socialization and exercising. Petitioner is also proposing a fence and

gate system for puppy safety and containment, detailed below.



**Map 2. The Proposed Conditional Use Site**

#### 8. Agency Comments.

DPZ. DPZ recommends the petition be granted subject to two approval conditions: that there shall be no age restrictions for dogs and that use of the outdoor area shall be restricted to 8:00am - to 4:00pm, Monday through Friday.

DPZ, Development Engineering Division. All improvements must comply with current Howard County design criteria including APFO requirements and stormwater management.

Bureau of Environmental Health. During building permit review, the Health Department will evaluate the existing sewage disposal system and sewage disposal area to determine adequacy. The increased use may require an expansion of the system and expansion of the disposal area. The proposed paved area is less than 10 feet from the existing well. The paved area must be revised to meet the 10-foot setback to the well or a new well must be drilled in a location approved on a perc certification plan prior to Health approval of a building permit.

Department of Inspections, Licenses and Permits. Please provide a van accessible handicapped parking space with an eight (8) foot wide adjacent access aisle. The petitioner shall be advised that the basement

of the dwelling and the route from the parking shall be handicapped accessible, as required by the Maryland Accessibility Code.

**Testimony of Petitioner Elisa Kamens**

9. Petitioner Elisa Kamens testified she would employ operant conditioning to train the puppies. Puppies would be exercising in the pool, but there is no medical purpose to this aquatic exercise. She also described an internal removal fencing system to be used in the northern outdoor exercise section behind the dwelling. The business would operate primarily in the basement and garage, which would be soundproofed. Puppies would also receive "home setting" training upstairs on the first floor. All outside training would be nonverbal (a whistle or clicker would be used.)

10. Ms. Kamens testified extensively about her professional training and "hands-on" training presence at the proposed facility.

**Protestant Testimony**

11. Manor Lane. Several Protestants, including, Dr. Sarah Via, Harry Hoffman, Suzanne Hoffman, and Joan Pontius, testified about the historical character and condition of Manor Lane. Dr. Via testified to the road's historical connection to Doughoregan Manor. She believes its open section design and narrow width means the use is inappropriate at the proposed location because the existing brewery at the end of the lane brings heavy traffic, and traffic would worsen if the use were granted. Protestant Exhibit (PR) 2B is a photograph of Manor Lane taken by Protestant Yovonda Brooks showing the width of Manor Lane, which has no shoulder.

12. Noise/Outdoor Use. Every Protestant who testified opined the use would generate

unacceptable noise levels in the quiet neighborhood. They believe they will be able to hear barking when the puppies are in the indoor facility use and when they are toileting, exercising, or training outside. Joan Pontius testified she has had to file animal control complaints because her neighbors do not control their barking dogs. Dr. Via and others challenged PE1, the daily schedule, opining the puppies could not meet the proposed toilet break schedule, meaning they would be outdoors more often. PR5.O is a chart intended to prove that the puppies will need to be outdoors more often than proposed on the PE1 daily schedule. If they are outdoors more often, the use will generate more noise.

13. Parking Landscaping. Dr. Via testified the proposed landscaping does not meet the HCZR §§ 131.0.B.3.b and B.3.c parking/landscaping criteria. PR1C is a photograph looking north from the pipestem driveways toward the proposed parking area. Two vehicles are visible. PR1D is a graphic overlay of PR1 showing three trees, which would better screen the parking area. PR1E-F are also intended to demonstrate the inadequacy of the proposed landscaping. She also pointed out that some of the trees/vegetation planted by Petitioner have died or in distress. PR2A is a photographic view of the CUS taken by Protestant Yovonda Brooks from her residence and showing the visibility of the parking area.

14. Fencing/Landscaping for the Outdoor Areas. Dr. Via testified the existing open fencing proposed for Outdoor Area A is inadequate because the area is visible from her driveway and it will not mitigate the sound of barking puppies when they are outside, as shown on PR1G-H. PR1I shows Outdoor Area B, which has the same open fencing. The closed perimeter privacy fence



section seen in PR1J- has gaps, does not extend to the edge of Outdoor Area B as shown on the CUP, and the screening trees do not run the entire length of the fence. In her view, this fencing/screening system will allow puppies to see out. If they can see out, they will bark. PR1L-M show the Leyland Cyprus trees planted by Petitioner, which in Dr. Via's view were planted too close to the fence and they will overhang onto her property as they grow. PR6 shows the CUP fence system. As marked up, it shows the vinyl fence along portions of the Outdoor Area perimeters with a note stating this fence type is more difficult to keep upright for more than a few feet. It also indicates there is no gate into Area A from Area A and the house and that the rear CUS perimeter privacy fence does not run the full length.

15. Impact on Historical Sites. Christian Domerchie, Joan Pontius, and other Protestants disagree with the TSR's identification of a lone vicinal historical site, HO-421, known as the "Gray House," and which is located at 4754 some 270 feet to the northwest of the Property. PR1A and PR 4A-C show two historic site at the intersection of Manor Lane and Clarksville Pike. HO-421 at 10820 Clarksville Pike is the site of Thompson Farm. HO-135 at 4955 Manor Road is the site of Porter's Tavern. PR4.A shows the tavern's closeness to Manor Lane. PR4.B is intended to show that the current owner of 4955 Manor Lane had to place multiple large boulders in the front section of his yard because motorists/trucks turning into Manor Lane continually encroached onto the property. Protestants believe the use will harm these historic sites.

