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 Certificates of Occupancy Nos. CO57903 and CO69395, dated July 23, 2003 and January 28, 2004, to WagTime LLC, for 24-hour dog boarding and grooming with accessory retail sales of pet supplies.	)	BZA Appeal No. 17092

D.C. BOARD OF ZONING
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DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

PROPOSED FINDINGS OF FACT:

1. On July 8, 2003, Wag Time, L.L.C. ("WagTime") applied to the Building and Land Regulation Administration ("BLRA") of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") for a certificate of occupancy at 1412 Q Street, N.W., for the following proposed use: "24 hr dog boarding and grooming with accessory retail sale of pet supplies." Exh. 36 (Attach. at 2, 16). The subject property is located in the C-3-A/Arts District and borders the R-5-B District. *Id.* at 3, 17; Tr. 3/30/04 at 219. The facility has an occupied square footage of 1,248. Exh. 36 (Attach. at 1-2, 16).

2. In a July 11, 2003 letter to the BLRA Administrator, counsel for WagTime represented that, in connection with the certificate of occupancy application, his client had made "the following commitments regarding the use of the outdoor space at the rear of the building" at 1412 Q Street, N.W.:

1. There would be no more than 20 dogs outside at any one time;
2. The use of that area would occur only between the hours of 9:00 A.M. and 5:00 P.M.; and
3. All use of the outdoor space would be supervised by employees of the business.

Exh. 36 (Attach. at 6-7) (quoting letter). Counsel stated that his client was "willing to observe the above restrictions as a means of attempting to alleviate concerns that may

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have been raised about the use of the rear space." *Id.* at 7. He also stated that his client was "continuing to investigate what she 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." *Id.*

3. On July 23, 2003, the BLRA issued to WagTime a temporary certificate of occupancy for the proposed use, with the certificate set to expire on January 31, 2004. By letter to WagTime's counsel, dated July 30, 2003, the BLRA Administrator (who was also DCRA's Acting Zoning Administrator) stated that DCRA had "conducted an in-depth review of all aspects of the plan to operate WagTime at the Q Street location" and that "DCRA has no legal basis for withholding a Certificate of Occupancy." He further stated that the "six-month, conditional C of O" was "based on the following commitments made by the applicant, which DCRA will monitor over the six-month period":

> 1. No more than 20 dogs are permitted outside at any one time;
> 2. Use of the outdoor space at the rear of the property is permitted only between 9 AM and 5 PM;
> 3. Use of the outdoor space must be supervised by employees; and
> 4. Construction of a proposed, temporary cover over part, or all, of the rear yard is required to protect and enclose the dogs and to help minimize noise impacts.

Exh. 36 (Attach. at 4-5) (quoting letter).

4. DCRA's conclusion that it had "no legal basis for withholding a Certificate of Occupancy" followed from a determination by Faye Ogunneye, Chief of DCRA's Zoning Review Branch, that WagTime's proposed use was a "service or retail use similar to" those expressly allowed as a matter of right in the (more restrictive) C-2 District under 11 DCMR § 721.4. Exh. 5; *see* Tr. 3/30/04 at 215-25. In reaching that determination, Ms. Ogunneye considered the proposed use's similarity to three matter-of-right uses in the more restrictive C-2 Zone: "Public bath, physical culture, or health service" (11 DCMR § 721.2(s)); "Veterinary hospital" (11 DCMR § 721.2(x)); and "Pet shop" (11 DCMR § 721.3(p)). Tr. 3/30/04 at 220-24, 245, 262-63; Exh. 5. Of these uses, she considered the veterinary hospital use to be "most relevant" to the issue of "dog boarding" because "at the hospital . . . . dogs do stay overnight and get cared for." Tr. 3/30/04 at 228.

5. The Board credits Ms. Ogunneye's testimony that the Certificate of Occupancy

> was issued for six months [only] in hopes that DCRA would be able to monitor activities on the site. If any residents were to call in and complain, we would go back and take a look and make sure that they were pretty much complying with the conditions they imposed on themselves.

Tr. 3/30/04 at 227. As Ms. Ogunneye explained to the Board, there was no reason "to have imposed these conditions other than the fact that they were offered by the

applicant," and at the end of the six-month period, "we took the conditions off." *Id.* at 227, 241.

