BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Stephanie Mencimer, et al., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of Denzil Noble, Acting Zoning Administrator, Department of Consumer and Regulatory Affairs, from the issuance of Certificate of Occupancy No. CO57903, dated July 23, 2003, to WagTime LLC, a 24-hour dog boarding and grooming with accessory retail sales of pet supplies.	)	BZA Appeal No. 17092

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' MEMORANDUM OF POINTS AND AUTHORITIES

The issue raised by this appeal is whether the Department of Consumer and Regulatory Affairs ("DCRA") erred in determining that a "dog boarding" facility is allowed as a matter of right in a C-3 District ("Major business and employment centers").

In deciding to allow WagTime's dog boarding facility to locate in a C-3 District, DCRA is entitled to assume that the facility will be operated in a manner that is lawful in a dense urban setting like the District. Allowing dog boarding facilities in the District's commercial zones does not mean that these zones, or other contiguous zones, may be subjected to the noise and odors associated with rural dog kennels.

DCRA's decision to allow dog boarding services as a matter-of-right use in a C-3 District is supported by the use's similarity to veterinary hospital services. A veterinary hospital is a type of "service establishment" that is expressly permitted as a matter of right in a C-2 District. 11 DCMR § 721.2(x). Veterinary hospitals provide overnight boarding for dogs that are awaiting or recovering from treatment. It follows that a dog boarding facility is a "service . . . use similar to" a veterinary hospital, and, like a

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veterinary hospital, is permitted as a matter of right in a C-2 District. 11 DCMR § 721.4. As is true for any other "use permitted in C-2 Districts under § 721," a dog boarding facility is a use that is also permitted in a C-3 District as a matter of right. 11 DCMR § 741.1.

This "right" to operate a dog boarding facility in a C-3 District is limited, however, by the right of neighbors to reasonable use and enjoyment of their own properties. Even a use that "does not violate zoning restrictions may nonetheless create a common-law nuisance." *Herbert v. Smyth*, 230 A.2d 235, 238 (Conn. 1967) (commercial dog kennel). In the District of Columbia, "the barking of a single household pet could, in some circumstances, be an actionable nuisance." *Carrigan v. Purkhiser*, 466 A.2d 1243, 1244 (D.C. 1983) (nuisance suit by next-door neighbor). The test is whether the dogs in question – either because of their smell or their noise – interfere with a neighbor's "reasonable use and enjoyment of [his or] her own land." *Id.* All else being equal, "the commercial breeding or keeping of dogs" may give rise to a "stronger" nuisance case than the keeping of dogs as "household pets or watchdogs." *Id.*[1]

Furthermore, any dog boarding facility in a C-2 or C-3 District has to comply with the District's animal control regulations, which make it illegal to "own or keep a dog that, by barking or in any other manner, disturbs the quiet of any neighborhood or any person."[2] 24 DCMR § 900.1. Violations are punishable "by a fine of not more than

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[1] Another consideration is whether there have been "continual or repeated violations of municipal ordinances." 58 Am. Jur. 2d § 134 (2002). As explained below, keeping barking dogs outside may violate both animal control and noise control regulations in the District.

[2] To avoid "constitutional infirmity," a provision of this type is construed as including *scienter* – *i.e.*, criminal intent – as an element of the offense. *Parry-Hill v. District of Columbia*, 291 A.2d 505, 506 & n.3 (D.C. 1972).

three hundred dollars ($300), or by imprisonment not exceeding ten (10) days." 24 DCMR § 900.9.

In addition, the District's noise control regulations allow maximum sound levels of 65 dB (daytime) and 60 dB (nighttime) in commercial zones and 60 dB (daytime) and 55 dB (nighttime) in residential zones. 20 DCMR § 2701.1. Sound levels are normally "measured at the property line of the property on which the noise source is located." 20 DCMR § 2701.2. If the property line runs between contiguous zones with different sound level limitations, the limitations of the more restrictive zones apply. *See* 20 DCMR § 2701.4. Violations of the sound limitations are punishable by fines of up to $300 and imprisonment for up to ten days, with each day the violation occurs constituting a separate offense. 20 DCMR § 2713.3.

The record in this appeal shows that WagTime's rear yard borders on a residential zone and that, therefore, the 60 dB (daytime) and 55 dB (nighttime) limitations apply. At the January 20, 2004 hearing in this appeal, Appellants introduced a table purporting to show "Noise Measures from Various Sources." The table lists "One Large Dog Barking @ 50 feet" as producing a "dBA (Average)" of 72, which easily exceeds both the daytime and nighttime limitations for a residential zone. It follows that if WagTime were to keep large barking dogs in its rear yard on a regular basis, the facility would be in violation of the District's noise control regulations.

DCRA's determination that a dog boarding facility may be located in a C-3 District does not relieve the facility's operator of responsibility for compliance with the District's animal control and noise regulations. The fact that a dog kennel in a rural area may lawfully keep dozens of dogs unattended and barking in outdoor pens does

not mean that an urban dog boarding facility may operate in a similar manner. The urban facility may have to keep most of its dogs inside, allowing them outside only for supervised walks. District residents who prefer that their dogs spend more time outside are free to forego the convenience of a boarding facility in the District and to bring their dogs to rural facilities instead.

In conclusion, DCRA's determination that a dog boarding facility is allowed as a matter of right in a C-3 District was correct because such a facility must be operated in compliance with the District's strict animal control and noise control regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15 th day of March, 2004, I caused true and correct copies of the foregoing District of Columbia Department of Consumer and Regulatory Affairs' Memorandum of Points and Authorities to be mailed, first-class postage prepaid, to the following:

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