

HUSCH BLACKWELL

Lisa M. Lawless
Senior Counsel

511 North Broadway, Suite 1100
Milwaukee, WI 53202
Direct: 414.978.5438
Fax: 414.223.5000
Lisa.Lawless@huschblackwell.com

September 16, 2023

VIA E-MAIL

Common Council
City of Madison
210 Martin Luther King, Jr. Blvd
Room 201
Madison, WI 53703

E-Mail: allalders@cityofmadison.com

Re: **Common Council meeting, 9/19/2023 -- Agenda Item 79500**
Appeal of the Plan Commission action on the conditional use request
for dog day care at 314 Junction Road, Legistar ID 78423

Dear Alders:

We submit the following letter in support of the appeal of Junction Point Condominiums ("Junction Point"), 301 Harbour Town Drive, Madison, WI 53717. Junction Point appeals the action of the Plan Commission. The filed appeal is in the materials for agenda item 79500.¹

PLAN COMMISSION ACTION

On August 7, 2023, the Plan Commission voted to approve the application for a conditional use permit ("CUP") for a dog day care called "Poochtails" to be located at 314 Junction Road in Madison.

¹ <https://madison.legistar.com/gateway.aspx?M=F&ID=cf91a74d-41a7-4827-83ac-efcc8acee8fd.pdf>

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The Plan Commission found the conditional use standards met and approved the conditional use subject to the comments and conditions in the Plan Commission materials, and also required the applicant to “specify in the operating procedures the day-to-day operating procedures, the qualifications of staff, a waste management plan, a plan for dog walking, any sound mitigation features, and other details deemed relevant.”

The approval allows up to 30 dogs at the dog day care, with hours of operation 8 am to 4 pm. No boarding is allowed.

THE PLAN COMMISSION ACTION SHOULD BE REVERSED BECAUSE THE PROPOSED CONDITIONAL USE IS NOT SUITABLE FOR THE LOCATION

The Plan Commission’s staff report states that if the proposed dog day care is “well managed,” then it is believed it will meet the requirements for the proposed conditional use. On the contrary, even if the proposed dog day care is well managed, a dog day care is simply not an appropriate use in this location. Because of the particular circumstances of the location, the proposed dog day care does not meet the requirements of the conditional use standards.

At 314 Junction Road, the site of the proposed use, there are 96 residential condominium units on three floors located above the commercial space on the first floor. The condos are owned by owners in the Junction Point Condominium Association. These 96 residential units are a long-established use, more than 18 years old. The commercial space at 314 Junction Road is not suited for a dog day care given the preexisting residential use on the floors above and the complete lack of exercise area/grass in the outdoor area on site.

As can be seen on the overhead photo in the Plan Commission materials, the site is occupied by the buildings and surrounding parking lot. The area surrounding the building is nearly entirely concrete with virtually no grass and no area where dogs could be exercised. (See Locator Maps in 78423, attached).

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Under these circumstances, this location is inherently not suited for the proposed use of a dog day care on the first floor, underneath the three floors of residential condo units.

Accordingly, the persons who submitted written comments to and spoke in the Plan Commission meeting expressed concern that the proposed use is not suited for this location. Written submissions in the record after the Plan Commission's action echo these concerns.

There is simply no outdoor space for dogs to be exercised. That means the 30 dogs will be walked through the surrounding neighborhood and/or the dogs will make their waste inside the commercial space. Further, commenters including property owners above the space and surrounding neighborhood members have expressed concern that the noise, odor, hygiene, health safety issues, and the general unsuitability of the dog day care would cause a diminution of the value of the owners' property in the three floors of condos above and also interfere with the owners' use and enjoyment of their property. Also, owners in the neighborhood surrounding the location have filed written comments in opposition, expressing concerns about the unsuitable use and the negative health and safety impact of having a dog day care at the proposed location.

For example, we point your attention to the letter filed by Lori Scarlett on September 13, 2023. Ms. Scarlett is a neighborhood owner and a veterinarian, and pointed out very specific reasons why the dog day care is not suitable and presents a health and safety hazard for property owners on site, in the neighborhood, and the dog clients on site and dogs in the surrounding area.

GROUND FOR APPEAL

To summarize the grounds for the appeal as stated in the appeal petition:

The first ground for the appeal is that the requirements for the proposed conditional use were not established by the applicant. Based upon the substantial and uncontested evidence submitted by affected property owners to the Plan Commission, none of the conditions required by MGO § 28.183(6)(a) were met. The Plan Commission's decision did not consider all the requirements of the conditional use standards and did not

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consider whether this proposed use met those requirements in the context of the proposed location. Therefore, it erred in finding that the requirements for the conditional use permit were met.

