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

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D.C. BOARD OF ZONING ADJUSTMENT

MID-CITY DEVELOPMENT COMPANY'S OPPOSITION TO WAGTIME'S MOTION TO DISMISS

Introduction

Wagtime, LLC ("Wagtime"), a party in this case, has filed a motion to dismiss this appeal, apparently in response to the Appellants' filing of a motion to amend their appeal to include the permanent certificate of occupancy (No. 69395) issued by the D.C. Department of Consumer and Regulatory Affairs ("DCRA") with respect to Wagtime's premises. Wagtime argues that the motion to amend the appeal to include the permanent certificate of occupancy is untimely and does not comport with the rules of the Board. Wagtime also argues that the appeal is moot because the temporary certificate of occupancy that is the subject of this appeal expired on January 31, 2004. Mid-City Development Company, an intervenor in this appeal, now files this opposition.

I. This Appeal is Not Moot.

This Board's rules prohibit it from considering "informal requests for advice or moot questions." 11 DCMR § 3100.7. In the judicial context the doctrine of mootness "assures that courts limit their decisions to the resolution of live cases and controversies between specific parties," and that a court "refrain from a decision if it "cannot affect the matter in issue in the case

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before it." Kopf v. D.C. Alcoholic Beverage and Control Commission, 381 A.2d 1372 (D.C. App. 1977). As we now discuss, there is plainly a live controversy among the parties, notwithstanding the expiration of the temporary certificate of occupancy, and a decision by this Board will materially affect the rights of the parties.

First, Wagtime continues to use the premises for dog boarding, pursuant to the permanent certificate of occupancy. The permanent certificate of occupancy is identical in terms of the authorized use to the temporary certificate of occupancy, authorizing, once again, "24hr. dog boarding and grooming with accessory retail sale of pet supplies." As a result, Appellants and Mid-City will continue to be aggrieved by the adverse impacts associated with this use, including excessive noise from the barking of dogs using the exterior space, and odors from their waste. Indeed, these adverse impacts will be exacerbated, inasmuch as the permanent certificate of occupancy, unlike the temporary certificate of occupancy, fails to include any conditions or limits on the use of the exterior yard in connection with the dog boarding operations. As a result, there continues to be a case and controversy at issue between the parties, and a determination by this Board that dog boarding is not a matter of right use in the C-3-A zone will not simply be an advisory opinion but will have a material impact on the rights of the parties.

Further, Appellants timely filed a motion to amend this appeal to include the permanent certificate of occupancy. Amendment of the appeal will ensure that a decision by this Board will require the revocation of the permanent certificate, providing the relief sought by Appellants in this appeal. Accordingly, this appeal is not moot.

The Court's decision in the Kopff case is instructive. In that case, the Court held that an appeal of an initial license issued by the ABC board was not moot despite the fact that the license

that was subject to the appeal had expired, since the ABC board had renewed the license and the objectors had made a good faith effort to preserve their objections with respect to the renewal license. The court pointed out that the renewal of the license was much more *pro forma* than the issuance of the initial license, and a decision would have an impact on the rights of the parties.

The same holds true here. In this case, the issuance of the temporary Certificate of Occupancy provided the context in which the Zoning Administrator made the administrative determination, still plainly at issue here, that Wagtime's use of the premises for 24-hour dog boarding was "matter-of-right" due to its similarity to other matter-of-right uses. See Appellants' Pre-hearing Submission, Attachment 6. The temporary certificate of occupancy indicates that determination was made at the highest administrative level within the DCRA -- by the Zoning Administrator himself – and was preceded by an "in-depth review" of the zoning issues. See Letter to Jerrily Kress, BZA from Bennett Rushkoff, Esq. (Jan. 16, 2004), attaching letter of Denzil Noble to Sheven E. Sher, dated July 30, 2003. The authorization on the permanent certificate of occupancy by Zoning Division staff person Faye Oguneye, by contrast, appears to be *pro forma,* "per the Zoning Administrator," and was not subject to a separate, in-depth review or re-consideration of the analysis of the prior administrative determination that this use is "similar" to other matter-of-right uses Therefore, the temporary certificate of occupancy and the underlying analysis undertaken by the Zoning Administrator are directly relevant to this appeal, and this appeal properly encompasses both the temporary and permanent certificates of occupancy.

II. Appellant's Motion to Amend the Appeal is Timely and Proper.

Wagtime next argues that the Appellants' motion to amend the appeal should not be

permitted because it is " not timely," has not complied with the notice requirements for appeals in 11 DCMR § 3112.7, 3112.14, and is on the 'wrong form.." Apparently, Wagtime believes that Appellants filed a separate appeal of the permanent certificate of occupancy rather than, as Appellants propose, to amend the present appeal to include the permanent certificate of occupancy. However, the Appellants' filing is plainly captioned as a "request to amend appeal," and was filed and accepted for filing in the same docket as the present appeal

Nor are the Appellants required to file a separate appeal of the permanent certificate of occupancy. This Board has frequently permitted Appellants to amend their appeal to include subsequently issued permits that are germane to the same project or order that was the subject of the original appeal, without requiring the filing of a new appeal or additional notice. See, e.g., Sisson v. DCBZA, 805 A.2d 964 (D.C. 2002) (noting that BZA permitted an appellant, on the day of the hearing, to amend her appeal to include all five of the permits issued with respect to the property, and not just the three permits specifically mentioned in the appeal). Here, the issuance of the permanent certificate of occupancy is plainly germane to the temporary certificate of occupancy, inasmuch as it authorizes an identical use: "24hr. dog boarding and grooming with accessory retail sale of pet supplies." As noted above, issuance of this certificate was *pro forma* and was not the subject of a separate zoning determination, but rather, was controlled by the "in-depth" undertaken by the Zoning Administrator in the context of the temporary certificate of occupancy. Accordingly, the parties would experience no prejudice or unfair surprise by permitting the appeal to be amended to include the permanent certificate of occupancy, and indeed, Wagtime makes no such argument in its motion to dismiss.

By contrast, requiring Appellants to file a separate appeal related to the permanent

certificate of occupancy would be highly prejudicial to Appellants, and would waste the resources of the Board and the parties, by requiring Appellants to re-present at a new hearing the same witnesses and evidence as has already been presented by the Appellant at the prior hearing on the temporary certificate of occupancy held on January 20, 2004, and requiring the re-litigation of procedural issues that have already by resolved by this Board.

In any event, by any standard, the motion to amend the appeal, filed on March 26, 2004, to include the permanent certificate of occupancy, issued on January 28, 2004, is plainly timely. If Appellants' were to file a separate appeal of this certificate of occupancy, the appeal must be filed within 60 days of the issuance of this certificate, *i.e.*, by March 29, 2004. 11 DCMR § 3112.2(a). The motion to amend this appeal was filed within this time period.

Likewise, Wagtime's suggestion that the appeal should be dismissed because the amendment is on the "wrong form" is also without merit. If this Board believes that the amendment is on the "wrong form," the Appellant must be given the opportunity to re-file on whatever form is most appropriate. See 11 DCMR § 3100.6 ("No appeal shall be dismissed on the grounds that the appellant failed to comply with the provisions of this chapter unless, afte rdue notice of the deficiency and expiration of a reasonable time as fixed by the Board, the deficiency has not been corrected.").

Conclusion

For the foregoing reasons, Wagtime's motion to dismiss should be rejected.

Respectfully submitted,

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March 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on March 30, 2004, a copy of the foregoing Opposition to Motion to Dismiss was served by mail on, or as otherwise indicated:

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