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,) BZA No. 17092
NW, (Square 0209, Lot 0878) per Certificate of Occupancy No.)
69395, dated January 28, 2004, issued to WagTime, LLC)

Hearing dates: January 20, 2004
March 30, 2004
May 11, 2004

Decision date: July 6, 2004

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PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF
APPELLANTS AND INTERVENOR MID-CITY DEVELOPMENT

I. SUMMARY OF EVIDENCE

1. This appeal was filed on September 22, 2003, by Stephanie Mencimer, Erik Wemple, John Weaver and Forrest R. Smith, pursuant to 11 DCMR §§ 3100.2 and 3200.2 challenging the issuance by the D.C. Department of Consumer and Regulatory Affairs ("DCRA") of a temporary Certificate of Occupancy ("C of O") authorizing WagTime, LLC ("WagTime") to use its premises 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. Mark Rabbage and Gary Ridley joined the appeal as co-appellants, and Mid-City Development Company was permitted to intervene as a party in support of the appeal. Transcript ("Tr."), at 126-28. This appeal was subsequently amended to include a permanent C of O issued to WagTime authorizing the same uses on January 28, 2004. The relevant facts leading up to the issuance of these certificates of occupancy are set forth below.

2. On May 29, 2003, DCRA issued a citation to WagTime for operating a dog grooming service/pet supply service at leased premises at 2104 18th Street, N.W. without a C of O. *See* DCRA Response to Board's Request, Attachment C (April 27, 2003). Upon being informed that WagTime was moving in June 2003, DCRA informed WagTime that it must obtain a Certificate of Occupancy prior to operating at its new premises. *Id.* In fact, WagTime had signed a consent order to vacate its prior leased premises in order to avoid eviction, due to complaints about the noise from WagTime's operations. Appellants' Pre-hearing Submission, Attachments 14 and 15. In June 2003, WagTime began operating a pet supply, dog daycare and grooming service at leased premises at 1412 Q Street, N.W., without first obtaining a C of O. Exhibit 36, at 10-12 (Letter from D.C. Corporation Counsel with Attachments (Jan. 16, 2004)).

3. WagTime's commercial dog boarding, pet supply and dog grooming enterprise at 1412 Q Street, N.W. is located in a 1.5 story town house on a residential block, directly abutted

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on three sides by two town houses and condominiums. *Id.*, at 13. The property is owned by 1412 Que St. LLC and leased to WagTime. *Id.*, at 2. The premises include an outside area used as a dog run, and WagTime's operations include providing dog boarding for approximately 25 to 35 dogs on a daily basis in a cageless environment, including use of the outdoor area. *Id.*, at 13; Appellants' Preheating Submission, Attachments 9, 10, and 16. WagTime's sanitation efforts consist of picking up dog feces and placing them in trashcans, and washing dog urine down the existing drain in the middle of the outdoor area, with overflow from these operations running off into the rear public alley. Exhibit 36, at 14; Trash is collected twice a week. Appellants' Pre-hearing Submission, Attachment 16.

4. While 1412 Q Street, N.W. is zoned C-3-A/Arts overlay, it directly abuts an R-5B zoned residential neighborhood. In addition, Mid-City Development Company, which intervened on the side of the Appellant, is in the process of constructing a building with 85 condominium apartments on 14th and Church Streets directly across the alley from WagTime's facility.

5. On June 30, 2003, following an on-site inspection of the premises, DCRA issued a Notice to Discontinue Use of the premises until a C of O had been issued. *See* DCRA Response to Board's Request, Attachment C (April 27, 2003).

6. On July 8, 2003, WagTime applied for a C of O to use the premises at 1412 Q Street, N.W for "24 hr. dog boarding and grooming with accessory retail sales of pet supplies." Exhibit 36, at 2. The application was reviewed by Faye Ognneye, Chief of DCRA's Zoning Review Branch, and Denzil Noble, Acting Zoning Administrator. Tr. at 216-17, 221 (March 30, 2004).