16. Location and Site. PRG-I are Protestant Yovonda Brooks' photographs of the location of the only Hearing-Authority approved Pet Day Care Facility, the Countryside Doggie Day Care

Facility conditional use granted in BA 17-021C&V. Comparing this location to the proposed location in this petition, Ms. Brooks opined the Countryside Doggie Day Care Facility is appropriately located, being behind and next to commercial uses, and away from residential uses. By comparison, the proposed CUS is located in a residential community.

PR5.B-C are graphic representations intended to show the Property's narrowness will create atypical adverse impacts because the CUS is smaller and closer to the road. Protestant Susan Hoffman testified this would result in a more intense use. Dr. Via, James Truby, Joan Pontius, Suzanne Hoffman, and others testified that the use is inappropriate in the community, which has significant acreage subject to preservation easements.

17. Impact on Retired Neighbors. Dr. Via, James Truby, Suzanne Hoffman and other Protestants believe the neighborhood will be uniquely affected by the noise associated with the use because many residents are retired and home during the day.

18. Pet Day Care Facilities as a Home-based Use. Christian Domerchie referenced the Hearing Examiner's January 15, 2015 BA 14-018C denial, which included an overview of the 2013 comprehensive zoning process adding Pet Day Care Centers as a new conditional use category. He believes the petition should be denied because Petitioner will not live at the residence.

## CONCLUSIONS OF LAW

### I. Background Issues

#### A. The Legislative History on the Uses Potentially Permitted Under HCZR § 131.0.39, the Pet Day Care Facility Conditional Use Category

One primary area of dispute between the parties is the uses permitted as part of a Pet

Day Care Facility conditional use, if approved. Petitioner contends the outdoor exercise, socialization, and training uses are permitted uses if approved by the Hearing Authority (the Hearing Examiner and the Board of Appeal.) Protestants contend the proposed outdoor exercise, socialization, and training uses are more in the nature of a kennel conditional use, which is subject to a greater minimum acreage and greater training use setbacks.

The "Pet Day Care Facility" conditional use category was adopted by the County Council through the 2012-2013 comprehensive zoning process (effective October 6, 2013). These are the DPZ proposed and adopted (without amendment) HCZR § 131.0.N.39 Pet Day Care Facilities conditional use standards. The 2013 uses approved for the Pet Day Care Facility use are pet day care and the exercising and walking of pets.

A Conditional Use may be granted in the RC, RR or R-20 Districts for pet day care facilities, provided that:

- a. The minimum lot size shall be one acre.
- b. All day care business functions must be completely enclosed within a building. Noise must not be perceptible at lot lines.
- c. The Hearing Authority may set hours of operation and limitations on the number and type of pets cared for.
- d. The facility shall not be located on a shared driveway.
- e. Parking areas shall be located and landscaped to minimize visibility from roads and adjacent residential properties.
- f. There shall be no overnight boarding of pets.
- g. Outdoor areas for walking or exercising pets may be permitted provided that pets shall not be left unattended in such an area. The Hearing Authority may set a limit on the number of pets permitted simultaneously in the outdoor area. The perimeter of this outdoor area shall be fenced and landscaped to ensure that animals are confined to the property and to minimize the visibility of the enclosure. All fencing shall comply with all requirements for fences as noted elsewhere in Section 128.0. The petitioner must clearly delineate the outdoor area on the Conditional Use plan.
- h. Disposal of wastes must be such that odors or other emissions are not perceptible at lot lines.
- i. On an ALPP purchased or dedicated easement property, the following additional criteria are required:
  - (1) The use shall not interfere with farming operations or limit future farming production.

(2) Any new building or building addition associated with the use, including any outdoor storage and parking area shall count towards the cumulative use cap of 2% of the easement.

Ms. Kamens was the first pet day care Facility conditional use petitioner. The Hearing Examiner on January 15, 2015 denied her BA 14-018C petition, declining to broaden the permitted uses to include outdoor canine aqua therapy and "crucial foundation work." On appeal, the Board of Appeals (BOA) voted 2-2 (denial/approval, with one recusal) to deny the petition. The tie vote effected a denial of the petition (November 22, 2016). The BOA concluded "[i]n light of the totality of the credible evidence offered by the parties and admitted into evidence during the course of the hearings, the Board is not persuaded that the proposed pet day care facility would not generate noise that would not be perceptible at lot lines." D&O, pg. 5. As the Hearing Examiner understands the denial, the Board members voting for denial read the HCZR § 131.0.N.39.b standard as requiring persuasive credible evidence that no noise would be perceptible at lot lines.

Petitioner subsequently petitioned for a Zoning Regulation Amendment (ZRA 167) proposing language clarifying that the noise perception sentence in HCZR § 131.0.N.39.b applies only to noise generated by pets within the indoor principal business function building.

b. All day care business functions must be completely enclosed within a building.  
INDOOR [[N]]Noise must not be perceptible at lot lines.

