District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

GARLAND F. PINKSTON
CLERK OF COURT

Telephone: 879-2700
Area Code 202

November 17, 2004

04-AA-1405 Wagtime vs. District of Columbia Zoning Commission

District of Columbia Zoning Commission
Jerrily Kress, Director
441 4th Street, N.W.
Suite 210S
Washington, D.C. 20001

Dear Sir/Madam:

Pursuant to the rules of this Court I am transmitting, herewith, a copy of the petition for review filed on November 17, 2004, in the above-entitled case.

Yours very truly,

Garland F. Pinkston
Clerk of Court

By: _____
Information Center Supervisor

cc: Edward Schwab, Esq.

BZA
Case No. 17092
Exhibit No. 98

Board of Zoning Adjustment
District of Columbia
CASE NO.17092
EXHIBIT NO.98

04-AA-1405
FILED
NOV 17 2004
DISTRICT OF COLUMBIA
COURT OF APPEALS

RECEIVED
NOV 17 2004
DISTRICT OF COLUMBIA
COURT OF APPEALS

DISTRICT OF COLUMBIA COURT OF APPEALS

WAGTIME, LLC	)	
Petitioner,	)	
v.	)	No.
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT	)	
Respondent.	)	

PETITION FOR REVIEW

Pursuant to D.C. Official Code § 2-510 and Rule 15 of this Court, Wagtime, LLC hereby petitions the Court for review of Board of Zoning Adjustment Order No. 17092 dated October 15, 2004 and mailed to all parties. Petitioner submits that the Order should be vacated and remanded as being arbitrary, capricious and not in accordance with law, and in violation of the District of Columbia Administrative Procedure Act. A copy of the Order is attached to this petition.

Edward L. Donohue

Edward L. Donohue
Holland & Knight, LLP
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DC Bar Number 412301
Attorney for Petitioner

November 17, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of this petition for review were served by first class mail, postage prepaid, this 17th day of November, 2004 upon:

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

Appeal No. 17092 of Stephanie Mencimer, et. al., pursuant to 11 DCMR §§3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Certificate of Occupancy No. CO57903, dated July 23, 2003, to WagTime LLC, for 24-hour dog boarding and grooming with accessory retail sales of pet supplies at premises located at 1412 Q Street, N.W., in the C-3-A/Arts District.

HEARING DATES: January 20, 2004, March 30, 2004, and May 11, 2004
DECISION DATE: July 6, 2004

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on September 22, 2003 challenging DCRA's decision to issue a certificate of occupancy (C of O) authorizing WagTime, LLC (WagTime) to use its premises as at 1412 Q Street, N.W., to provide commercial dog boarding and grooming services as a principle use, with accessory retail sales of pet supplies. Following a public hearing in this matter, the Board voted to grant the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for January 24, 2004. In accordance with 11 DCMR §3113.4, the Office of Zoning mailed notice of the hearing to the Appellants, ANC 2F (the ANC within whose Commission the boundaries of the subject property is located), the property owner and DCRA.

Parties

Appellants

The original Appellants in this case, Stephanie Mencimer, Erik Wemple, John Weaver, and Forrest R. Smith, were later joined by Gary Ridley and Mark Rabbage. Each of these individuals authorized Andrea Doughty, Bonn Macy and Erik Wemple to represent them before the Board.

The Property Owner

The property owner, WagTime, (the Owner or WagTime), was represented by Edward Donohue, Esq., of Cole, Raywid & Braverman, LLP. As the property owner, WagTime is automatically a party under 11 DCMR §3106.2.

DCRA

DCRA was represented by Assistant Attorney General for the District of Columbia, Bennett Rushkoff, Esq.

Intervenor

Mid-City Development (Mid-City), also referred to as the "Intervenor", requested party status as a proponent of the appeal. The request was granted without objection from the other parties and Mid-City was represented by Andrea Ferster, Esq.

The affected ANC
ANC 2F, an automatic party to the Appeal, submitted a letter stating that it "[did] not take a position in favor of or opposing the above referenced appeal." (Exhibit 23). It did not submit any evidence or argument during the public hearing.

Persons in Support and in Opposition
The Board received numerous letters in support and in opposition to the appeal.

FINDINGS OF FACT

The Property

1. The subject property is located at 1412 Q Street, NW (Square 1209, Lot 0878) in the C-3-A/Arts zone district, and borders the R-5-B zone district.

The Appellants
2. The Appellants and their authorized representatives are the Owner's neighbors. Stephanie Mencimer and Erik Wemple reside at 1414 Q Street. John Weaver and Forrest Smith reside at 1416 Q Street. Gary Ridley and Mark Rabbage reside at 1408 Q Street. Andrea Doughty resides at 1417 Q Street, and Bonn Macy resides at 1445 Q Street.

