20

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal of Zoning Administrator's Decision Allowing the Location of a 24-Hour Dog Boarding Kennel Use at premises 1412 Q Street, NW, (Square 0209, Lot 0878) per Certificate of Occupancy No. 57903, dated July 23, 2003, issued to WagTime, LLC.) BZA No. 17092

MID-CITY DEVELOPMENT COMPANY'S RESPONSE TO WAGTIME'S OPPOSITION CONCERNING MID-CITY'S PARTICIPATION IN THE CONTINUATION HEARING AS AN INTERVENOR AND MID-CITY'S MOTION TO STRIKE LETTERS ATTACHED TO WAGTIME'S RESPONSE

Wagtime, LLC ("Wagtime"), a party in this case, has filed two letters, both styled as an "opposition to certificate of occupancy appeal." The first letter apparently responds to the entry of appearance filed by counsel for intervenor Mid-City Development Company ("Mid-City"), in which Mid-City also notified the Board of its intent to present Mr. Armando Lourenco as an expert witness at the continuation hearing set for March 30, 2004. The second letter sets forth Wagtime's substantive response to the issues raised in this appeal, and attaches a number of written testimonials from Wagtime's clients expressing support for Wagtime. Mid-City now files this reply to the first letter, and files this motion to strike the letters from Wagtime's supporters attached as Exhibit B to the second letter.

I. Mid-City Response to the Objections Raised by Wagtime to Mid-City's Witness.

In its first letter, Wagtime suggests that Mr. Armando Lourenco should not be allowed to testify as an expert witness at the continuation hearing set for March 30, 2004, apparently based on the misconception that Mr. Lourenco is a witness for the Appellants, rather than intervenor Mid-City, and based on Wagtime's view that allowing "appellants . . . to introduce new

BZA
Case No. 17092
Exhibit No. 73

Board of Zoning Adjustment
District of Columbia
CASE NO.17092
EXHIBIT NO.73

witnesses" after having presented their case on January 20 would be "unfair," and that Mr. Lourenco's testimony would result in an "unnecessary delay" and a misuse of this Board's "scarce resources." As we now discuss, these objections are without merit.

At the outset, it appears that Wagtime is under the misapprehension that it is the Appellants, rather than Mid-City, that seek to present Mr. Lourenco as an expert witness. However, the entry of appearance filed by Mid-City makes clear that Mr. Lourenco will be a witness for intervenor Mid-City, not appellants. As the record also makes clear, Mid-City was granted "*intervenor* status" pursuant to 11 DCMR § 3112.15. *See* Transcript of BZA Hearing in Case No. 17092, at 116, 124-27 (Jan. 20, 2004) (hereinafter "Transcript") (emphasis added). Mid-City did not agree to present a combined case with Appellants (as distinct from Gary Ridley and Mark Ravage, who were granted status as co-appellants, and presented a combined case with the Appellants), but was permitted to present its own case. Transcript, at 118-19.

Contrary to Wagtime's suggestion, there is nothing "unfair" in permitting a party who has been granted status as an intervenor to present its case at the hearing. To the contrary, the rules of this Board specifying the "order of procedure" for appeals specifically contemplate the presentation of "Intervenor's case, if intervention is permitted by the Board," not as part of Appellant's case but after the testimony of the ANC and the owner, just prior to rebuttal and closing. 11 DCMR § 3117.11(a)(5). Indeed, at the hearing on January 20, 2004, Wagtime stated, through counsel, that it had "no objection" to Mid-City's intervention, and did not seek to impose any restrictions on Mid-City's participation in the appeal as intervenor. Transcript, at 121. Presumably, Wagtime therefore understood that, as an intervenor, Mid-City might exercise its prerogative to present evidence in accordance with the order of procedure in appeals in

support of its position.

Therefore, it is unclear why Wagtime believes that it would be "unfair" to allow Mr. Lourenco to testify. Mid-City, as an intervenor, is not required to request permission from this Board to present an expert witness. The Board's rules do not require persons seeking status as intervenors (as distinct from the appellant) to identify expert witnesses in advance of presenting their case. *See* 11 DCMR §§ 3106.2, 3112.10. Indeed, Wagtime itself has not sought fit to inform the Board of any witnesses that Wagtime might seek to present in support of its case in opposition. Nonetheless, Mid-City identified its sole witness in counsel's entry of appearance as a courtesy to the parties and the Board. Thus, Wagtime's "opposition" to Mr. Lourenco's testimony is misnamed. To the extent that Wagtime wishes to raise, as a preliminary matter, its opposition to Mid-City's witnesses, the proper way to do so would be to file a motion *in limine* to exclude Mid-City from presenting its expert witness.

