

**MEMORANDUM**

Patrick M. Griffin

TO: Mark VanKerkhoff  
Keith Berkhout  
Kane County Board

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FROM: Patrick M. Griffin

DATE: June 9, 2020

SUBJECT: Brian and Tracy McLean – Petition #4535  
02N152 Kautz Rd.; PIN: 09-36-476-016 (Part Of)

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Mr. VanKerkhoff and Mr. Berkhout:

My office was recently retained by the applicant in the above-referenced petition. Specifically, I was retained to address certain legal precedent offered by opponents of the application.

**Background**

As you are aware, the subject property is zoned F District – Farming under the Kane County Zoning Ordinance. The subject property is immediately surrounded on three sides (to the North, West and South) by two other F District parcels, and is abutted on the East by Kautz Road.

Beyond the immediately adjacent properties, to the North is the 38-lot County Line subdivision and industrial properties; to the West is the St. Charles East Side Sports Complex, inclusive of a dog park; to the South are additional F District and industrial parcels, and to the East is the DuPage Airport.

**Special Use Considerations**

F District zoning provides for numerous permitted and special uses. One of the expressly allowed special uses is “Kennel” which includes “An establishment where household pets, such as dogs and cats, are bred, trained, boarded or groomed.” The Illinois Supreme Court has explained that, under Illinois zoning law, “a 'special use' is a type of property use that is expressly permitted within a zoning district by the controlling zoning ordinance so long as the use meets certain criteria or conditions.” *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 196 Ill.2d 1, 16 (2001). The identification of a use as a “special use” constitutes “a local legislative determination that the use, as such, is neither inconsistent with the public’s health, safety, morals or general welfare, nor out of harmony with the town’s general zoning plan.” *Id.* at 17.

This law means that the County, by expressly providing for this allowable special use in its ordinance, has *already* determined in its legislative discretion that uses like the proposed kennel are allowed and contemplated in the F District, so long as the specific proposal satisfies designated standards for the special use. Put another way, while it may be that there are parcels within the County's F District zoning that, for reasons unique to those parcels, are particularly *unsuitable* for kennels, this is not one of those parcels. Indeed, given that: (1) the subject property is immediately surrounded on three sides by other F District parcels; (2) the subject property and the County Line subdivision are immediately across the street from the DuPage Airport; (3) the subject property and the County Line subdivision are in close proximity to the East Side Sports Complex and multiple industrial uses; and (4) the applicant has agreed to all of the recommended special use conditions proposed by staff, there is no proper basis to reject the applicant's proposed use.

Although this application was voted on favorably by the Zoning Board of Appeals, and initially by the Development Committee, the application was referred back to Development Committee to consider additional proposed conditions – all of which have been accepted by the applicant. Several committee members who declined to support the application did so based on criteria that are not proper to consider when reviewing a special use for a parcel *already* zoned in the appropriate zoning district. For example, considerations of whether the County Line subdivision preceded this proposal is not a relevant inquiry for a special use. An appropriate consideration *could be* whether the F District designation on the subject property existed at the time the County Line subdivision was established and then populated by the current residents. That question is arguably appropriate because existing zoning designations can establish the reasonable expectations of incoming residents, and it puts them on notice of the specific permitted and special uses within the adjacent F District.

### **Objectors Legal Authority - Kennels**

The objectors presented the case of *People ex rel Traiteur v. Abbott*, 27 Ill.App.3d 277 (5<sup>th</sup> Dist. 1975) in support of their objection to the application. The *Abbott* case was a nuisance case (as opposed to a zoning case) where the court considered whether *existing* conduct constituted a public nuisance under the applicable ordinance. There, several witnesses testified that “a foul and sickening odor and the sound of dogs howling and barking permeates the air,” and that “the dogs howl at all times of the day and . . . on one occasion . . . the howling went on all night.”

The application before the Board is readily distinguishable from *Abbot*. First, the Board is not considering whether the conduct of an already-established business constitutes a nuisance, but rather is assessing the propriety of a special use provided for in the underlying zoning district. Accordingly, it must adhere to the guidelines set out by the Illinois Supreme Court in *Living Word*. Second, the Board must accept – absent a justifiable reason not to – that the applicant will abide by the conditions established by the proposed special use permit. Here, the operators have not only accepted the conditions willingly, but have explained how they intend to implement and enforce them through established policies and procedures. The applicants are both experienced trainers who will be living on-site in the existing residence.

