GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

December 14, 2004

Edward L. Donohue, Esq.
Mary Carolyn Brown, Esq.
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006

Re: BZA Appeal No. 17092 (1412 Q Street, N.W.) Wagtime

Dear Mr. Donohue and Ms. Brown:

The Office of Zoning (OZ) received your Motion to Stay Enforcement of Proposed Revocation of Certificate of Occupancy (attached), in reference to the above-cited matter, on December 8, 2004. Please be advised that the record in the subject appeal is closed. The final date of the appeal order is October 15, 2004. Additionally, your motion directly bears upon the substance of the appeal, and was not served on all of the parties. As such, in accordance with 11 DCMR § 3121.9, OZ is returning your motion. Please call Richard S. Nero, Jr., Chief, Support Services and Quality Control on (202) 727-6311, if you have any questions relevant to the foregoing.

SINCERELY,

JERRILY R. KRESS, FAIA
Director, Office of Zoning

Attachment
cc: Doris Woolrich, Esq.
Office of Compliance, Enforcement Division
DCRA
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002
rsn

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17092
EXHIBIT NO. 100

Board of Zoning Adjustment
District of Columbia
CASE NO. 17092
EXHIBIT NO. 100

2K/22

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

RECEIVED
D.C. OFFICE OF ZONING
2004 DEC -8 PM 3:19

Appeal of Wagtime, LLC	)	
	)	
	)	Appeal No. 17092
From the Decision of the District	)	
of Columbia Board of Zoning Adjustment	)	
	)	
Dated October 15, 2004	)	

MOTION TO STAY ENFORCEMENT OF
PROPOSED REVOCATION OF CERTIFICATE OF OCCUPANCY

Wagtime, LLC ("Wagtime"), by and through undersigned counsel, hereby files this motion to stay enforcement of the October 15, 2004 Decision and Order of the Board of Zoning Adjustment (the "BZA" or "Board"), attached hereto as Exhibit A. (the "Order"). In issuing the Order, the Board granted the appeal and concluded that the certificate of occupancy issued to Wagtime, LLC on January 28, 2004 was issued in error. As discussed below, we believe that the decision of the Board is in error, and enforcement by the Department of Consumer and Regulatory Affairs ("DCRA") should be stayed until such time as the error can be corrected. As grounds for this motion, Wagtime hereby states as follows:

1. On November 12, , DCRA issued a Notice of Proposed Revocation ("Revocation Notice"), consistent with the Order. A copy of the Revocation Notice is attached hereto as Exhibit B. Wagtime challenged the Revocation Notice to the D.C. Office of Administrative Hearings. A copy of the challenge is attached as Exhibit C. We expect that the Office of Administrative Hearings will conduct a hearing on the challenge in the near future.

2. In addition, Wagtime filed a Petition for Review in the District of Columbia Court of Appeals, a copy of which is attached as Exhibit D.

3. As a result of these administrative and judicial appeals, and because of Wagtime is likely to succeed on the merits in its appeals as discussed in detail below, Wagtime's current motion for stay of enforcement should be granted by the Board. Denial of the stay will cause Wagtime irreparable injury, granting the stay will not harm other parties, and the public interest favors granting a stay.

a. Likelihood of Success On the Merits

The first element in considering whether a stay should be granted is whether the movant has shown a likelihood of success on the merits of the underlying claim. See Kuflom v. District of Columbia Bureau of Motor Vehicle Services, 543 A.2d 340, 344 (D.C. 1988). The movant does not have to present a substantial case on the merits, but rather must simply make a meaningful showing of probable or likely success. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 599 F.2d 841, 843 (1977). "The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed ...may grant a stay even though its own approach may be contrary to [the] movant's view of the merits." Id.

In support of its assertion that it is likely to succeed on the merits, Wagtime offers the following:

(i) The Board based its decision on the appeal on the unsubstantiated finding that dog boarding is a "principal use" at Wagtime. In fact, Wagtime provided uncontroverted information to the Board that the boarding of dogs is a

small percentage of its operation. In finding of fact 22, the Board stated that it had accepted the opinion of one of the witnesses for the appellant that the "intensity of the use between a principal use and an accessory use would have a qualitative impact on the external effects on a neighboring community". The witness that made these representations never testified that he had ever visited the site, or had any first-hand knowledge of the operation. In fact, he appeared to have simply adopted the assertions of the appellants that dog boarding was a "principal use" for Wagtime. The burden of proof is on the appellants to prove this element, which appellants did not do. Therefore, it is error for the Board to accept this testimony, and to make unsupported findings. By itself, this is reversible error.