7. Rather than issue a permanent C of O, DCRA instead issued a six month "conditional" C of O (#57903) on July 23, 2003 authorizing WagTime to use the premises located at 1412 Q Street (Square 209, Lot 878) for "24 Hr. Dog Boarding and Grooming with Accessory Retail Sales of Pet Supplies. Exhibit 36, at 1-2. The temporary C of O was made subject to the following conditions: "1. No more than 20 dogs 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." *Id* at 4-5. DCRA did not inform nearby property owners of the conditions on the C of O, nor were these conditions displayed on the face of the C of O. *Id.* at 1; Tr. at 165 (May 11, 2004).

8. By letter dated July 30, 2003, DCRA informed WagTime that it had "no legal basis for withholding a Certificate of Occupancy (C of O) for WagTime at 1412 Q Street, N.W." Exhibit 36, at 6. The only written review and analysis in the record is an e-mail from Ms. Ogunneye dated June 4, 2003, which determined that "a pet spa is allowed in a C-2-A zone and all subsequent zones." Appellants' Prehearing Submission, Attachment 6. There is no written

review or evaluation of whether a dog boarding kennel was permitted in the C-3 zone as a principle use. Tr. at 246 (Mar 30, 2004).

9. The Zoning Administrator's office did not make an assessment or comparison of the noise, or other operational characteristics of veterinary hospitals, pet shops, or any other use permitted as a matter-of-right in the C-2 zone relative to the impacts or operational characteristics of dog boarding kennels, and did not consider the differences in the intensity of noise or other impacts, or any differences in the degree to which each of these facilities are subject to government regulation or licensing. Tr. at 243-6, 289 (March 30, 2004); Tr. at 145-46 (May 11, 2004).

10. According to Ms. Ogunneye, the determination was made that dog boarding use was similar to use as a veterinary hospital "[b]ecause at the hospital the dogs do stay . . . overnight and get cared for." Tr. at 228 (March 30, 2004). Likewise, 'in a pet store that sells dogs, cats, whatever those dogs stay there overnight." *Id.* at 263. Ms. Ogunneye stated that her opinion was based on the zoning regulations, definitions, and whether "such uses had previously existed." *Id.* at 233.

11. According to Ms. Ogunneye, the C of O "was issued for six months 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." *Id.* at 227.

12. Ms. Ogunneye stated that no residents complained during that period. *Id.* at 235. However, Appellants submitted documents showing that at least one e-mail complaint was sent to the Zoning Administrator, in August 2003, and numerous complaints were lodged by neighbors to the police, to the owner of the premises, and to DCRA about the noise and odors generated by WagTime's operations. Appellants' Pre-hearing submission, Attachment 12; Transcript, at 96 (May 11, 2004). More complaints would have been made to DCRA by residents had DCRA not instructed residents on November 3, 2003, that complaints should be directed to DC Metropolitan Police Department rather than DCRA. *Id.*, Attachment 12, Entry No. 25. Ms. Ogunneye also conceded that, regardless of complaints, the Zoning Administrator lacked authority to impose either a time restriction on the C of O or specific conditions intended to address potential adverse effects associated with the dog boarding use. Tr. at 231-32 (March 30, 2004).

13. On January 28, 2004, DCRA issued a permanent C of O (#69395) to WagTime for "24 Hr. Dog Boarding and Grooming with Accessory Retail Sales of Pet Supplies." *See* Exhibit 76. The permanent certificate of occupancy included no conditions on the number of dogs permitted outside at one time, the use of outdoor space in evening hours, or the degree of supervision required.

14. Appellants conceded that use of the premises for animal grooming and for retail

sales of pet supplies is a permitted use, either as a principle or as an accessory use, in the C-3 zone. Appellants challenged only the issuance of a certificate of occupancy authorizing as a matter-of-right the principle use of the premises for dog boarding.