When the County Council convened on January 3, 2017 and approved Bill 71-0201 (ZRA 167), Council Member Mary Kay Sigaty explained her reasoning for Amendment 1, which added a definition of "Pet Day Care Facilities" to the HCZR § 103.0 definitions section, it being unclear

how the use was meant to be applied in the 2007 and 2013 amendments.

DAY CARE FACILITY: AN ESTABLISHMENT WHERE, FOR A FEE, CARE AND SERVICES ARE PROVIDED FOR DOMESTIC PETS. SERVICES MAY INCLUDE GROOMING, TRAINING, EXERCISING, AND SOCIALIZING, BUT PETS ARE NOT TO BE BOARDED OVERNIGHT, BRED, SOLD, OR LET FOR HIRE.

In light of this legislative history, a Pet Day Care Facility permitted by conditional use approval has both primary and accessory operational use components. The primary operational use is the indoor pet day care use – the indoor pet day care "business function" which HCZR § 131.0.39.b requires to be completely enclosed within a building with no noise perceptible at lot lines from this primary use. The accessory operational use component is the walking and exercising of pets. When pets are walked or exercised in a specified outdoor area, they are subject to HCZR § 131.0.39.g.

g. Outdoor areas for walking or exercising pets may be permitted provided that pets shall not be left unattended in such an area. The Hearing Authority may set a limit on the number of pets permitted simultaneously in the outdoor area. The perimeter of this outdoor area shall be fenced and landscaped to ensure that animals are confined to the property and to minimize the visibility of the enclosure. All fencing shall comply with all requirements for fences as noted elsewhere in Section 128.0. The petitioner must clearly delineate the outdoor area on the Conditional Use plan.

Unlike Subsection .b, Subsection .g does not regulate noise levels. Outdoor noise is evaluated under HCZR § 131.0.B, the test for evaluating every conditional use petition for atypical adverse physical condition impacts.

One potential issue arising from this legislative history review is how the uses permitted by the regulatory definition of "Pet Day Care" as accessory uses - grooming, training, and socialization - are to be evaluated under the specific § 131.0.N.39 standards, which were not amended to add language regulating the areas where these accessory uses may occur or add

qualifying standards like those applicable to the indoor business function (no noise perceptible at lot lots) or outdoor areas for walking or exercise (requiring employee presence and fenced areas ). In accord with the rules of statutory construction, the regulatory definition of "Pet Day Care Facility" is to be read pari materia with the specific § 131.0.N.39 use standards. To maintain fidelity to the Pet Day Care Facility use standards, the Hearing Examiner reads the specific indoor and outdoor standards in §§ 131.0.N.39.b and .g as applicable to any proposed grooming, training, or socialization accessory use supportive of the primary Pet Day Care use. The logical "land use" foundation for this statutory construction is further addressed in Part III's review of the actual conditional use area in relation to the entire Property.

#### **B. Residency Requirements for Pet Day Care Facilities**

The Hearing Examiner in BA 14-018C surveyed the legislative history of the Pet Day Care Facility conditional use category. That decision and order discussed then DPZ Director Marsha McLaughlin's July 24, 2013 Council work session review of several proposed conditional use category text amendments. About the proposed Pet Day Facility use, she noted the Council had previously amended the HCZR to allow pet day care use as a matter of right in certain zoning districts. She also described a western Howard County veterinarian's proposed comprehensive zoning text amendment to allow a pet care use with complex subcategories, which DPZ simplified as the proposed Pet Day Care Facility Conditional Use intended as a home-based business in the RC, RR, or R-20 districts.

A reading of the DPZ proposed and adopted conditional use category evidences that the

use standards impose no property owner/occupancy/management requirement. The BA 17-021C&V decision and order approving up to 45 dogs within a new 6,525sf building with indoor recreation spaces, ancillary office space, and a 10'x160' outdoor exercise area, is clearly not a home-based Pet Day Care Facility. When owner occupancy or some residency requirement is an essential land use component of a conditional use category to make it compatible with the neighborhood, it is a specific standard. HCZR § 131.0.O, for example, is a new (2017) conditional use category authorizing Schools Providing Instruction in Music, Dance, Martial Arts, Yoga, And Meditation Practice in the R-20 zoning district. Per subsection .g, at least one person involved in the instructional school must reside in the structure.

Although not part of this conditional use petition, there will be residential use of the Property by one resident (not Ms. Kamens).

### **C. Atypical Adverse Impact on Retirees**

Protestants argue the use will generate atypical adverse impacts on the neighborhood because many residents are retired; being at home during the day, they will suffer inordinately from any puppy noise. As a first matter, Protestants adduced no evidence of any atypical noise levels from the proposed use. As for the alleged atypical noise impact on retirees in the neighborhood, the Hearing Examiner took notice during the hearing of the unreported Court of Special Appeals opinion, *Clarksville Residents Against Mortuary Defense Fund, Inc., Et Al. v. Donaldson Properties, Et Al.*, July 26, 2016 No. 1762, September Term, 2014. (Clarksville). Clarksville involved the Howard County BOA's approval of the Donaldson Funeral Home on

Clarksville Pike. In granting the petition, the BOA acknowledged the testimony about the cultural aversion of Asians living in the area to a funeral home, but concluded these cultural sensitivities were not a physical condition to be considered pursuant to the adverse impact test in what is now HCZR § 131.0.B, and further, that it was impossible for Donaldson to prove the Funeral Home would not offend a particular person or group of people. Pg. 30. The Court found substantial evidence supported this conclusion.