(ii) The Board erred when it stated that "the zoning regulations do not intend a dog boardinghouse use to be authorized as a matter of right, without any restrictions, particularly if it is adjacent to residential property." Order at page 7. DCRA testified that dog boarding takes place at veterinary hospitals and pet shops. Further, DCRA opined that the uses at veterinary hospitals and pet shops are "similar to" the use by Wagtime. Nevertheless, the Board apparently credited the testimony of lay witnesses over DCRA regarding the relative external effects generated by these various animal-related business and found, without any basis in the record, that a dog boardinghouse created greater external effects than the other two types of animal businesses.

Significantly, however, the Zoning Regulation do not place any limitations on veterinary hospitals or pet shops; both are permitted as a matter of right, and without restriction either as to size, numbers of animals, hours of operation or outdoor use of space. Further, the Zoning Regulations do not articulate a stricter standard for animal-related businesses adjacent to residential district. If the Zoning Regulations intended DCRA or the Board to evaluate this business against such a stricter standard, it knew how to say so, just as it has done for other certain uses. For example, fast food restaurants, permitted under 11 DCMR 721.3 (s) have very specific conditions of approval related to trash, traffic and other external impacts. Also, 11 DCMR 721.2 (e) allows bowling alleys ion the C-2 districts provided they are soundproofed.

The Zoning Commission has not placed similar restrictions on veterinary hospitals or pet stores. For the Board to do so in this case, as an accommodation to the appellants concerns about one particular operation, is an abuse of discretion. If the Zoning Commission intends to restrict animal-related operations when they occupy space nearby or adjacent to residential areas, it can amend the regulations. The Board cannot do so simply as a response to neighborhood opposition.

(iii) The Order is otherwise arbitrary and capricious and not in accordance with the law. For example, the Board spent a great deal of time during the hearings discussing certain conditions preferred by Wagtime and made a part of a previously issued certificate of occupancy. Those conditions, the

appropriateness of imposing such conditions on a use that the Zoning Administrator deemed to be by-right, and the extent to which Wagtime complied with them, occupied much of the debate. The Board seems to have agreed with the appellants that the Zoning Administrator's use of these conditions is a tacit admission that the use is not exactly compatible with the zone. In other words, if you have to create conditions to control the nature of the occupancy, it must mean that the use should not be permitted in the zone. That an applicant for a certificate of occupancy would agree to impose upon itself certain operating conditions is simply not legitimate grounds to revoke the right to occupy space. It does, in fact, amount to an arbitrary and capricious decision, that should not be allowed to stand.

Thus, Wagtime meets the first element in determining whether a motion for a stay should be granted.

b. Irreparable Injury

Wagtime will suffer irreparable injury if the motion to stay is denied. While it is true that injuries in terms of money, time and energy expended in the absence of a stay may not rise to the level of being "irreparable" in some instances, it is equally true that an injury deemed to be insufficient to justify a stay in one case may well be sufficient to justify a stay in another. See Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (1958); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 599 F.2d 841, 843 (1977). Revocation Notice leaves Wagtime with few options. It has a long-term lease at its present location, and has

made a substantial investment in improvements to the leased space. Wagtime has a large number of customers who want to have their pets groomed, walked and occasionally boarded at Wagtime. There are a number of large hotels that regularly use the services at Wagtime for the pets of the hotel's customers. If Wagtime cannot serve these needs, those customers will be lost, and possibly for good. Not only do the Wagtime's employees live, work and raise their families in the community, but the business focuses on serving the neighborhood. This is not to say that there aren't other options for pet owners. In fact, there are a few establishments nearby to Wagtime that offer retail, grooming and animal boarding. Upon information and belief, those businesses operate with certificates of occupancy that simply state the use as "pet shop" and yet overnight boarding is regularly provided as a service for walk-in customers. If the Board will permit it, Wagtime would like an opportunity to demonstrate that the enforcement contemplated by the DCRA—the revocation of the certificate of occupancy, is selective and discriminatory. If allowed to stand, Wagtime will likely be forced out of business, surely an irreparable injury.