Second, there was no basis for the Plan Commission to make conclusions on the public health, safety, and general welfare of the neighborhood because the Fire Department has not considered those issues due to an incomplete application and lack of clarity of submitted plans. MGO § 28.183(6)(a)1.

Third, the Plan Commission based its approval of the proposed CUP based upon reviewing three dog day cares located in a mixed use property, citing them as precedent. However, those uses are materially different:

- One is located in a strip mall with only adjacent commercial renters (416 Monona), and it has 90 square feet of outdoor exercise area;
- Another is a mixed use that has no resident ownership units above the dog day care;
- The third is in a new building offered only to renters and advertised as providing dog day care to potential owners in promoting the building (502 S. Park Street). There is an enclosed outdoor dog run there.

In contrast, Junction Point has been in ownership since 2005, a clearly established use long pre-dating the proposed conditional dog day care use, and was never advertised as providing dog day care to the owners.

Fourth, before the Plan Commission, a licensed real estate broker provided unrebutted testimony that the values of the ownership units will be diminished by this dog day care and will result in diminution in value for the owners (see comments of Pete McCall).

Fifth, more than 100 adversely affected property owners oppose the proposed dog day care use and in their submissions describe how their use and enjoyment of their

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properties will be substantially impaired. That includes issues of noise/barking, disruption of use of their properties, odors, dog waste, lack of hygiene, dog bites, lack of dog runs, lack of exercise area in the applicant's leased space, and instead use of public parking spaces and privately owned yards for dog urination and pooping.

Sixth, MGO § 28.151 required the applicant to submit written operating procedures at the time of the permit application. However, there were no operating procedures submitted with the permit application and they have not been submitted. The CUP application should not have been approved without the operating procedures first submitted. Those operating procedures are necessary to assess the proposed condition use under the conditional use requirements. Further, the operating procedures apply during the life of the business, and must include information regarding identification and correction of animal behavior that affects surrounding uses, including excessive uses. Issues such as the walking of the dogs and lack of exercise area, and the concerns for disposal of waste, are ones that involve animal behavior that affect surrounding areas.

REQUIREMENTS FOR APPROVAL OF CONDITIONAL USE APPLICATION

The requirements for a CUP application are addressed in the Wisconsin Statutes. The applicant for a conditional use permit must prove that all the requirements and conditions for the conditional use are satisfied and that showing must be "supported by substantial evidence."

Specifically, the statute provides:

The applicant must demonstrate that the application and all requirements and conditions established by the city relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The city's decision to approve or deny the permit must be supported by substantial evidence.

Wis. Stat. § 62.23(7)(de)2.b (emphasis added). " 'Substantial evidence' means facts and information, other than merely personal preferences or speculation, directly pertaining

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to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.” Wis. Stat. § 62.23(7)(de)1.b.

The Madison General Ordinances required the Plan Commission to include findings of fact on which its action on the CUP is based. MGO § 28.183(5)(a)5 (The Plan Commission decision shall include findings of fact.)

The ordinances provide that no application for a conditional use shall be granted unless the Plan Commission finds that the requirements are met. MGO § 28.183(6)(a). The ordinance provides in pertinent part that:

No application for a conditional use shall be granted by the Plan Commission unless it finds that all of the following conditions are present:

1. The establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, or general welfare.
2. The City is able to provide municipal services to the property where the conditional use is proposed, given due consideration of the cost of providing those services.
3. The uses, values and enjoyment of other property in the neighborhood for purposes already established will not be substantially impaired or diminished in any foreseeable manner.
4. The establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.

....

MGO § 28.183(6)(a) (emphasis added).

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The Plan Commission did not make findings of fact on all of these requirements before approving the CUP application. The Commission addressed only standard #3, that the uses, values, and enjoyment of other property in the neighborhood for purposes already established will not be substantially impaired or diminished in any foreseeable manner. However, the Plan Commission did not address the substantial evidence that the proposed dog day care is not suitable for the location and it will in fact diminish the enjoyment of the property owners in the condos above the location and of the neighboring property owners. Having a dog day care on this property will diminish the value of the condominiums and interfere with the condo owners' use and enjoyment of their property.

Further, the Plan Commission also did not consider the substantial concerns expressed about safety, hygiene, and interference with the condo units and the surrounding area, of having 30 dogs in the property and walked in the neighborhood. Odors, noise, and waste are substantial concerns but there has been nothing provided to establish mitigation of these effects for the safety and peace of the condo owners and neighbors in the surrounding area. The applicant did not carry its burden of providing substantial evidence that the establishment, maintenance, or operation of the conditional use (the dog day care) will not be detrimental to or endanger the public health, safety, or general welfare. The lack of record on this point to provide assurances for public health and safety means that the applicant did not carry its burden of providing substantial evidence to establish this requirement.