15. Appellants presented expert testimony from David Baker, who was qualified as an expert witness in dog kennels and pet shops. Tr. at 159-60 (Jan. 20, 2004). Mr. Baker provided unrebutted testimony regarding the operational characteristics of dog boarding kennels and pet shops, specifically, that while dogs sometimes stay overnight at pet shops, these dogs are normally puppies rather than full-grown dogs, are caged and behind a glass-enclosed wall, and not in outdoor dog runs. *Id.* at 292 and 293. The noise generated by kennels, by contrast, is much greater because dogs are outdoors and in a less controlled environment. *Id.* at 296-8.

16. Appellants presented unrebutted fact testimony from Kara McCabe, based on her experience in working in a veterinary hospital, that while animals receiving treatment at veterinary hospitals occasionally stay overnight, these animals are typically caged and sedated or post-operative, are kept indoors, and generally do not make noise. *Id.* at 277.

17. Appellants presented unrebutted expert testimony from Ruth Berman, who was qualified as an expert witness in dog kennels. *Id.* at 169. Ms. Berman testified that dog kennels typically have outdoor dog runs and generate high noise levels. *Id.* at 308. Typically, no more than one dog is permitted at a time in outdoor dog runs. *Id.* at 316. The noise and odor impact of kennels with outdoor dog runs means that kennels cannot satisfactorily be located in close proximity to residences, and most jurisdictions would prohibit kennels located within 200 feet of a neighboring property to have an outdoor dog run. *Id.* at 307-08. She testified that kennels were not similar at all to veterinary hospitals or pet shops. *Id.* at 310-11.

18. Appellants presented unrebutted evidence concerning the typical decibel levels associated with dog kennels and decibel levels associated with other uses. Exhibit 44, Tr. at 331-34 (Jan. 20, 2004). According to this information, even a dog kennel considered to be an interior use generates a noise level of 108 dBA (average), which level is higher than the noise generated by a vacuum cleaner at 3 feet, a military helicopter, a factory, a piggery, or a riveter. *Id.* Only an amplified rock music performance generated higher noise levels that a dog kennel. *Id.* Noise measurements taken at various times over a month-long period at the property boundary line of WagTime's facility documented noise levels from between 80 and 90 dBA. Appellants' Pre-hearing Submission, Attachment 15. At levels ranging from 80 to 100-plus dBA, dog barking noise levels exceed even DC's maximum permissible noise level of 70 dBA in the Industrial (M) zone. *Id.*, at p.15 n 19

19. Appellants presented evidence that an average dog produces approximately 1 liter of urine and one half pound of feces per day. Appellants' Pre-hearing Submission, at 12 n. 14. Therefore, WagTime, which boards approximately 20 dogs per day, produces 140 liters of urine and 70 pounds of fecal matter per week. *Id.* The smell of urine emanating from WagTime was so overpowering that the owners themselves alerted the Hazardous Material Unit of the D.C. Fire and Emergency Services Department. *Id.*, Attachment 11.

20. Two expert witnesses in zoning testified. Mr. George Oberlander, who was qualified as an expert witness in the D.C. zoning regulations, testified on behalf of the Appellants that, in his opinion, a boarding kennel is not similar to a pet shop or other matter-of-right uses in the C-3 zone because it involves a different intensity of impacts. Tr. at 190 (Jan. 20, 2004). Other uses are interior or involve less intensity of impacts. *Id.* at 201.

21. Mr. Armando Lourenco, a former D.C. Zoning Administrator, was qualified as an expert in the interpretation of D.C. zoning regulations, and testified on behalf of Intervenor Mid-City Development. Mr. Lourenco testified that, in determining whether a proposed use that is not specifically established in the zoning regulations is similar to an established comparable use, the longstanding practice of the Zoning Administrator is to compare and assess the relative impacts of the established and non-established uses based on their relative external effects on the proposed location and surrounding premises. Tr. at 310 (May 11, 2004). The standard of external effects governing unlisted uses in the "M" zone provides some useful criteria for assessing impacts between un-established and established uses. *Id.* at 332.

22. Mr. Lourenco noted that the other service uses listed in 11 DCMR § 721.2 have restrictions that tend to mitigate the issue of external noise, such as soundproofing of bowling alleys, the prohibition of outdoor storage for plumbing and heating shops. *Id.* at 318.