In any event, Mid-City disagrees that Mr. Lourenco's expert testimony will be duplicative of Appellants' case, or that the presentation of this expert witness is a "tactic" that would divert "the scarce resources of DCRA staff well as [sic] this Board.". As reflected in the attached *curriculum vitae,* Mr. Lourenco would qualify as an expert in the interpretation of D.C. zoning regulations, and his expertise plainly arises to the level of a Zoning Administrator, a position that he previously held. This testimony is therefore not duplicative of that offered by the Appellant, inasmuch as this Board expressly declined to qualify Mr. George Oberlander, the expert witness presented by Appellants, as an expert in interpreting D.C.'s zoning regulations which arises to the level of a zoning administrator. *See* Transcript, at 144, 146. Instead, this Board accorded Mr. Oberlander the "different level" expert status of an expert in D.C. zoning regulations. *Id.* at 144.

Indeed, it accorded Mr. Oberlander this "different level" expert status in response to an objection interposed by Wagtime to Mr. Oberlander's qualifications. *Id.* at 141.

In short, presenting a highly-qualified expert view on a matter of first impression involving the interpretation of D.C.'s zoning regulations as hardly a "tactic" that would somehow waste this Board's "scarce resources." Accordingly, Wagtime's objections to Mid-City's presentation of Mr. Lourenco as an expert witness as part of its case are without merit.

II. Mid-City's Case Presentation Should Not Be Limited to Five Minutes

Wagtime also states that the "intervening party" should only be permitted to present one witness – Mr. Scott Pannick – and be allowed no more than five minutes time based on the fact that "Appellants told the board that his [sic] intervention . . . would require no more than five minutes," and based on its view that additional testimony would be "an unnecessary reiteration of testimony already entered for the record in the previous hearing." Wagtime therefore states in its letter that "the Board should proceed with the continuation hearing in the manner agreed upon: beginning with the Zoning Administrator's case, Ms. Mencimer's case[1], five minutes for Mr. Pannick, the ANC's case and finally closings and rebuttals." Once again, Wagtime's objection is based on a misreading of the record of the hearing that took place on January 20, and a misunderstanding of the rules governing appeals.

First, it is not correct that Mid-City somehow seeks to change the order of proceeding in the appeal from the order established by the rules governing appeals. To the contrary, as the

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[1] Wagtime's suggestion that "Ms. Mencimer's case" should follow the Zoning Administrator's case is indicative of Wagtime's confusion, since as is clear from the transcript (not to mention the caption of this appeal), Ms. Mencimer is one of the four original appellants, which case presentation preceded that of the Zoning Administrator. Transcript, at 131.

Chairman made clear at the January 20th hearing, "Mid-City now is a party in this, has the presentation of their own case. And it will follow that of the government and the ANC's. . . . So they'll not be directly in line after [Appellants]." *Id.* at 132.[2] This order fully comports with the order of procedure specified in this Board's rules governing appeals. *See* 11 DCMR § 3117.11(a).

Nor is it correct that Appellants, through their representations at the hearing, can limit Mid-City's presentation to five minutes, or that Appellant otherwise have the authority to waive Mid-City's right, as intervenor, to present its case and witnesses in the manner it determines necessary to advance its interests. As noted above, Appellants did not represent Mid-City at the January 20th hearing. Any intention on the part of Appellants to include testimony by Mr. Pannick as part of the 60 minutes allotted for Appellants' case cannot be construed as waiving Mid-City's right to present its own case, and, in any event, Appellants' intention at the outset of the hearing to include Mr. Pannick as part of its case was based on the contingent possibility that Mid-City might not be granted status as an intervening party, with the right to present their own case. To the extent that the Chairman of this Board later suggested, in jest, that Mid-City would be limited to five minutes, the Chairman quickly clarified that he was not being serious. Transcript, at 359. Further, as noted above, Wagtime itself did not object to Mid-City's intervention, and did not seek to impose any restrictions on Mid-City's participation in the appeal as intervenor.