The thrust of Clarksville's argument is that the adverse effects of a funeral home at this location would be atypical because of the "large Asian demographic," but the generalized allegations of the inherent depressing and culturally unsettling effects of funeral homes is not something that lends itself to objective evaluation as do such physical conditions as are provided for in Section 131.B. The Board, after weighing the evidence, granted the conditional use. In doing so, it recognized the County Council's decision to include "Funeral Home and Mortuary" as a permitted conditional use in rural residential districts. The Board was not persuaded that the number of Asian residents in the area made the inherent adverse effect of a funeral home particularly atypical in this area. To the extent that the issue was fairly debatable, the Board found the opposition testimony to be "unsupported opinions and conclusions."

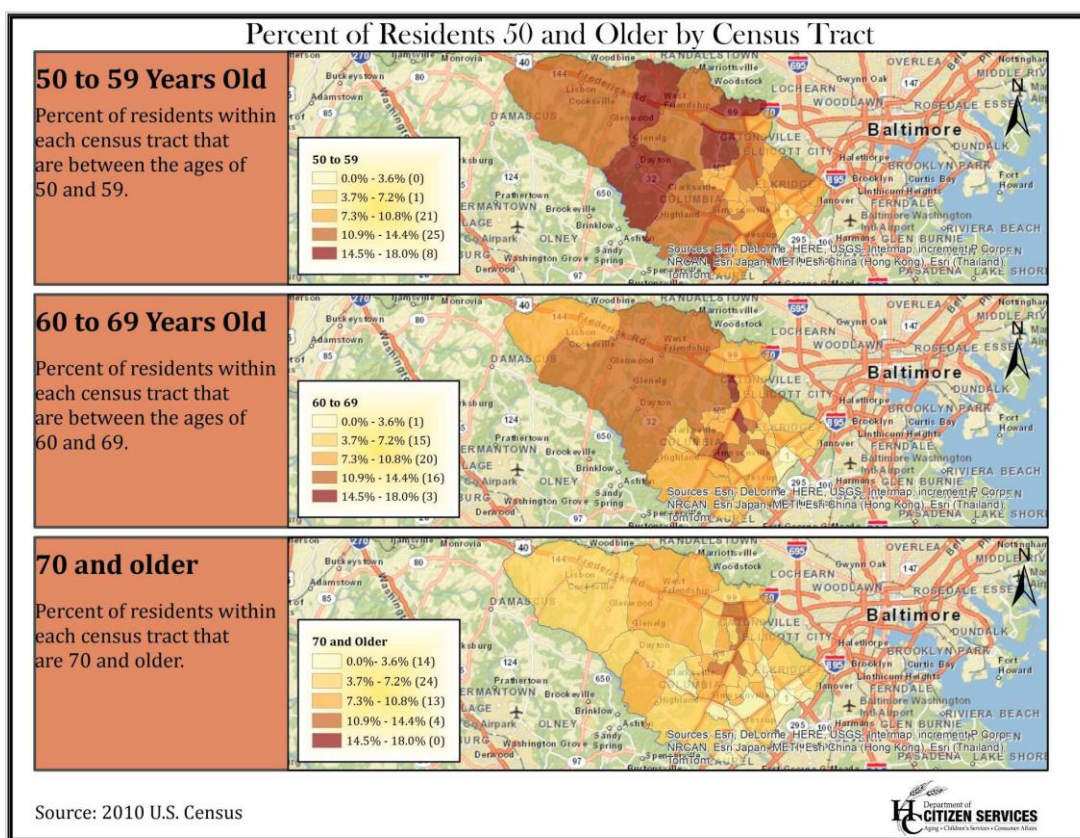
The Court in Footnote 14 of this paragraph made this observation.

We note that in HCZR Section 131.B considerations of adverse effects expressly include, but are not limited to, "noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions;" "[t]he location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping;" and "adverse[] impact[] [to] environmentally sensitive areas." (Alteration and emphasis added). These are all criteria that can be objectively evaluated.

Applying this line of reasoning to Protestants' argument that the use itself would generate atypical noise impacts due to the presence of many retired persons in the neighborhood, the Hearing Examiner concludes these opinions are conclusory at best and cannot be objectively evaluated. By what objective measure would noise have a differential impact on retired persons at home during the day than other populations at home during the day? (Is this Ageism?)



Furthermore, Protestants failed their evidentiary burden of adducing evidence of a higher retiree population in this neighborhood than elsewhere in the zoning districts where the use is authorized. Map 3 shows Howard County 2010 census data by "older adult" age. The county prepared this map for its Senior Community Master Plan initiative.<sup>1</sup> In no "retirement" age bracket does Protestants' neighborhood have an atypical percentage of persons of retirement age than elsewhere in the county where the use is permitted by Hearing Authority approval.