6. On September 22, 2003, Appellants Stephanie Mencimer, Erik Wemple, John Weaver, and Forrest R. Smith ("Appellants"), all of whom lived near the subject property, filed this appeal with the Board from DCRA's July 23, 2003 decision to issue a certificate of occupancy for the proposed use at the premises of the subject property. Exh. 1; Exh. 26 at 1-2 & Attach. 1. Their appeal focuses on use of the premises for dog boarding as opposed to dog grooming. Tr. 1/20/04 at 230.

7. By letter dated December 16, 2003, the Chairman of the Advisory Neighborhood Commission ("ANC") for the subject property informed the Board that the ANC, while not taking a position on the merits of this appeal, desired that the Board resolve the issue of whether the property's "current use" was a matter-of-right use:

> At its December 3, 2003 monthly meeting, which was publicly noticed and with a quorum present, ANC 2F voted unanimously (6-0-0) to accept the recommendation of its Community Development Committee (CDC) that it not take a position in favor of or opposing the above-referenced appeal. The ANC requests the Board of Zoning Adjustment issue an opinion as to whether the current use of the property is a matter of right within C-3-A zoning and thereby resolve this issue for all involved.

Exh. 23.

8. On January 20, 2004, two additional individuals joined the group of Appellants. Tr. 1/20/04 at 127. Also that day, Mid-City Development Company, owner of a nearby building being developed for condominiums, was granted status as a party intervenor on the side of Appellants. *Id.* at 118-20, 127-28; *see also* Exh. 75 (attorney's letter of appearance).

9. On January 28, 2004, three days before the scheduled expiration of the certificate of occupancy issued on July 23, 2004, DCRA issued to WagTime a second certificate of occupancy to use the premises of the subject property for "24hr. dog boarding & grooming with accessory retail sale of pet supplies." Exh. 74 (Attach. 1 at 2). The second certificate of occupancy was not accompanied by any conditions and did not have an expiration date. On March 23, 2004, Appellants filed an appeal with the Board from DCRA's decision to issue the second certificate of occupancy. *Id.* at 1. The Board has deemed the original appeal to be amended to include both certificates of occupancy. Tr. 3/30/04 at 196, 199.

10. The issuance of the second certificate of occupancy was based on DCRA's determination that the proposed use was allowed as a matter of right; DCRA's "issuance of the second Certificate of Occupancy was not because there hadn't been complaints" during the period that the first certificate of occupancy was in effect. Tr. 3/30/04 at 256 (Ogunneye testimony). Moreover, in DCRA's view, whether or not there had been

"evidence of detrimental impact" during the six-month period under the first certificate of occupancy "had no bearing on whether or not [the use] was a matter-of-right." *Id.* at 230.

11. The primary external effects of uses that relate to dogs are the noise and waste that dogs produce. A single large dog barking outdoors can produce a noise level of 72 decibels at 50 feet. Exh. 74 (Attach. 2 at 1-2). Dogs engaged in group play in an outdoor kennel are likely to generate prolonged barking noise. Tr. 1/20/04 at 297-98.

12. Strategies for reducing the noise generated by dogs include keeping dogs inside most of the time, not placing dogs together for free play, not allowing dogs outside except for leashed walks or supervised individual play, providing dogs with an indoor exercise room, and quieting barking dogs by placing them in cages covered with blankets or towels. *Id.* at 270-71, 278-79, 293, 309, 312. As a general rule, dogs on leashes will not engage in prolonged barking, even when two leashed dogs are walked together. *Id.* at 309, 312.

13. Strategies for properly disposing of dog waste include picking up and bagging indoor waste, arranging for bags of waste to be picked up regularly, using a "pooper scooper" to collect outdoor waste, and providing "some type of filtration or silt system" for drainage of dog run waste. *Id.* at 268, 294-96.

14. Dogs may be boarded entirely indoors, without ill effect, for a period of a week of two, as long as there is some human contact, adequate food, and a clean environment. *Id.* at 311-13. Some dogs may be maintained indoors indefinitely as long as they are walked regularly. *Id.* at 280.

15. A veterinary hospital typically cares for dogs overnight after surgery, and may allow a dog stay overnight prior to surgery. *Id.* at 264-65. Sometimes, a dog will engage in prolonged barking while staying at a veterinary hospital following surgery. *Id.* at 269.

16. Pet shops commonly house up to 15 to 20 puppies in glass enclosed cases. Pet stores may also place puppies in indoor exercise cages, with grilled floors that allow puppy excrement to drop into trays. *Id.* at 291-93.