Additionally, the supplemental regulations, MGO § 28.151, require the following for an animal day care:

Animal Day Care. Applicants shall submit at the time of permit application written operating procedures. Such procedures, which shall be followed for the life of the business, must address the identification and correction of animal behavior that impacts surrounding uses, including excessive barking. (Am. by ORD-19-00047 , 7-2-19)

(Emphasis added). MGO § 28.211 defines “animal day care” to mean: “An establishment that provides care of dogs and other domestic pets for periods of less than twelve (12) hours a day.”

The applicant here did not file written operating procedures at the time of the permit application. The Plan Commission is allowing it to submit such procedures later, after approval of its application. This was erroneous, as the operating procedures are necessary to assess the nature of the proposed conditional use and whether it meets the conditional use standards including the effect on public health and safety.

**SUBSTANTIAL EVIDENCE IN THE RECORD SHOWS THE PROPOSED USE
DOES NOT MEET THE REQUIREMENTS
OF THE CONDITIONAL USE STANDARDS**

All of the following was shown before the Plan Commission in written submissions or comments at the meeting, and in written submission to the Common Council. All of these points are in the record:

- The dog day care is in a commercial space on the first floor of the building. Residential units are on top of it. As the many written public comments have stated, the proposed use is too close to this substantial residential use.
- There is substantial neighborhood opposition, both the condo owners of the three floors above, and owners in the surrounding neighborhood.
- As written public comments to the Plan Commission shared, there are senior citizens among the residents of Junction Point. A dog day care below their condos would substantially interfere with their peace and use of their property.
- The public comments have expressed that the dog day care diminishes the enjoyment and use of the residential property. One commented that he wouldn't purchase a unit located directly over or near a dog day care facility.

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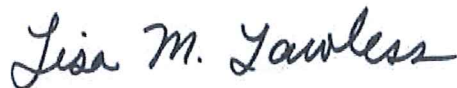
- Many public comments expressed concerns about health and safety issues such as allergens and hygiene, as well as concerns about odors from the dogs and dog waste. Having 30 dogs housed inside the space certainly would be expected to cause issues of odor and dog waste. No details were provided to address these concerns.
- Many of the public comments expressed concern about noise from the dogs and barking concerns. Even normal levels of barking from 30 dogs in the space will be disruptive of the property owners in the floors above.
- Comments also expressed concern that there is no outdoor space to walk or exercise the dogs. Concern was expressed that the dogs will be kept indoors the whole time given the location limitations. Concern was also expressed that dogs will have to be walked in the neighborhood. One commenter noted that there are already complaints about dog messes left in Junction Ridge park.
- One person in comments questioned how the six employees will they handle walking 5 dogs at a time.

CONCLUSION

Junction Point Condominiums thanks the Common Council for its consideration. It requests the Council to reverse the action of the Plan Commission approving the application for conditional use by Poochtails at 314 Junction Road and deny the CUP application. A dog day care is simply not a proper use in this location and does not meet the requirements of the conditional use ordinance.