**Map 3. Howard County's Older Adult Population**

<sup>1</sup> Planning for the Growth of the Older Adult Population in Howard County, Appendix B: Demographic Report for the Commission on Aging, pg. 15. <https://www.howardcountymd.gov/Departments/Community-Resources-and-Services/Office-on-Aging-and-Independence/Publications/Master-Plan>. Visited July 16, 2018.

-----

For clarity, logic, and to avoid undue repetition, this decision and order first evaluates the petition to measure Petitioner's burden of proof and persuasion that the petition complies with the approval standards specific to the Pet Day Care Facility conditional use category.

**II. Specific Criteria for Pet Day Care Facilities (§ 131.0.N.39)**

A Conditional Use may be granted in the RC, RR or R-20 Districts for pet day care facilities, provided that:

**a. The minimum lot size shall be one acre.**

The Property is 2.9 acres.

**b. All day care business functions must be completely enclosed within a building. Indoor noise must not be perceptible at lot lines.**

The primary operational business function is the pet day care use, which will be located in the dwelling basement and garage. This area will be soundproofed. One proposed accessory use to this primary indoor business function is puppy training in a home setting on the first floor. Applying the above statutory construction to the home setting puppy training use on the first floor, all areas of this training area shall also be soundproofed as a condition of approval to prevent indoor noise being perceptible at lot lines. The Site Development Plan (SDP) or alternative compliance plan that the Hearing Examiner is requiring as a condition of approval for all the reasons discussed herein shall include a floor plan indicating the home setting training area. Additionally, all windows in areas of the structure used for day care and home setting training shall have sound-dampening curtains or blinds.

**c. The Hearing Authority may set hours of operation and limitations on the number and type of pets cared for.**

The maximum number of pets approved is 15 dogs, all of whom shall be no older than one year. In accord with the Hearing Examiners' statutory construction of the use, every dog receiving training or socialization shall be a pet day care puppy. This also means that only the puppies in day care may avail themselves of pool exercise at the designated hour. There should therefore be no dog arriving at the facility at any time or day just for this use, not even during the dog days of summer.

The proposed hours of operation are from 7:00am – 6:00pm, Monday through Friday. On Saturdays from 9:00am – 2:00pm, the Petitioner proposes to schedule time for one-on-one client visits to review what their pets have been taught over the previous week. There will be no more than five client visits per Saturday and Petitioner does not intend to have more than two dogs on the site at any time. The Hearing Examiner routinely reads proposed hours of operation as including the arrival/departure times for employees and clients. Therefore, no puppy may be dropped off and no employee shall arrive before 7:00am Monday-Friday. All puppies must be picked up before 6:00pm. All employees must leave by 6:00pm. These times are consistent with PE1, the daily schedule.

Petitioner intends to limit outdoor use of the Property to 4 hours per day. DPZ recommends the use of the outdoor area shall be restricted to 8:00am - 4:00pm, Monday through Friday. The Hearing Examiner agrees with Protestants that the puppies will likely be toileting outdoors more often than indicated on the daily schedule. PE1. For this reason, the Hearing

Examiner is not imposing any time limit on toileting in Outdoor Area A. In the Hearing Examiner's view, the 2-year renewal requirement will test whether this "open toileting" schedule will produce any atypical noise impact. Consequently, the requested 4-hour outdoor use window shall apply only to Outdoor Area B and the one-hour pool exercise use (10:30am 11:30am) Monday - Friday. Additionally, the approval condition imposed in § 131.0.N.39.g prohibits all use of Outdoor Area B between 10:30am and 11:30am Monday – Friday because there will be no fourth employee to attend puppies in this area.

As for the proposed Saturday hours, the Hearing Examiner when she approves weekend hours for conditional uses (not involving religious activities ) routinely sets a later start hour when the use in a residential neighborhood. For this reason, the Saturday use hours shall be 10:00am – 4:00pm. This Saturday operational use shall be confined to the day care structure and Outdoor Area B. There shall be no pool "exercise" on Saturday (which should not occur because this is not a training or therapy use.)

**d. The facility shall not be located on a shared driveway.**

The Property is not located on a shared driveway.

**e. Parking areas shall be located and landscaped to minimize visibility from roads and adjacent residential properties.**

The "minimize visibility" qualifying language in this standard requires parking areas to be located and landscaped to minimize the ground-level view from roads and residential properties, not the view from residential dwellings. The proposed parking area is shown on the CUP and seen in several Protestant exhibits. During operational hours, up to three employee vehicles will be

parked in this area. Puppies will be dropped off/picked up in the above noted times. Therefore, as a condition of approval, Petitioner shall install three Giant Arborvitae trees where three evergreen trees are shown on the CUP south of the two parking spaces. These trees shall be planted within the 30-use setback. Three Giant Arborvitae trees shall be planted on the easterly side of the four parking spaces closer to Manor Lane, where three evergreens are shown. Petitioner shall confer the DPZ staff as to the appropriate planting distance between the tree groupings during SDP or alternative compliance review.