23. Mr. Lourenco testified that, even looking solely at pet shops and veterinary hospitals, the Zoning Administrator's examination of similarities should have examined "other conditions of a pet shop and veterinary hospital that go beyond the fact that a dog slept here, which is not the issue." *Id.* at 330.

24. Mr. Lourenco concluded that veterinary hospitals, in which ailing dogs are kept indoors and often sedated, have very different impacts than facilities where healthy adult dogs are exercising outdoors as a group, in the same way as a jail has adverse potential impacts that are different from a hotel, even though both involve the temporary boarding of individuals. *Id.* at 312-13. Mr. Lourenco emphasized that the fact that dog boarding might occur at a veterinary hospital, either incidental to treatment or as an accessory use, did not demonstrate that dog boarding as a principle use was similar to use as a veterinary hospital, since as an accessory use, dog boarding would be subordinated to the needs of the principal use and its presence would have a much lesser external impact than when it is the principle use. *Id.* at 314-15.

25. Mr. Lourenco disputed the view of the D.C. Corporation Counsel that the applicability of general noise and animal control rules provided sufficient assurances that the impacts of dog boarding kennels on surrounding properties would be minimal, noting that many uses not permitted as a matter-of-right were subject to non-zoning regulatory and licensing controls by the D.C. government. *Id.* at 310-11, 313-14.

26. Mr. Lourenco also stated his view that the imposition of a temporary, six month C of O with "use" conditions, such as that no more than 20 dogs could be in the outdoor portion of

the facility, and DCRA's plan to monitor adherence to these conditions, was without precedent in his experience within DCRA. *Id.* at 320-21. Mr. Lourenco expressed the view that the imposition of such a temporary, conditional C of O amounted to "zoning by public opinion," and the conditions themselves constituted *de facto* amendments to the Zoning Regulations, that exceeded the authority of the Zoning Administrator. *Id.* at 321-22.

II. PRELIMINARY MATTERS

1 On March 24, 2004, Appellants filed a motion for leave to amend their appeal in order to include the permanent C of O, issued on January 28, 2004. This Board granted the motion, finding that the amendment was timely and raised identical issues to that before the Board with respect to the temporary C of O. Therefore, the Board also dismissed the motion to dismiss filed by WagTime, which argued that the appeal was moot due to the expiration of the temporary C of O.

III. FINDINGS OF FACT

1. The uncontroverted evidence in this case demonstrates that dog boarding kennels have operational characteristics and external effects that are different from veterinary hospitals. Dog boarding does not involve the treatment of disease or the provision of medical care to dogs. While dogs are present at veterinary hospitals in connection with their treatment, it is an inherent characteristic of veterinary hospitals that they are typically sedated or post-operative, are kept indoors and caged, and generally do not make noise.

2. The uncontroverted evidence in this case demonstrates that dog boarding kennels have operational characteristics and external effects that are different from pet shops. It is an inherent characteristic of pet shops that dogs present in pet shops are normally puppies rather than full-grown dogs, are caged and behind a glass-enclosed wall, and not in outdoor dog runs.

3. These characteristics of veterinary hospitals and pet shops are not restrictions placed on these uses by the Zoning Regulations, but rather are inherent to the provision of medical treatment and to the display for sale of pets, respectively.

4. Because dog boarding kennels involve outdoor uses, and the presence of large numbers of healthy adult dogs, they result in much more intense and objectionable noise and odor impacts on neighboring properties than do veterinary hospitals, pet shops, or other permitted uses in the C-3 zone.

5. Dog barking noise is loud relative to the noise level of uses normally occurring in the C-3 zone, and more akin to the noise levels generated by uses permitted only in the Industrial (M) zone, and subject to standards of external effects.

6. The permanent C of O issued to WagTime contains no conditions on dog

boarding operations, and therefore permits WagTime to board an unlimited number of dogs at any one time without supervision, and allows unrestricted use of the outdoor space by dogs without any limitations on the number of dogs allowed outside at any one time or the times during which dogs may be allowed outside.