There will be a loss of jobs, loss of business and the forced closure of a legitimate commercial enterprise.

These injuries to the Appellant are far greater than the mere payment of the fine. Neither of these injuries can be adequately compensated by monetary relief. Indeed, as the court stated in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., "[t]he destruction of a business is, of course, an essentially economic injury. It is not, however, one of the 'mere' economic injuries . . . insufficient to warrant a stay.

The economic injuries disparaged [are those] for which 'adequate compensatory or other corrective relief will be available at a later date.'" 559 F.2d at 843, n.2. In this case, the significant damage to the Appellant's public image, combined with the potential of having its certificate of occupancy revoked, are each so severe that adequate compensatory or other corrective relief will not be available at a later date to return the Appellant to the status quo. As such, the balance of equities weighs in favor of granting the requested stay since the Appellant will suffer irreparable harm if the stay is not granted.

c. No Harm to Respondent

The issuance of a stay would not substantially harm DCRA, or appellants. The DCRA has not initiated any enforcement proceedings against any other businesses that currently provided animal boarding. If the DCRA agrees with the Board that such a use is not permitted in the C-3 district, it should enforce against all such businesses. Wagtime showings of probable success and irreparable injury weigh against the revocation of the certificate of occupancy.

Appellants have worked diligently for the past year to try to force Wagtime to close its business. Appellants have used every device available to them to ensure the outcome they desire. However, appellants would not be harmed by the issuance of the stay and the full and fair consideration of the issues by the Office of Administrative Hearings. There are no pending health or safety issues, nor has Wagtime been cited for any. This is really a simple matter of the appellants not liking the use that is lawfully

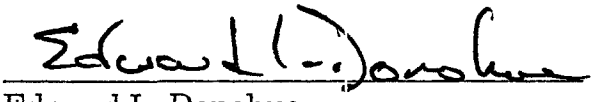
permitted under a fair interpretation of the zoning regulations. Justice demands that a stay be issued to allow for a hearing on the proposed revocation.

d. Public Interest

A stay in this matter would promote the public interest in sound procedure and judicial economy. The public has an interest in ensuring that laws and regulations are enforced and fairly and evenly. At one of the hearings on this appeal, the chairman of the Board asked, rhetorically, whether under appellants interpretation dog boarding would even be allowed in manufacturing districts like M or CM. Incinerators, motorcycles repair garages and detention centers are allowed, but because dog boarding is not an enumerated use, it apparently is banned from any location in the District of Columbia. One would think that at a minimum, the animal-owning public should have an opportunity to have this resolved following a hearing on the merits. Accordingly, the public interest will be protected by resolving the issues raised in this case and preserving orderly procedure.

WHEREFORE, Wagtime respectfully requests that this Board enter a stay of enforcement and to instruct the DCRA to cease enforcement proceedings against Wagtime pending resolution of this appeal before the Office of Administrative Hearings.

Respectfully submitted,



Edward L. Donohue
Mary Carolyn Brown

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006
(202) 955-3000

Counsel for Wagtime, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion To Stay Enforcement was served this _____ day of December, 2004, by hand-delivery upon the following:

Doris Woolrich, Esq.
Office of Compliance, Enforcement Division
Department of Consumer & Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

Edward L. Donohue

2164454_v3

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

EXHIBIT A

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

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:

Stephanie Mencimer
1414 Q Street, N.W.
Washington, D.C. 20009

Andrea Doughty, Esq.
1417 Q Street, N.W.
Washington, D.C. 20009

Erik Wemple
1414 Q Street, N.W.
Washington, D.C. 20009
John Weaver

Forrest R. Smith
1417 Q Street, N.W.
Washington, D.C. 20009

Gary Ridley
1408 Q Street, N.W. #32
Washington, D.C. 20009

Bonn Macy
1445 Q Street, N.W.
Washington, D.C. 20009

Mark Rabbage
1408 Q Street, N.W. #22
Washington, D.C. 20009

Edward L. Donohue, Esq. on behalf of Wagtime, LLC
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006

Andrea Ferster, Esq. on behalf of Mid-City Development
1100 17th Street, N.W.
10th Floor
Washington, D.C. 20036