**f. There shall be no overnight boarding of pets.**

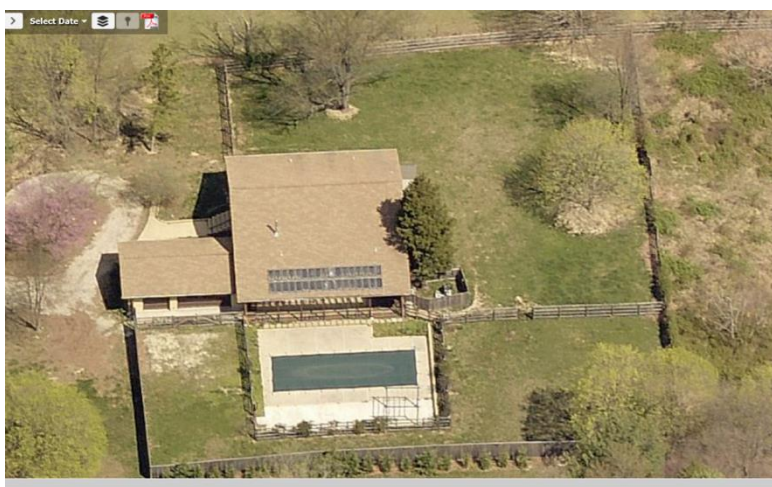
No overnight boarding of pets is proposed.

**g. Outdoor areas for walking or exercising pets may be permitted provided that pets shall not be left unattended in such an area. The Hearing Authority may set a limit on the number of pets permitted simultaneously in the outdoor area. The perimeter of this outdoor area shall be fenced and landscaped to ensure that animals are confined to the property and to minimize the visibility of the enclosure. All fencing shall comply with all requirements for fences as noted elsewhere in Section 128.0. The petitioner must clearly delineate the outdoor area on the Conditional Use plan.**

In addition to the indoor primary day care use area and accessory home setting training use, Petitioner is proposed three outdoor exercise, training, and socialization areas, the pool and Outdoor Areas A and B. No puppy may be left unattended in these outdoor areas. However, the operation will employ only three persons. One employee must always be in the indoor day care area, leaving only two employees, including Ms. Kamens, to attend to puppies in the three outdoor areas. PE1, the training schedule, indicates that "aqua exercise" will be offered one hour daily from 10:30am – 11:30am, for which an attendant must be present. Obviously, then, no puppy training or exercise or any use of Outdoor Area B can occur between 10:30am and

11:30am, there being only three employees. As a condition of approval, then, there shall be no use of Outdoor Area B between 10:30am – 11:30am Monday-Friday.

Photograph 1 is a 2017 Howard County GIS aerial view of the Property included here to assist the Hearing Examiner in this evaluation of the proposed fencing. The CUP, shown on Maps 1 & 2, depicts existing and proposed fenced areas.

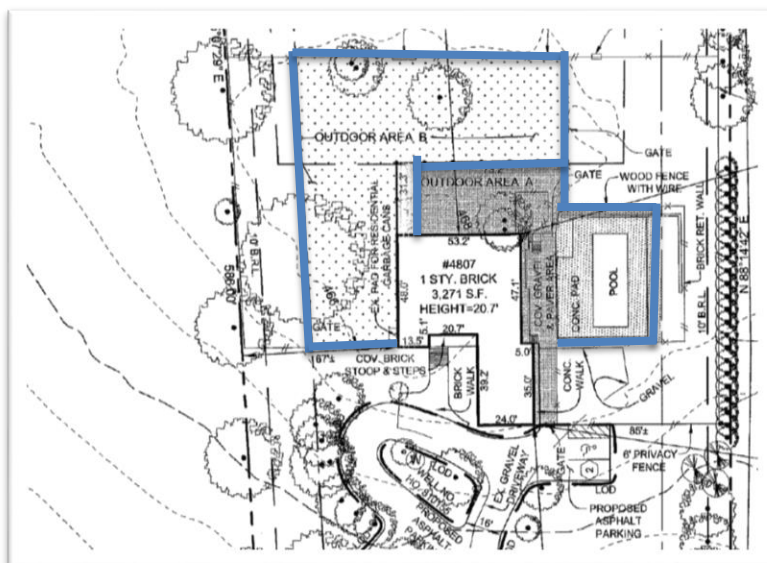


***Photograph 1, 4807 Manor Road, 2017 GIS Aerial***

What the Hearing Examiner identifies as the current "perimeter" fence is a six-foot wood privacy fence called out in the CUP legend as the existing wood fence (#-#) running in a southerly direction beginning at the sidewalk next to the garage and south running to the 10-foot structure setback. From here, it runs in an easterly direction along the 10-foot structure setback. This fencing can be seen in Map 1, PR2A, and PR1A-M. PR1.K shows the area where this wood privacy fence ends and what the CUP identifies as a 5-foot high, 4-board fence begins. This fence runs east along the 10-foot structure setback to the rear lot line, where it turns north and runs along the rear lot line and then runs along the north lot line and south to the facility structure.