Very truly yours,

HUSCH BLACKWELL LLP



Lisa M. Lawless



City of Madison

Conditional Use

Location

314 Junction Road

Applicant

Shontell Pruitt, Malik Shabazz
Poochtails

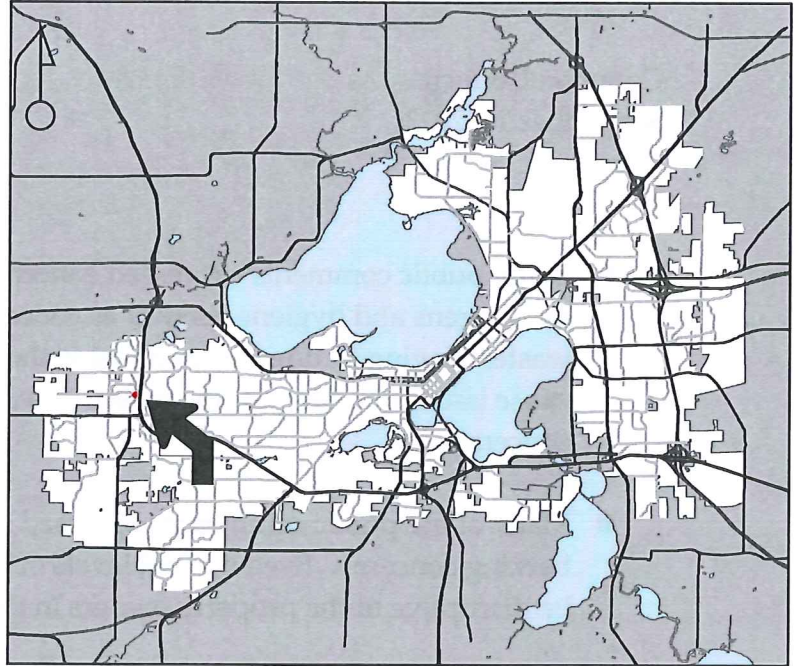
Proposed Use

Allow animal daycare in a tenant space
in a mixed-use building

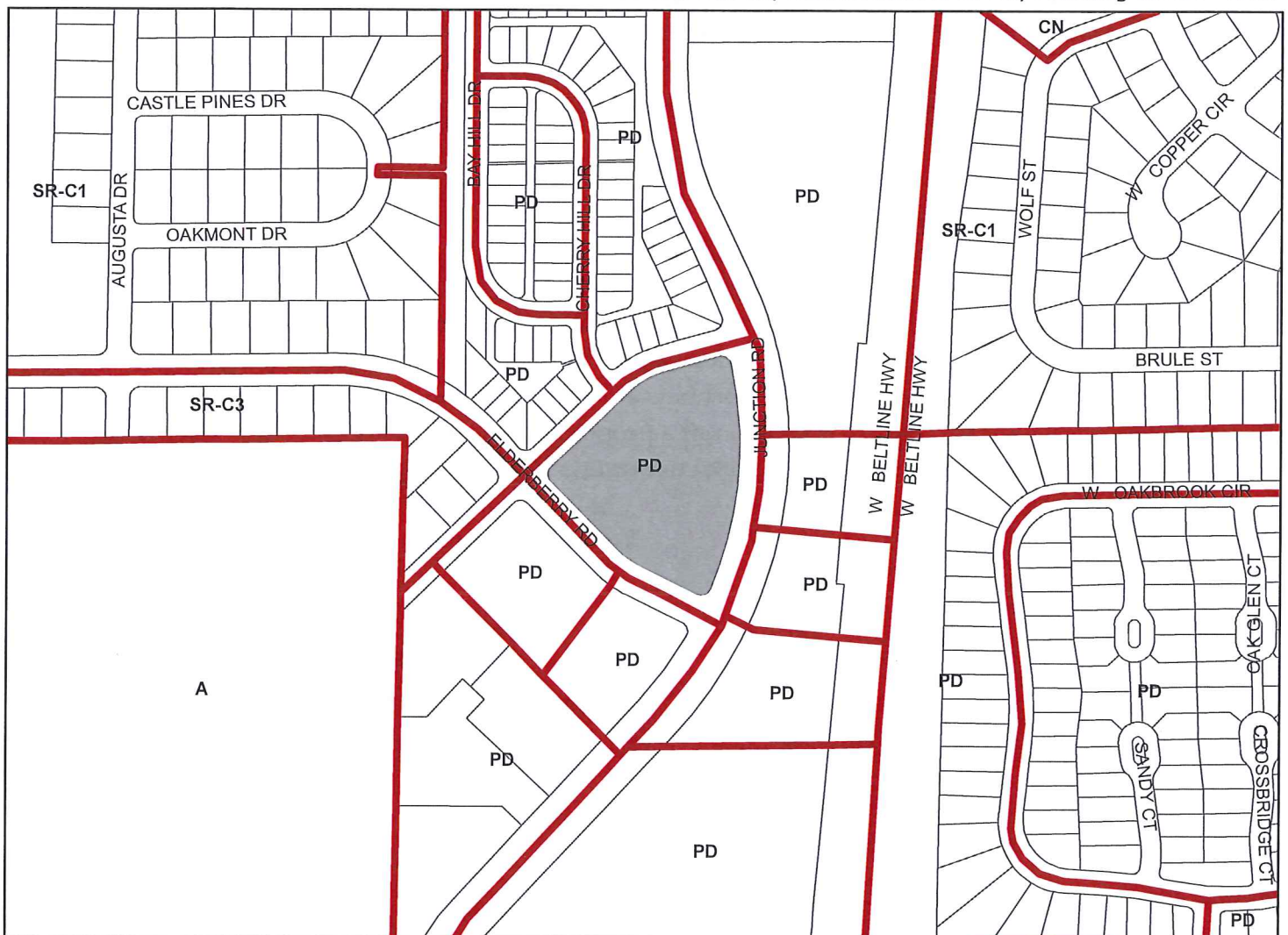
Public Hearing Date

Plan Commission

July 24, 2023



For Questions Contact: Lisa McNabola at: 243-0554 or lmcnabola@cityofmadison.com or City Planning at 266-4635



Scale : 1" = 400'

City of Madison, Planning Division : JC : Date : 6-16-23