The Intervenor
3. Mid-City Development is the record owner of Lot 98 in Square 0209, a parcel of land and buildings located across the public alley immediately to the rear (south) of WagTime's premises. Because Mid-City is developing 85 condominium units at its property, it is significantly more affected by the WagTime C of O than other persons in the general public.

The Certificate of Occupancy
4. WagTime filed an application for a C of O with DCRA on or about July 8, 2003. The application proposed the following use: "24 hour dog boarding and grooming with accessory retail sale of pet supplies," consisting of 1,248 square feet of occupied space.

5. After filing the C of O application, WagTime proffered to DCRA "the following commitments regarding the use of the outdoor space at the rear of the building": (a) there would be no more than 20 dogs outside at any one time; (b) the use of that area would occur only between the hours of 9:00 am and 5:00 pm; and (c) all use of the outdoor space would be supervised by employees of the business. Wagtime also noted that it was "continuing to investigate what [it] can do to put a temporary cover over part, or all, of the rear yard to protect and enclose the dogs and to help minimize the impact of any noise."

6. On July 23, 2003, DCRA issued WagTime a temporary C of O which was to expire on January 31, 2004. In a letter dated shortly thereafter, dated July 30, 2004, DCRA stated that it had "no legal basis" for withholding the C of O, and additionally stated that the temporary C of O was conditioned upon the above commitments proffered by WagTime,which DCRA would monitor over the six-month period. The Board credits DCRA's assertion that the conditions were imposed because they were proffered by WagTime during the C of O application process.

7. When DCRA issued the C of O, it recognized that the proposed use did not fall within any of the service or retail establishments listed in sections 721.2 or 721.3, of the Zoning Regulations, the matter of right use classifications expressly designated within the C-3 zone. As a result, DCRA went on to consider whether the proposed boarding use in the C-3 zone was a "service or retail use similar to" expressly allowed matter of right uses in the more restrictive C-2 zone, to wit: a "public bath, physical culture, or health service" (11 DCMR §721.2(s)), a "veterinary hospital" (11 DCMR §721.2(x)), and a "pet shop" (11 DCMR §721.3(p)). The evidence further indicates that, of the three uses analyzed for comparison, DCRA considered the veterinary hospital use the most "relevant" use, finding that "dogs stay overnight and get cared for" in both instances.

The Appeal

8. Appellants filed this appeal challenging the temporary C of O on September 22, 2003, focusing on DCRA's finding that a dog boarding use is similar to a veterinary hospital use and/or pet shop.

9. The case was first heard on January 20, 2004, at which time Mid-City Development was granted party status as an "Intevenor" and proponent of the appeal. Following the presentation of the Appellants' case on January 20, 2004, the hearing on the appeal was continued to March 30, 2004.

10. On January 28, 2004, three days before the scheduled expiration of the temporary C of O, DCRA issued a second C of O to use the premises for "24 hr. dog boarding and grooming with accessory retail sale of pet supplies." The second C of O (the permanent C of O) was not accompanied by any conditions and did not have an expiration date.

11. On March 23, 2004, Appellants filed an appeal challenging DCRA's decision to issue the permanent C of O.

Preliminary Matters

12. Prior to the March 30 continuation date, the parties made written submissions and/or sought various types of relief from the Board, specifically:

(a) The Appellants moved to amend the appeal to include the permanent C of O issued by DCRA on January 28, 2004 (Exhibit 74).
(b) The Owner moved to dismiss the appeal on the ground that it was moot because the temporary C of O had expired on January 31, 2004 (Exhibit 77).

(c) The Owner opposed Mid-City's proposed expert testimony by Armando Lourenco, and requested that Mid-City's testimony be limited in time (Exhibit 71).
(d) Mid-City moved to strike letters submitted in support of WagTime because they had been submitted by various neighbors and customers of Wagtime rather than by WagTime directly (Exhibit 73).

13. At the start of the March 30 public hearing, the Board ruled on the preliminary matters as follows:

(a) The Board granted the Appellants' motion to amend the appeal to include the permanent C of O.
(b) The Board denied the Owner's motion to dismiss on the ground of mootness. Even with the expiration of the temporary C of O, the Board found there was a live case or controversy stemming from the permanent C of O as to whether dog boarding is a permitted use in the zone.
(c) The Board originally deferred the questions regarding Mid-City's case presentation and expert testimony, but ultimately ruled that Mr. Lourenco could provide expert testimony. The Board also found that Mid-City was not limited to a "5 minute" presentation merely because that time limit had been discussed at a prior proceeding.
(e) Mid-City's motion to strike the letters was denied, and WagTime was given leave to proffer the letters in support as direct evidence in support of its case.

The Dog Boarding Use

14. WagTime offers "cageless" boarding facilities and represents that it is the only "indoor/outdoor" dog boarding facility in the northwest Washington, D.C. area.