There is also an internal fence system. The CUP shows an existing wood and metal/wire fence called out in the legend as ~~##x##~~ and surrounding the pool and running along the outer boundaries of the proposed Outdoor Area B and the southern boundary of Outdoor Area A. This fencing can be seen on PR1.G. Much of the perimeter fencing lies within the 30-use setback; consequently, this fencing may not be utilized to demonstrate compliance with this standard. Also shown on the CUP is a proposed vinyl pen area, which appears to the Hearing Examiner to be located along some portions of Outdoor Area A.

The Hearing Examiner is not persuaded the proposed fencing will minimize the visibility of these outdoor areas. As a condition of approval, Petitioner shall install a 6-foot high privacy fence along all perimeters (boundaries and interiors) of Outside Areas A and B, and the Outdoor Pool Exercise Area, with the appropriate gate system, as shown on Map 4. Petitioner shall also install a Type D landscape buffer along the outdoor perimeter fencing, with appropriate credit for the fencing as provided for in the Landscape Manual (pg. 33).



**h. Disposal of wastes must be such that odors or other emissions are not perceptible at lot lines.**

**i. On an ALPP purchased or dedicated easement property, the following additional criteria are required:**

- (1) The use shall not interfere with farming operations or limit future farming production.**
- (2) Any new building or building addition associated with the use, including any outdoor storage and parking area shall count towards the cumulative use cap of 2% of the easement.**

### III. General Criteria for Conditional Uses (§ 131.0.B)

HCZR §§ 131.0.B.1-3 require the Hearing Authority to evaluate whether a proposed Conditional Use through the application of three standards, harmony with the General Plan, overall intensity and scale of use, and adverse impacts.



**A. Harmony and Intensity of Use – On-Site Standards**

**1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.**

This mandate is reflected in the language of § 131.0.B.1, where the "harmony with the General Plan" standard is clarified to mean that the evaluation of a conditional use plan under the "in harmony with" the General Plan standard shall be premised on land uses and policies that can be "related to the proposed use." PlanHOWARD2030 designates the Property as "Rural Resource" on the Designated Place Type Maps. Pet Day Care Facilities are presumptively compatible in Rural Resource Areas absent specific Plan policies that such institutional or assembly uses in a Rural Resource Area inharmonious. There are no Howard County General Plan policies directly relating to the proposed use. By operation of state and county law, the Pet Day Care Center conditional use zoning text amendment adopted through the adoption of the 2013 comprehensive zoning ordinance, was a legislative finding of harmony with PlanHOWARD 2030.

**2. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site are such that the overall intensity and scale of the use(s) are appropriate for the site.**

Protestants effectively argue the Property's configuration makes the overall intensity and scale of the use inappropriate. No variances are requested, an indication of appropriate scale. There is no credible evidence that the location of the conditional use site in the front portion of the Property makes the overall intensity and scale inappropriate, considering that the maximum number of pets proposed is 15 dogs less than one year of age.

Still, the Hearing Examiner has some concern that the conditional use petition identifies the entire 2.9-acre Property as the conditional use site, given that the use standards were not amended to regulate the grooming, training, and socialization accessory uses contained in the regulatory definition of "Pet Day Care Center." Absent the above statutory construction, a petitioner could, arguably, conduct puppy training and socialization in areas other than the fenced/landscaped outdoor areas for walking and exercising. Although there is no evidence in this petition that Petitioner intends to use the back section of the Property for training or socializing, the Hearing Examiner's construction of the HCZR would prevent this.

Manor Lane is a local road and although the road is open section (no curb and gutter), it is a typical rural road where a pet day care facility could reasonably be expected to be located if there is safe ingress and egress.

Subject to all conditions of approval, the nature and intensity of the use, the size of the Property in relation to the use, and the location of the site, with respect to streets that provide access, are such that the overall intensity and scale of the use is appropriate.

#### **B. Atypical Adverse Impacts - Off-Site Standards**

A proposed conditional use's compatibility with the neighborhood is measured under § 131.0.B.3's six off-site "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (4) access; (5) impact on environmentally sensitive area, and; (6) impact on the character and significance of historic sites.

Inherent in the assessment of a proposed conditional use under these criteria is the

recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an RC district. The proper question is whether there are facts and circumstances showing the particular uses proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional] use irrespective of its location within the zones. People's Counsel for Baltimore County v. Loyola College in Maryland, 406 Md. 54, 956 A.2d 166 (2008); Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981); Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, and as conditioned, the Petitioner has met its burden of presenting sufficient evidence under HCZR § 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a Pet Day Care Facility in the zoning districts where it is permitted.

**3. The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the proposed use under this standard, the Hearing Authority shall consider whether or not:**

**a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.**

There is no evidence of record regarding atypical adverse effects on vicinal properties from dust, fumes, and odors, intensity of lighting, or hazards. Puppy waste will be stored in containers on the north side of the structure behind the privacy fence and hauled to a landfill

once or twice weekly to prevent odors. The indoor day care business function use and the "home setting" training area on the first floor shall be soundproofed and all windows shall have sound dampening curtains or blinds. There is no evidence of atypical noise physical conditions anticipated with the daily operational uses approved in this decision and order.