7. Dog boarding kennels are not subject to any regulatory or licensing program that imposes sanitary or other operational standards on these facilities, such as regulations governing the removal of dog wastes. *See* DCRA Response to Board's Request, Attachment B (April 27, 2003). By contrast, both pet shops and veterinary hospitals must satisfy detailed operational and sanitary standards in order to received a required license. See 22 DCMR Chapter 700 and Exhibit 81 (DC Register 6630 (Sept. 2, 1988), amending 17 DCMR Chapter 29).

8. D.C.'s animal control laws, 24 C.F.R. Part 900, prohibit persons from allowing dogs to enter neighboring properties without permission, but impose no health or sanitary standards on persons who keep dogs on their own property.

IV. CONCLUSIONS OF LAW

1. Under § 3203.1 of the Zoning Regulations, "no person shall use any structure, land, or part of any structure or land for any purpose other than a one-family dwelling until a certificate of occupancy has been issued to that person, stating that the use complies with the provisions of this title and the D.C. Construction Code, Title 12 DCMR."

2. Under 11 DCMR § 3100.2 the Board of Zoning Adjustment shall hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of this title.

3. The Board of Zoning Adjustment has the power, in conformity with the Zoning Code, to "reverse or affirm, wholly or partly; or may modify the order, requirement, decision, determination, or refusal appealed from; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken." D.C. Code § 5-641.07(g)(4); 11 DCMR § 3101.5.

4. Any use that is authorized by a certificate of occupancy must be "designated on the Certificate of Occupancy in terms of a use classification ... established by" the Zoning Regulations. 11 DCMR §3203.8(a),

5. The zoning regulations list 24 service uses that permitted in a C-2 district, or other less restrictive district, as a matter-of-right. 11 DCMR § 721.2. Dog boarding facilities or kennels are not specifically included in this list. *Id.*

6. In addition to the specifically listed uses, "[o]ther service and retail use similar to that permitted in §§ 721.2 and 721.3, . . . shall be permitted in a C-2 District as a matter-of-

right." 11 DCMR § 721.4.

7. In determining whether to permit a use that is not specifically listed in the Zoning Regulations, this Board applies "standards of compatibility and likeness to determine the use category," looking "both as to the nature of its operations . . . and the likely impacts of its operations." Decision in BZA Appeal No. 16839 of ANC 4A, at 5-6 (Oct. 15, 2002), *rev'd on other grounds, Chagnon v. D.C. Board of Zoning Adjustment*, 844 A.2d 345 (D.C. 2004).

8. Past BZA decisions have upheld the decision of the Zoning Administrator that an unlisted use is "similar" to a listed use, based on the fact that "he reviewed the uses specifically cited and determined what characteristics were common *to all of them*." BZA Appeal No. 12845 of Keefe Co., at 2 (Jan. 19, 1983) (emphasis added); *See also* BZA Appeal No. 13714 of Solomon S. Colker, at 3 (Jan. 19, 1983). Therefore, the Zoning Administrator erred by failing to compare the operational impacts of dog boarding with *all* the uses listed as a matter-of-right in the C-2 zone, 11 DCMR § 721.2, and failing to determine whether dog boarding shared any common characteristics with *all* these uses relevant to the external effects on neighboring properties.

9. Based on a review of the service uses listed in 11 DCMR § 721.2, it is clear that none of the uses listed as being permitted as a matter-of-right in the C-2 zone by their nature generate excessive noise or odors. The few uses that potentially generate excessive noise are subject to zoning restrictions designed to mitigate noise impacts, such as the requirement that bowling alleys be soundproofed, and there be no outdoor storage for plumbing and heating shops.

10. The preponderance of the evidence in this case shows that dog boarding kennels are likely to generate excessive noise and odors, and that dog boarding kennels are not subject to any regulatory or licensing requirements that would impose an affirmative obligation to take steps to abate these impacts. D.C.'s noise and animal control laws, while generally applicable, merely penalize excessive noise rather than require affirmative measures, such as the installation of soundproofing or noise barriers, to abate noise impacts. 20 DCMR Chapter 2700; 24 DCMR Chapter 900. These laws do not impose sanitary standards or other regulatory controls governing the operation of a commercial dog boarding kennels. *Id.* Accordingly, even assuming that the use will operate within the limits of applicable law, these applicable laws do not provide sufficient mitigation of noise and odors associated with dog boarding kennels.