Bennett Rushkoff, Esq.
D.C. Office of the Attorney General
441 4th Street, N.W., 4th Floor
Washington, D.C. 20001

Chairperson
Advisory Neighborhood Commission 2F
P.O. Box 9348
Washington, D.C. 20005

Commissioner 2F01
Advisory Neighborhood Commission 2F
P.O. Box 9348
Washington, D.C. 20005

Jack Evans, City Councilmember
Ward Two
1350 Pennsylvania Avenue, N.W.
Suite 106
Washington, D.C. 20004

Acting Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
Washington, D.C. 20002

Ellen McCarthy, Deputy Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor

Washington, D.C. 20002

Alan Bergstein, Esq.
Office of the Attorney General
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

rsn

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Building and Land Regulation Administration
Office of the Zoning Administrator

Lisa Schreiber
and
WagTime, LLC
1412 Q Street, N.W.
Washington, D.C. 20009

NOTICE OF PROPOSED REVOCATION OF CERTIFICATE OF OCCUPANCY NUMBER CO69395

This is official notice that the District of Columbia Department of Consumer and Regulatory Affairs ("the Department") intends to revoke Certificate of Occupancy Number CO69395, issued to Wagtime, LLC on January 28, 2004. The Department is taking this action pursuant to 12 DCMR § 110.5.3 (2003) which authorizes the Director to revoke a Certificate of Occupancy found to have been issued in error. On October 15, 2004, the Board of Zoning Adjustment (BZA), in Appeal Number 17092, found that Certificate of Occupancy Number CO69395 was issued in error in that *"dog boarding as a principal use is not permitted as a matter of right in the C-3-A/Arts zone district"* (see attached BZA Appeal Number 17092).

You have the right to challenge this proposed action. In order to exercise your right to a hearing, you must request it in writing within ten (10) calendar days of your receipt of this Notice. Your request may be mailed first class U.S. mail, postage pre-paid, to Office of Administrative Hearings, P. O. Box 77718, Washington, D.C. 20002. Alternatively, you may hand-deliver your written request for a hearing to the Office of Administrative Hearings, 941 North Capitol St., N.E., Suite 9100, Washington, D.C. 20002, within ten (10) calendar days of your receipt of this notice.

If you decide to request a hearing, you should also send a copy of your request, pleading or written communication in this case to the Department of Consumer and Regulatory Affairs, Office of the General Counsel, 941 North Capitol St., N.E., Suite 9400, Washington, D.C. 20002. Please be advised that, if you do not request a hearing within the time and manner specified in this notice, or fail to appear at a scheduled hearing, such failure will result in the immediate revocation of your Certificate of Occupancy without a hearing. Should you request a hearing, you will be notified by the Office of Administration Hearings of the hearing date and time.

Date: November 12, 2004

TOYE BELLO

Toye Bello
Zoning Administrator

EXHIBIT B

cc: Edward L. Donohue, Esq. and Steven E. Sher, Esq.
on behalf of WagTime, LLC
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006

Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street N.E. room 2100
Washington D.C. 20002
Tel: (202) 442 - 4470 Fax (202) 442 - 4862

Government of the District of Columbia
DCRA 4A

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.
CO 69395

THIS PERMIT IS VALID ONLY FOR THE PREMISES OF THE PROJECT ADDRESS

DATE : 1/28/2004

ADDRESS:	FLOOR(S):	PRCLID : 0209 (square) -0000- 0878 (lot)
1412 Q ST NW	FIRST FL & MEZZANINE	WARD: 2 ZONE: CM3

PERMISSION IS HEREBY GRANTED TO:	TRADING AS:
CORPORATION - WAGTIME LLC ID No.: L09504	

APPROVED USES:	PREVIOUS USES:
OTHER - SEE DESCRIPTION	OTHER - SEE DESCRIPTION

TYPE:		OCCUPIED SQ. FOOTAGE:	FLOOR LOAD:	EXPIRATION DATE:
CHANGE OF OWNERSHIP		1,248		NONE

DESCRIPTION OF USE:	FEE :
24HR. DOG BOARDING & GROOMING WITH ACCESSORY RETAIL SALE OF PET-SUPPLIES	$75.00

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated. VALID ONLY for the premise at the above address or part thereof, and for the purpose(s) indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW certificate must be obtained.