**b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.**

The existing structure to house the business function of the use will comply with all setbacks/height requirements in the RC zoning district. Petitioner shall install the privacy fencing and landscaping required by the Hearing Examiner under HCZR § 131.0.N.39.g. As for Dr. Via's concerns about the Cyprus trees planted too close to the driveway property line, the Hearing Examiner may not order Petitioner to remove them. However, these trees are not approved as part of the landscape plan. Subject to all conditions of approval, the use will not hindering or discouraging the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

**c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.**

There is no HCZR § 133.0 parking requirement for Pet Day Care Facilities. Petitioner is proposing six parking spaces and a circular driveway for drop off/pick up. Pet day care facilities do not result in long term parking, since clients drop pets off and leave immediately. Additionally, the petitioner has indicated that no more than five clients will access the Property at any one

time. Therefore, the six proposed parking spaces and circular drop off/pick up area will be adequate to serve the use and the existing dwelling. The proposed dog waste containers will be located behind the privacy fence and on the north side of the structure.

**d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.**

The proposed conditional use will be accessed from Manor Lane, DPZ reports the sight distance appears to provide reasonable access. There is no shared driveway access.

**e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.**

The TSR reports there are no environmentally sensitive areas in the vicinity.

**f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.**

The TSR identifies the closest historic property as HO-421, known as the "Gray House," located at 4754 Manor Lane about 270 feet to the northwest of the Property. The Property is adequately buffered from the historic structure by distance and vegetation. While the Hearing Examiner credits Protestant testimony about the two historic sites at the intersection of Manor Lane and Clarksville Pike, there is no evidence the location of the Pet Day Facility some distance from these sites will cause atypically diminish their character and significance. When a proposed conditional use has greater potential for diminishing the character and significance of historic sites in the vicinity, the appropriate approval condition is to reconfigure the location of the conditional use structure/use to protect the view, or heighten the on-site landscaping.

#### **IV. Additional Considerations**

Ms. Kamen's role as the facility's trainer is pivotal to the proposed use. Therefore, as a condition of approval, the Pet Day Care Facility is specific to Petitioner Elisa Kamens and does not attach to or run with the land. The conditional use approval shall not pass to any successors or assignees or be transferable from one owner to another. Ms. Kamens must be the primary trainer.

To ensure compliance with all conditions of approval, the Hearing Examiner is requiring the Petitioner to renew the conditional use every two years from the date of this decision and order. This renewal date recognizes the use may not commence until DPZ has approved the SDP/alternative compliance plan and until the Department of Inspections, Licenses, and Permits has issued all building permits.

**ORDER**

Based upon the foregoing, it is this **25<sup>th</sup> day of July 2018** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Elisa Kamens for a Pet Day Care Facility in an RC-DEO (Rural Conservation: Density Exchange Option) Zoning District for a maximum of 15 dogs is **GRANTED**.

**Provided, however, that:**

1. The conditional use shall apply only to the uses and structures as described in the petition and as depicted on the conditional use plan, subject to all conditions of approval, and not to any other activities, uses, structures, or additions on the Property. All factual findings and conclusions of law are incorporated by reference in this Order section.
2. Petitioner shall be bound by her testimony and the representations of her counsel.
3. This Pet Day Care Facility approval is specific to Petitioner Elisa Kamens and does not attach to or run with the land. The conditional use approval shall not pass to any successors or assignees or be transferable from one owner to another.
4. Petitioner Elisa Kamens shall be the primary trainer.
5. The use is approved for up to fifteen dogs no older than one year of age.
6. The approved hours of operation are from 7:00am – 6:00pm, Monday through Friday, and Saturdays from 10:00am – 2:00pm.
7. The Saturday operational use shall be confined to the first floor room setting portion of the structure and Outdoor Area B. There shall be no pool exercise or any pool use on Saturday.
8. No puppy training or exercise or any use of Outdoor Area B shall occur between 10:30am and 11:30am Monday – Friday.
9. Petitioner shall renew the conditional use every two years from the date of this decision and order.
10. Petitioner shall submit a Site Development Plan and receive Department of Planning and

Zoning approval. Petitioner is eligible to submit an Alternative Compliance petition/plan in lieu of a Site Development Plan.

11. The Site Development Plan or alternative compliance petition/plan shall include a note containing these conditions of approval.

12. The Site Development Plan or alternative compliance petition/plan shall include a floor plan indicating the home setting training area.

13. All windows in areas of the structure used for day care and home setting training shall have sound-dampening curtains or blinds.

14. The structure, all means of ingress/egress, including access to the pool and Outdoor Areas A and B, all walkways, and all gates shall comply with the Maryland Accessibility Code, and as otherwise may required by county agencies.

15. Petitioner shall comply with all agency comments.

16. Petitioner shall install the 6-foot privacy fence depicted on Map 4. A Type D landscape buffer shall be installed on the outside perimeter of Outdoor Areas A and B and on the outside perimeter of the pool exercise area with appropriate credit for the fencing as provided for in the Landscape Manual.

17. Only pets in day care shall receive on-site walking, training, exercise, or socialization.

18. The use shall not commence until all plans and permits are approved.

19. Petitioner shall comply with all federal, state, and county laws and regulations.

**HOWARD COUNTY BOARD OF APPEALS**

**HEARING EXAMINER**



---

**Michele L. LeFaivre**

Date Mailed: \_\_\_\_\_

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.