11. Looking solely at pet shops and veterinary hospitals, two matter-of-right uses permitted in the C-2 zone, the Zoning Administrator erred in concluding that dog boarding kennels are similar to pet shops and veterinary hospitals. The common characteristic must be relevant to the facilities impacts on neighboring properties. The mere fact that dogs may stay overnight at both veterinary hospitals, pet shops, and kennels, without additional information concerning the nature or the likely impacts of their respective operations, is not sufficient basis for finding that dog boarding kennels are "similar to" veterinary hospitals or pet shops.

12. One characteristic that the Zoning Administrator failed to consider is the fact that

veterinary hospitals and pet shops are required to comply with detailed operational and sanitary standards as a condition of receiving licensure from the D.C. government. Dog board kennels, by contrast, are not subject to any regulatory licensing program. Past BZA decisions have looked at licensing as being a relevant common characteristic of a professional occupation, in determining whether an unlisted occupation is "similar to" a listed professional occupation. *See* Decision in BZA Application No. 11864 of Carr Management (July 18, 1975).

13. The preponderance of the unrebutted evidence in this case demonstrates that dog boarding kennels are likely to result in substantially greater impacts on neighboring properties than do either pet shops or veterinary hospitals. Past decisions of this Board have also recognized that overnight dog boarding imposes greater impacts on neighboring properties than does simply operation of a veterinary hospital. For example, this Board granterd a special exception for a veterinary clinic in a C-1 district subject to a condition that "[n]o animals shall be kept on the premises over night." Decision in BZA Application 11465 of Barbara Sussman and Joann Tannenbaum (Aug. 7, 1986). S*ee also State ex Rel Bruflat v. Board of Zoning Appeals,* 141 Wis.2d 974, 414 N.W. 2d 318 (1987) ("a reasonably perceptible distinction exists which eliminates the need for persons of ordinary intelligence to guess as to the difference between a pet shop and a kennel").

14. The preponderance of evidence demonstrates that a commercial dog boarding kennel is not similar to either a veterinary hospital, pet shop, or any other use listed as a matter-of-right in the C-2 zone.

15. The Acting Zoning Administrator abused his discretion by failing to examine the operational characteristics of dog boarding and the external effects of dog boarding operations as compared to the characteristics and external effects of other uses listed as a matter-of-right in the C-2 zone.

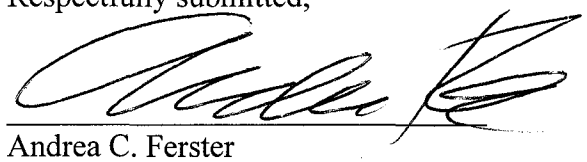
16. In light of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the subject appeal is granted, and the Certificate of Occupancy is revoked, because dog boarding is not permitted as a matter of right as a principle use in the C-3-A zone., and therefore may be permitted only by use variance.

VOTE: (Geoffrey Griffis, Chair; National Capital Planning Commission representative, David Zaidain; Ruthanne Miller, and Curtis Etherly, Jr.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
Jerrily Kress, Director
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Respectfully submitted,



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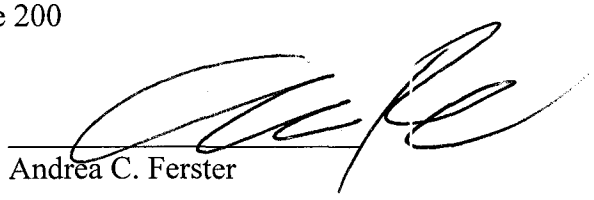
CERTIFICATE OF SERVICE

I hereby certify that, on June 22, 2004, a copy of the foregoing Proposed Findings of Fact and Conclusions of Law of Appellants and Intervenor was served by mail on:

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