More germane to the current application is *Stanek v. Lake County*, 60 Ill.App.3d 357 (2<sup>nd</sup> Dist. 1978). In *Stanek* (a zoning case), the plaintiff property owner purchased 4.5 acres outside the Village of Wauconda in Lake County, incorrectly believing it to be zoned AG Agriculture, and thus permitting the operation of a dog kennel. In fact, the property was zoned UR-1 Residential, which did not permit the kennel. *Id.* at 357. Upon learning of his mistake, Stanek acquired an additional strip of land in order to have 5 acres and thus qualify for AG zoning, and he thereafter applied to the County for a zoning change along with a proposed plan for a kennel. *Id.* at 357-58. The Village of Wauconda objected to the application and Stanek failed to obtain the supermajority vote required based on the objection. Stanek then filed suit against the County alleging that the denial of the requested zoning was unconstitutional.

Among other facts adduced at trial in *Stanek* were that: (1) the plaintiff intended to utilize an acoustical design to minimize the noise levels; (2) the use of the kennel “was compatible with the residential character of the area and the kennel would serve as a buffer zone between the residential property to the south . . . and the light industry operations to the north.” *Id.* at 359. The *Stanek* court observed that a landowner has a fundamental right “to use his land in any lawful manner, not inconsistent with the public interest” and found that the County’s denial of Stanek’s right to operate the kennel merely because it was adjacent to residential uses was “unreasonable and arbitrary.” *Id.* at 361-62.

Based on the guidance of *Living Word* and *Stanek*, and the fact that the applicant here is not seeking to rezone the subject property, but rather is seeking to utilize one of the expressly permitted special uses under the existing zoning, the application should be approved.

**Objector’s Legal Authority - Noise**

Both the applicant and the objectors submitted competing evidence relative to the precise amount of noise that may be produced by the proposed special use. The underlying methodologies contained in the reports is beyond the scope of this memorandum, but even assuming the objectors’ methodology is correct, the actual distance from the northern edge of the proposed outdoor play area is 40’ from the applicant’s northern property line, and the distance from applicants northern property line to the southern property line of the County Line subdivision is another 180’, for a total distance of 220’ for the most direct path, disregarding rear yard set-backs. The noise attenuation with no dampening, with dampening at full effect, and with dampening at sixty percent (60%) effect, is thus as follows:

	<u>No Dampening</u>	<u>Dampening at Full Effect</u>	<u>Dampening at 60% Effect</u>
Source dBA:	119	119	119
Distance:	220 ft.	220 ft.	220 ft.
Reduction:	(46.85)	(46.85)	(46.85)
Dampening:	<u>0.00</u>	<u>(28)</u>	<u>(16.8)</u>
<b>Final dBA:</b>	<b>72.15</b>	<b>44.15</b>	<b>55.35</b>

Objectors rely on Title 35 of the Illinois Administrative Code for the proposition that the maximum allowable noise intrusion for this class of property is 55dBA. Applicant disputes the applicability of this section (evidently, it would effectively preclude dog ownership), but even assuming its applicability, moderately effective dampening achieves the required levels.

Notably, the IEPA's Frequently Asked Questions page advises that it "no longer has the resources to operate a noise program" and that "accordingly, IEPA is no longer investigating alleged noise pollution." The FAQ section further advises that "as IEPA no longer runs a noise program, it suggests that you consider reporting your noise concern to the local police or health department."

Objectors next rely on the City of St. Charles Municipal Code – which is also inapplicable – and claim that it requires that "no noise should be 'audible' at the property line" and further observe that this "is one of the strictest standards we have observed." In fact, Sections 17.20.030(m) and (w) of the Code require that Kennels and Pet Care Facilities "shall not allow the creation of noise by any animal or animals under its care which can be heard by any person at or beyond the property line of the lot on which the kennel is located, which occurs: (a) repeatedly over at least a seven-minute period of time at an average of at least twelve animal noises per minute; or (b) repeatedly over at least a fifteen minute period of time, with one minute or less lapse of time between each animal noise during the fifteen-minute period." Requiring no audible noise at a property line would effectively ban most known uses in almost any zoning district.

Finally, Article 15-2.C.5 of the Kane County Code – which actually *is* applicable to existing uses – is a nuisance ordinance that precludes harsh, prolonged or unusual noise, which it defines as follows: "Harsh, Prolonged or Unusual Noise: To make, continue, create or cause to be made or continued any noise which is harsh, prolonged, unnatural, or unusual in time or place as to occasion unreasonable discomfort to any persons within the neighborhood from which the noise emanates or as to unreasonably interfere with the peace and comfort of neighbors or their guests or operators or customers in place of business, or as to detrimentally or adversely affect such residences or places of business."

Applicant has made a firm commitment to operate its facility in conformity with this requirement as well as all other applicable County regulations, and has further agreed to incorporate appropriate policies and procedures, as well as significant written conditions on their special use, in order to ensure continued compliance.

### **Conclusion**

For all of the foregoing reasons, Applicant respectfully requests the County Board's approval.