17. Veterinary hospitals and pet shops typically keep dogs indoors. *Id.* at 284, 293-94, 312-13. Therefore, these facilities would tend not to generate the level of noise generated by dogs playing outside in groups.

18. In conclusion, the external effects of a facility that boards dogs will depend primarily on the number of dogs present and on whether the facility takes steps to reduce the noise generated by dogs and to properly dispose of dog waste. By taking steps to reduce noise and to properly dispose of waste, a facility devoted primarily to the boarding of dogs may ensure that its external effects are similar to the external effects of veterinary hospitals or pet shops that keep a similar number of dogs.

PROPOSED CONCLUSIONS OF LAW:

1. A use is permitted in a C-3 District as a matter of right if it is a use that is permitted as a matter of right in a C-2 District. 11 DCMR § 741.1.

2. A "service or retail use" is permitted as a matter of right in a C-2 District if the use is "similar to" one or more of the matter-of-right uses listed in 11 DCMR §§ 721.2 and 721.3. 11 DCMR § 721.4.

3. The matter of right uses listed in 11 DCMR §§ 721.2 and 721.3 include use as a veterinary hospital (§ 721.2(x)) and use as a pet shop (§ 721.3(p)).

4. Applying this regulatory scheme, the Board must consider whether use as a dog boarding facility is "similar to" use as a veterinary hospital or use as a pet shop. If so, then use as a dog boarding facility is a matter-of-right use in a C-3 District. The two most important factors to consider when determining whether uses are "similar" for purposes of 11 DCMR § 721.4 are the degree to which the uses are normally associated with one another and the degree to which the uses generate similar external effects. The more that different uses are associated with one another and generate similar external effects, the more these uses are compatible and, therefore, "similar to" each other.

5. In contrast to the adult day treatment program in *Chagnon v. District of Columbia Bd. of Zoning Adjustment*, 844 A.2d 345, 348-49 (D.C. 2004), which could not qualify as a "child/elderly development center" because it failed to meet the "plain language" of the pertinent definition, a use that is "similar to" a use listed in section 721.2 or 721.3 need not meet any further definitional requirement in order to be deemed a matter-of-right use under section 721.4. Moreover, the uses listed in sections 721.1 and 721.3 represent an extraordinarily broad range of commercial activity with an equally broad range of regulatory regimes. Therefore, while a professional had to be licensed, bound by a code of professional ethics, and professionally educated in order to qualify for "similar professional person" status under another zoning regulation, *see* Exh. 82 (Board decisions regarding similarity of professionals), a use need not be subject to any specific type of regulatory scheme in order to be a "similar" use for purposes of section 721.4.

6. Dog boarding facilities, veterinary hospitals, and pet shops are uses that are normally associated with one another. All are retail establishments that serve the dog-owning public by keeping dogs on the premises. Like dog boarding facilities, veterinary hospitals keep customers' dogs overnight and, in some cases, offer dog boarding as a related service. Tr. at 313.

7. While humans generate a very wide range of external effects depending on the activities in which they are engaged – effects that range from the mild annoyances of residential activities to the extreme noise and pollution generated by heavy industry – dogs generate a much more limited range of external effects. These external effects – barking and the generation of dog waste – result simply from the fact that dogs are dogs.

These external effects are associated, to at least some degree, with any commercial use that involves the care and maintenance of dogs.

8. The only dog-related commercial uses mentioned in the zoning regulations are veterinary hospital and pet shop, both of which are listed as matter-of-right uses in a C-2 District. Therefore, C-2 (and less restrictive) Districts have been deemed suitable for the external effects associated with commercial uses that involve the care and maintenance of dogs. Moreover, neither the veterinary hospital use nor the pet shop use is subject to a soundproofing requirement or a size limitation. *Cf.* 11 DCMR §§ 721.2(e) and 721.2(j) (bowling alley "shall be soundproof"; general indoor storage facility shall not exceed 2,500 square feet of gross floor area).

9. Any dog-related facility, even if allowed as a matter of right in a C-2 (or less restrictive) District, must 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." 24 DCMR § 900.1; *see Parry-Hill v. District of Columbia*, 291 A.2d 505, 506 & n.3 (D.C. 1972) (provision construed as including criminal intent as an element of the offense). These regulations also make it illegal for one "having custody of a dog" not to "immediately remove [the dog's] excrement from any curb, gutter, alley or street," and illegal for one "having custody of a dog [to] permit the dog's excrement to remain on private property without the consent of the owner or occupant of the property." 24 DCMR §§ 900.7 and 900.8.