Finally, as noted above, Mr. Lourenco's testimony will not be "an unnecessary reiteration of testimony already entered for the record in the previous hearing," but presents the perspective

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[2] For the record, and contrary to Wagtime's assertion, intervenors present their case after, not before, the ANC's case. *See* 11 DCMR § 3117.11(a).

of an expert in the interpretation of the zoning regulations not previously presented as part of Appellants' case. In any event, Mid-City estimates that Mr. Lourenco's testimony will take up approximately 10 minutes of time – only five more minutes than Wagtime is apparently willing to concede. By contrast, Wagtime's letter of "opposition" to Mid-City's witness will likely result in an extensive discussion of this issue as a "preliminary matter," consuming the "scarce resources" of the parties and this Board (and indeed, has already consumed the scarce resources of Mid-City by necessitating the filing of this response). Accordingly, Wagtime's insistence that either the rules governing appeals or the prior hearing warrant restricting Mid-City's case to five minutes for Mr. Pannick, preceding the ANC's case, are without merit.

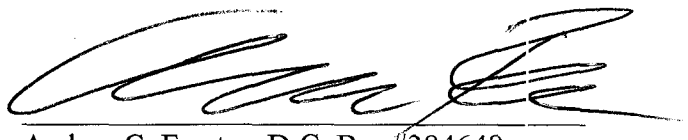
II. Mid-City's Motion to Strike

As Exhibit B to Wagtime's second "opposition" letter, Wagtime has appended various letters from clients to demonstrate that "there are a great number of neighbors, and customers of Wagtime that have written thoughtful and informative letters in support of Wagtime and in opposition to the appeal." Mid-City moves to strike these letters, as they are not relevant to the issues in this appeal. Rather, these letters are simply testimonials as to Wagtime's "cleanliness" or that their dogs are "well-behaved" – as issue that Appellants could easily rebut – issues that would only be relevant in the context of a variance proceeding that Wagtime seeks to avoid.

Moreover, the rules of this Board governing appeals do not contemplate permitting persons in opposition to the appeal to testify in the appeal. 11 DCMR. § 3117.11(a). Wagtime cannot be permitted to circumvent this restriction by filing letters from persons in opposition as appendices to its own opposition filing. To the extent that this Board allows these letters to remain in the record, Mid-City requests that it be permitted to present rebuttal evidence, including

statements from former customers who were highly dissatisfied with Wagtime's services.

Respectfully submitted,



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Attorney for Mid-City Development Company

March 24, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on March 24, 2004, a copy of the foregoing Response & Motion was served by mail on:

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- CURRICULUM VITAE -

August 00 - Present

President
Lourenco Consultants, Inc., Washington, DC

Manages and directs operations of consulting firm in regulatory compliance, code consulting and related services, in support of the development industry and of municipal regulatory agencies. Directs firm's third-party compliance activities, encompassing plans certification and code compliance inspections. Represents clients before the Board of Zoning Adjustment and serves as expert witness on code and Zoning matters.

July 98 - July 99

Acting Zoning Administrator
Zoning Division – Building and Land Regulation Administration, Washington, DC

Oversaw the operation of the Zoning enforcement division of the District of Columbia, on an interim basis, personally and directly involved with all critical decisions of enforcement of complex Zoning cases.

June 98 - August 00

Administrator
Building and Land Regulation Administration, Washington, DC

Oversaw operations of an Administration with a budget of $6M, encompassing six Divisions: Zoning, Historic Preservation, Permit Processing, Fire Protection, Building Inspection and Surveyor's Office. Acted as Building Code Official for the District of Columbia. Directed a staff of 95, including 42 inspectors and 19 professional staff (engineers, architects and historians) with plans review and field inspection responsibility in the disciplines of zoning regulations, historic preservation law, official surveying records, construction, plumbing, mechanical, electrical, fire protection, boiler and elevator codes. The Administration processed and issued 35,000 permits annually, including 10,000 building permits.

Dec 97 - May 98

Project Director, Schirmer Engineering Corporation
Miami Regional Office, North Miami Beach, Florida

Started-up and managed new regional code consulting and fire protection engineering office of leading nationwide corporation. Directed office day-to-day operations and business development and managed projects in South Florida.

Dec 96 - Dec 97

Project Director, Schirmer Engineering Corporation
Washington Regional Office, Arlington, Virginia

Provided technical direction to the engineering staff of the regional office. Assisted the regional manager in the day-to-day operations and in business development and managed major nationwide projects within the purview of the office, including new anchor stores for a major upscale department store chain.