David A. Clark
DIRECTOR

PERMIT CLERK:
LEON PAUL

Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street N.E. room 2100
Washington D.C. 20002
Tel. (202) 442-4470 Fax (202) 442-4662

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.
CO 57903

THIS PERMIT IS VALID ONLY FOR THE PREMISES OF THE PROJECT ADDRESS.

DATE: 7/23/2003

ADDRESS	FLOOR(S)	PRCL ID: square / -0000- / lot	ZONE
1412 Q ST NW	1ST FL.& MEZZANINE	0209 / 0878	WARD: 2 — C-3-A/ART

PERMISSION IS HEREBY GRANTED TO:
CORPORATION: WAGTIME LLC
ID No.: L09504

TRADING AS:
Consumer

APPROVED USES:	PREVIOUS USES:
OTHER- SEE DESCRIPTION	OFFICE SPACE

TYPE:	BZA NO.:	OCCUPIED SQ. FOOTAGE:	OCCUP. LOAD:	EXPIRATION DATE:
USE CHANGE		1,248		NONE

DESCRIPTION OF USE:
24HR. DOG BOARDING AND GROOMING WITH ACCESSORY RETAIL SALE OF PET SUPPLIES. (C OF O TO EXPIRE 1-31-04)

FEE: $75.00

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated. VALID ONLY for the premise at the above address or part thereof, and for the purpose(s) indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

David A. Clark
DIRECTOR

PERMIT CLERK:
THINGOC MACXOAN

Holland+Knight

Tel 202 955 3000
Fax 202 955 5564

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006
www.hklaw.com

Edward L. Donohue
202 419 2455
ed.donohue@hklaw.com

November 18, 2004

VIA HAND DELIVERY

Toye Bello
Zoning Administrator
District of Columbia, Department of Consumer
and Regulatory Affairs
941 North Capitol Street, NE
Suite 2000
Washington, DC 20002

Re: Notice of Proposed Revocation of Certificate of Occupancy for Wagtime, LLC

Dear Mr. Bello:

Please accept this letter submitted on behalf of Lisa Schreiber and Wagtime, LLC as our request to challenge the Notice of Proposed Revocation of Certificate of Occupancy Number CO 69395. The Notice of Proposed Revocation was received by certified mail on November 15, 2004. Accordingly, this challenge is timely filed as required under DCRA rules.

As requested, we are providing a copy of this letter to the Office of the Attorney General.

Please contact me if there are any questions in this regard.

Sincerely yours,

HOLLAND & KNIGHT LLP

Edward L. Donohue

Edward L. Donohue

ELD/ls
Enclosures

cc: Lisa Schreiber (w/encl.)
Julie Lee (w/encl.)

EXHIBIT C

DISTRICT OF COLUMBIA COURT OF APPEALS

RECEIVED
NOV 17 2004
DISTRICT OF COLUMBIA
COURT OF APPEALS

WAGTIME, LLC *Petitioner,*

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Respondent.

No.

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
Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
DC Bar Number 412301
Attorney for Petitioner

November 17, 2004

EXHIBIT D

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:

Stephanie Mencimer
1414 Q Street, N.W.
Washington, D.C. 20009

Andrea Doughty, Esq.
1417 Q Street, N.W.
Washington, D.C. 20009

Erik Wemple
1414 Q Street, N.W.
Washington, D.C. 20009

Forrest R. Smith
1417 Q Street, N.W.
Washington, D.C. 20009

Gary Ridley
1408 Q Street, N.W., #32
Washington, D.C. 20009

Bonn Macy
1445 Q Street, N.W.
Washington, D.C. 20009

Mark Rabbage
1408 Q Street, N.W., #22
Washington, D.C. 20009

Andrea Ferster, Esq. on behalf of Mid-City Development
1100 17th Street, N.W.
10th Floor
Washington, D.C. 20036

Bennett Rushkoff, Esquire
D.C. Office of the Attorney General
441 4th Street, N.W., 4th floor
Washington, D.C. 20001

Chairperson
Advisory Neighborhood Commission 2F
P.O. Box 9348
Washington, D.C. 20005

Edward L. Donohue

2398305_v1