15. Appellants and Mid-City maintain that dog boarding facilities have operational characteristics that are different from those of veterinary hospitals and pet shops. They refer to such characteristics as: the age of the dogs, the frequency and duration of overnight and outdoor stays, and the different levels of noise and waste that are generated at the different facilities. Through testimony and argument, Appellants and Mid-City asserted that, as compared to veterinary hospitals and pet shops, the dogs at boarding facilities are older, require more overnight stays, and require more time outdoors. They also asserted that the operation of a dog boarding facility generates greater amounts of noise and waste than the operation of a veterinary hospital or pet shop.

16. The Board finds that dog boarding facilities and veterinary hospitals share certain common operational characteristics. The most obvious and significant of these characteristics is the fact that both uses involve the overnight stay of dogs.

17. The Board also finds that as compared to both a pet shop and a veterinary hospital, the operations of a dog boarding facility are characterized by greater amounts of noise and waste, and greater numbers of overnight and outdoor stays.

18. The Board credits the testimony of Ruth Berman, qualified by the Board as an expert in dog kennels. Ms. Berman testified that, as distinguished from veterinary hospitals and pet shops,

most jurisdictions do not permit dog kennels within 200 feet of neighboring properties due to the greater noise levels and outdoor use associated with them.

19. The Board credits the testimony of Karen McCabe, based upon her experience as a former veterinary hospital technician. Ms. McCabe testified that dog boarding facilities are not similar to veterinary hospitals because overnight stays are typical at boarding facilities and only occasional at veterinary hospitals.

20. The Board credits the testimony of David Baker, qualified by the Board as an expert in pet shops and dog kennels based upon his experience providing services and products to both. Mr. Baker testified that in his opinion WagTime's facility is not similar to pet shops where: (a) the dogs only occasionally stay overnight; (b) puppies rather than grown dogs are housed; (c) the animals are "caged" rather than "uncaged"; and (d) the animals do not generally go outdoors.

21. The Board credits the testimony of Armando Lourenco, a former D.C.R.A. Zoning Administrator, qualified by the Board as an expert in the interpretation of D.C. zoning regulations. Mr. Lourenco testified that, in determining whether a proposed use is "similar to" an established comparable use, DCRA's longstanding practice is to compare and assess the relative impacts of the established and non-established uses based on the relative external effects on the proposed location and surrounding premises.

22. The Board also accepts Mr. Lourenco's opinion that in this type of case, a difference in the intensity of use between a principal use and an accessory use would have a qualitative impact on the external effects on a neighboring community – i.e. dog boarding as an accessory use at a veterinary hospital or pet shop would have a much lesser external impact upon a neighboring community.

23. The Board finds that dog boarding facilities are dissimilar from veterinary hospitals and pet shops because of the difference in sanitary and operational standards that apply to boarding facilities and the other uses. Dog boarding facilities are not subject to any regulatory or licensing program in the District that imposes sanitary or other operational standards. In contrast, both pet shops and veterinary hospitals must satisfy detailed operational and sanitary standards in order to receive a required license. *See*, 22 DCMR Chapter 700, Exhibit 81 (DC Register 6630, Sept. 2, 1988), amending 17 DCMR Chapter 29.

24. The Board also finds that other jurisdictions have regulated dog boarding/kennel uses by restricting proximity to neighboring properties and controlling impacts from noise and odor. See Attachment 42 to Exhibit 86.

CONCLUSIONS OF LAW

Positions of the Parties

Appellants concede that the "dog grooming" and accessory "retail uses" authorized by the C of O are permitted uses under the Zoning Regulations (p. 4 Statement of Appeal). WagTime argues, therefore, that the only relevant question is whether DCRA correctly found that the proposed "boarding" operations were "similar" to those uses permitted in the zone, in

other words, whether a dog boarding facility is "similar" to a veterinary hospital or pet shop. WagTime further argues that this appeal must be denied unless DCRA abused its discretion when it answered this question in the affirmative.

DCRA defends it decision to issue the temporary and permanent C of O under the regulatory scheme. It argues that it properly considered the degree to which the uses are normally associated with one another, and that the external effects – dog barking and generation of dog waste - of a dog boarding facility are similar to the external effects of a veterinary hospital and pet shop when the boarding facility operates in compliance with animal control and noise regulations..

Appellants and Mid-City allege that DCRA erred when it determined that dog boarding is permitted as a matter of right in the C-3-A zone. They contend that dog boarding is neither expressly permitted nor "similar to" any other uses that are expressly permitted.

The Pertinent Regulations

"Dog boarding" is not a defined term in the Zoning Regulations and matter of right uses in the C-3 zone are not specifically enumerated. However, a use is permitted in the C-3 zone as a matter of right if it is a use that is permitted as a matter of right in the C-2 zone 11 DCMR §741.1.