Aug 95 - Dec 96

Senior Engineer, Schirmer Engineering Corporation
Eastern Regional Office, Falls Church, Virginia

Responsibilities included oversight of consultation and design engineering services within the eastern regional office, including building and fire code consultation, as well as management of major projects within the purview of the office.

Feb 94 - Aug 95

Deputy Director, Code Enforcement Bureau
Fire Department, City of Alexandria, Virginia

Assisted the Director in the management of the Bureau, with a staff of 43 and a budget of $2M. Duties included oversight responsibility for the daily operations of the New Construction Inspections and the Administrative Division.

June 90 - Feb 94

Program Manager, Permit Processing Division
Building and Land Regulation Administration, Washington, DC

Managed the Division and headed the Permit Center, with a staff of 40, including 15 engineers. Division processes and issues 35,000 permits annually, including 10,000 building permits for a construction total in the order of one billion dollars. Had overseeing responsibility for the enforcement of the D.C. Construction Codes (including BOCA Building, Mechanical, Plumbing and Energy Conservation codes) in plan review. Ensured, through the permit issuance processes, the appropriate enforcement of other local regulations in areas as diverse as environmental impact, land use, historic preservation, health, water quality, sanitation, and noise control.

Jan 88 - Jun 90

Chief, Mechanical Engineering Section
Building and Land Regulation Administration, Washington D.C.

Headed the engineering section, with a staff of 5 engineers, including mechanical and plumbing plans review on an average of 10,000 building permits annually, including approximately 1,000 projects ranging from $75K to multi-million-dollar developments. Occupied positions of progressively higher responsibility, through 1990, including Acting Chief of the Technical Review Branch (engineering plans review).

Sep 86 - Jan 88

Mechanical Engineer, Mechanical Engineering Section
Building and Land Regulation Administration, Washington D.C.

Formerly with the Portuguese Nuclear Safety Agency, since 1978, as a Mechanical Engineer and, since 1980 as a Nuclear Engineer specialized in Structural Mechanics.

EDUCATION

1979 - 1980 **MS Nuclear Engineering**
National Institute of Nuclear Sciences and Technology, Saclay, France
Major: Structural Mechanics

1966 - 1972 **BS Mechanical Engineering**
Lisbon University of Technology, Lisbon, Portugal
Major: Production Management & Mechanical Structures

PROFESSIONAL REGISTRATION

1989 Licensed Professional Engineer (P.E.) - Registered in District of Columbia.

APPOINTMENTS AND MEMBERSHIPS

1996-Present Chair of the Issues and Policy Subcommittee of the Mayor's Building Code Advisory Committee (BCAC). District of Columbia

1997-2001 Member of the Construction Codes and Standards Liaison Task Group of the Society of Fire Protection Engineers (SFPE).

1998 - 1999 Member of the International Mechanical Code Development Committee International Code Council (ICC)

1996 - 1998 Member of BCAC representing the Chesapeake Chapter of SFPE. District of Columbia

1996 - 1998 Active in several BCAC's technical subcommittee (Fire and Life Safety - Existing Structures). District of Columbia

1997 - 1998 Member of NFPA Technical Committee on Fire Protection of Nuclear Facilities
Alternate - NFPA 801-805

1997 - 1998 Member of NFPA Technical Committee on Air Conditioning
Alternate - NFPA 90

1994 - 1996 Member of the BOCA Code Interpretations Committee
Building Officials and Code Administrators International (BOCA)

1992 - 1994 Member of the Mayor's Building Code Advisory Committee (BCAC)
District of Columbia

1988 - 1994 Active in several of BCAC's technical subcommittees (Fire and Life Safety - Existing Structures - Mechanical - Plumbing - Accessibility)

2003- Present Member of International Code Council
2003 - Present, Professional member

1987 - 2003 Member of Building Officials and Code Administrators (BOCA) International
1987 - 1993, Active Member representing the District of Columbia
1994 - 1995, Active Member representing the City of Alexandria
1995 - 1998, Professional member
1998 - 2000, Active Member representing the District of Columbia
2000 - 2003, Professional member

1995 - 1998 Member of Southern Building Code Congress International (SBCCI)
Professional member

PROFESSIONAL AFFILIATIONS

National Society of Professional Engineers (NSPE)
Society of Fire Protection Engineers (SFPE)
International Code Council (ICC)
National Fire Protection Association (NFPA)
Automatic Fire Alarm Association (AFAA)