10. Furthermore, any "right" to operate a dog-related facility in a C-2 District is limited 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 in a nuisance case 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.*

11. The District's noise control regulations allow maximum sound levels of 65 decibels (daytime) and 60 decibels (nighttime) in commercial zones and 60 decibels (daytime) and 55 decibels (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.

12. The noise produced by one large dog barking outdoors at 50 feet – 72 decibels – exceeds the daytime and nighttime limitations for both commercial and residential zones. Lawful operation of a dog boarding facility, or any other facility that maintains dogs on the premises, means avoiding prolonged outdoor barking – or even prolonged indoor barking – that violates the District's animal control or noise control regulations.

13. Lawful operation of a dog boarding facility also means complying with the District's animal control regulations by preventing dog waste from running off the property onto public alleys or streets.

14. In comparing the external effects of dog boarding facilities to the external effects of veterinary hospitals and pet shops, one must assume that all the facilities are being operated lawfully and do not result in an actionable nuisance. Otherwise, there is theoretically no limit to the potential external effects. Therefore, in comparing the external effects of a dog boarding facility, a veterinary hospital, and a pet shop in a C-2 District, one must assume that each facility is operated in a manner that does not produce prolonged outdoor barking and that does not result in dog excrement being left on any curb, gutter, alley, or street.

15. Evidence relating to WagTime's operation of its dog boarding and grooming facility – including evidence relating to neighborhood complaints – is relevant only to the extent that it may help the Board to determine the external effects of *lawful* operation of a dog boarding facility. The issue before the Board is whether dog boarding is allowed in a C-2 or C-3 District as a matter of law, not whether WagTime, either because it has operated in violation of District law or for some other reason, is undeserving of its certificate of occupancy.

16. Having compared the external effects of dog boarding facilities to the external effects of veterinary hospitals and pet shops, as well as the degree to which dog boarding services are associated with the services of veterinary hospitals and pet shops, the Board concludes that "dog boarding" is "similar to" both veterinary hospitals and pet shops for purposes of 11 DCMR § 721.4. Therefore, dog boarding is permitted as a matter of right in a C-2 or C-3 District.

17. The Board need not consider the appropriateness of (1) the six-month time limit on the first certificate of occupancy, or (2) the conditions set forth in the BLRA Administrator's July 30, 2003 letter to WagTime's counsel. The time limit and conditions applied only to the first certificate of occupancy, which was replaced by the second certificate of occupancy on January 28, 2004. In addition, whether or not WagTime complied with the conditions was not a consideration in the Zoning Administrator's decision to issue the second certificate of occupancy. Therefore, the Board declines on mootness grounds to consider the appropriateness of DCRA's decision to impose these conditions on the first certificate of occupancy.

18. The opening of WagTime's dog boarding facility was not a "major action" as defined by the District's Environmental Policy Act ("Act") and, therefore, did not require the filing of an Environmental Impact Screening Form (EISF). D.C. Official Code §§ 8-109.02(2) & 8-109.03(a) (2001). The Act and its implementing regulations define two types of major actions: (1) an action that meets a million-dollar cost threshold (in 1989 inflation-adjusted dollars) and "*may* have a significant impact on the environment," 20 DCMR § 7201.2 (emphasis supplied), and (2) an action that does not meet the million-dollar cost threshold but "imminently and substantially affects the public health, safety,

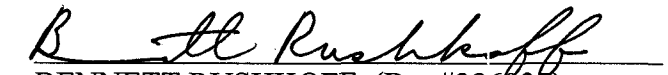
or welfare," 20 DCMR § 7201.3. Given the absence of good reason to believe either that an imminent and substantial effect on public health, safety, or welfare was likely to result from the boarding of dogs at WagTime's facility, or that such a small (1,248 square-foot) facility could possibly have cost as much as $1 million in 1989 dollars, DCRA could not reasonably have required WagTime to prepare and submit an EISF as part of its application for a certificate of occupancy.

19. For these reasons, the Board concludes that DCRA did not err in issuing to WagTime certificates of occupancy that included 24-hour dog boarding as a permitted use.

Respectfully submitted,

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Dated: June 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2004, I caused true and correct copies of the foregoing District of Columbia Department of Consumer and Regulatory Affairs' Proposed Findings of Fact and Conclusions of Law to be mailed, first-class postage prepaid, to the following:

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