The permitted uses in the C-2 zone include a "service or retail use" that is "similar to" one or more of the matter of right uses listed in §§ 721.2 and 721.3 (See, 11 DCMR §721.4). As noted by all of the parties, the matter of right uses listed in these sections include use as a "veterinary hospital" (§ 721.2(x)), and use as a "pet shop" (§ 721.3(p)). Thus, the Board finds as a matter of law that a "dog boarding" use would be permitted as of right in the C-3 zone if it were found to be "similar to" either a veterinary hospital or a pet shop.

The Zoning Administrator failed to apply an appropriate methodology to determine whether a dog boarding facility was a use that was similar to the matter of right uses enumerated in Section 721.

In assessing whether a dog boarding facility was similar to a veterinary hospital or pet shop, the Zoning Administrator reviewed the uses specifically allowed in Section 721 to determine if the proposed use shared relevant qualities with them. In essence, the Zoning Administrator concluded that because veterinary hospitals and pet shops care for dogs and allow them to stay overnight, that a dog boarding facility was "similar" to these uses, and therefore, allowed under the zoning regulations as a matter of right.

The Zoning Administrator failed to examine any differences in external impacts between a dog boarding facility and a veterinary hospital and a pet store, despite the fact that the Zoning Administrator initially issued a temporary C of O and stated in connection with that C of O that DCRA would monitor the facility during the temporary 6- month period. Not only did the Zoning Administrator fail to examine the actual external impacts of the dog boarding facility at issue in this case during the temporary 6-month period of time, he failed to undertake research

and analysis of any kind to assess external impacts. According to DCRA's testimony at the hearing, DCRA's research was limited to past BZA decisions and Court decisions.

The Board credits the testimony of Armando Lourenco, a former Administrator of DCRA's Building and Land Regulation Administration and Acting Zoning Administrator, qualified by the Board as an expert in the interpretation of the District's Zoning Regulations, that in determining whether a proposed use is "similar to" an established comparable use, DCRA's longstanding practice is to compare and assess the relative impacts of the established and non-established uses based on the relative external effects on the proposed location and surrounding premises. Mr. George Oberlander, qualified by the Board as an expert witness in zoning, also testified that in determining similarity of uses, DCRA must look at external impacts.

Accordingly, the Zoning Administrator failed to properly evaluate whether the proposed dog boarding facility use was similar to a veterinary hospital or pet store because he failed to determine its external impacts.

The dog boarding use is not "similar to" a veterinary hospital or pet shop

The Board heard extensive evidence in this case with respect to the similarities and dissimilarities between a dog boarding facility and a veterinary hospitals and pet store. Based on the evidence presented, the Board concludes that a dog boarding facility use is not similar to either a veterinary hospital or a pet shop use. The Board reaches this conclusion because it finds that the external effects generated from a dog boarding facility are more intense than those generated by either a veterinary hospital or a pet shop, especially the greater amount of noise and odor that is inherent to a dog boarding facility. Wagtime's proffering of conditions in connection with its application for a C of O and DCRA's imposition of such conditions in connection with its issuance of the temporary C of O support a conclusion that even Wagtime and DCRA perceived a need to mitigate potential external effects stemming from the dog boarding use. The issue for DCRA was whether the proposed use had similar external effects as a veterinary hospital, not whether proffered conditions could mitigate those effects. Adding conditions to a certificate of occupancy cannot convert an unauthorized use into one permitted as a matter of right. Only the Zoning Commission can accomplish that change in status.

In addition, the Board notes that the current regulatory scheme governing animal facilities in the District subjects pet shops and veterinary hospitals to sanitation and ventilation standards, but dog boarding facilities are neither (Findings of fact 23) currently regulated nor even defined. Accordingly, they are not subject to the same licensing standards and requirements that may mitigate potential adverse impacts associated with the care of dogs.

Finally, the Board is persuaded that the greater intensity of noise and management of waste associated with a dog boarding facility distinguishes its use from either a pet shop or a veterinary hospital use. The Board notes that in those jurisdictions identified in the record, boarding facilities are strictly regulated differently from veterinary hospitals and pet stores so as not to create a nuisance due to potential noise and odor (Findings of Fact 18, 24). Accordingly, the Board finds that the zoning regulations do not intend a dog boarding use to be authorized as a matter of right, without any restrictions, particularly if it is adjacent to a residential property.

For all of these reasons, the Board concludes that the Zoning Administrator erred in determining that dog boarding as a principal use is permitted as a matter of right in the C-3-A zone.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the appeal is **GRANTED** Vote taken on July 6, 2004

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis A. Etherly, Jr., and David A. Zaidain, by absentee ballot to grant the appeal, the Zoning Commission member not participating, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: OCT 15 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL. SG

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO. 17092

As Director of the Office of Zoning, I hereby certify and attest that on OCT 15 2004, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

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