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June 22, 2004

Via Hand Delivery

Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment of the District of Columbia
D.C. Office of Zoning
441 4th Street, N.W., Suite 210
Washington, D.C. 2001

Re: BZA Application No. 17092

Dear Mr. Griffis:

On behalf of the Applicant, please accept the attached proposed Findings of Fact and Conclusions of Law for the above referenced case.

Thank you.

Sincerely,

Edward L. Donohue

Enclosure

GOVERNMENT OF D.C.
ZONING COMMISSION
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BZA
Case No. 17092
Exhibit No. 93

Board of Zoning Adjustment
District of Columbia
CASE NO.17092
EXHIBIT NO.93

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION
CASE NO.
EXHIBIT NO.
2004 JUL 22 PM 3:53

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF WAGTIME, L.L.C.

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") filed an application for a Certificate of Occupancy ("C of O") for 1412 Q Street, NW with the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") Building and Land Regulation Administration ("BLRA"). The application proposed the following use: "24 hr dog boarding and grooming with accessory retail sale of pet supplies," with an occupied square footage of 1,248. The property at 1412 Q Street, NW is located in the C-3-A/Arts District, which borders the R-5-B District. Tr. 3/30/04 at 219.

2. Several days after it filed its application for the C of O, counsel for WagTime wrote to the BLRA Administrator and represented that, in connection with the C of O application, WagTime 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.

Counsel stated that WagTime was "willing to observe the above restrictions as a means of attempting to alleviate concerns that may have been raised about the use of the rear space." In addition, counsel also noted that WagTime 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."

3. The BLRA issued a conditional certificate of occupancy to WagTime on July 23, 2003 for the proposed use; however, this first C of O was to expire on January 31, 2004. On July 30, 2003, the BLRA Administrator stated in a letter to counsel for WagTime 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." The Administrator 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.

4. DCRA's conclusion that it had "no legal basis for withholding a Certificate of Occupancy" was based on a determination by the Chief of DCRA's Zoning Review Branch (Faye Ogunneye) that WagTime's proposed use was a "service or retail use similar to" those expressly allowed as a matter of right in a C-3 District under 11 DCMR § 741.4. Tr. 3/30/04 at 215-25; Exh. 5. 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. 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. Ms. Ogunneye testified at the hearing that the C of O had been 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. She further explained that there was no reason "to have imposed these conditions other than the fact that they were offered by the applicant." *Id.* Ms. Ogunneye also testified that the conditions were removed at the end of the six-month period. *Id.* at 241.

6. On September 22, 2003, Appellants Stephanie Mencimer, Erik Wemple, John Weaver, and Forrest R. Smith ("Appellants") filed this appeal with the Board from DCRA's July 23, 2003 issuance of a certificate of occupancy for the proposed use at 1412 Q Street, NW. All of the Appellants live near 1412 Q Street, NW, and their appeal focuses on use of the premises for dog boarding. Tr.1/20/04 at 230. On January 20, 2004, Mid-City Development Company was granted status as a party intervenor on the side of Appellants.

7. On January 28, 2004, DCRA issued to WagTime a second certificate of occupancy to use the premises of the subject property for "24 hr dog boarding & grooming with accessory retail

sale of pet supplies." The second C of O 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.

8. Ms. Ogunneye testified that 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. According to Ms. Ogunneye, 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.

9. Appellants presented testimony that veterinary hospitals typically care for dogs overnight after surgery, and may allow a dog stay overnight prior to surgery, (*id.* at 264-65), and that sometimes, a dog will begin prolonged barking while staying at a veterinary hospital following surgery. *Id.* at 269. Appellants conceded that there are no limitations on the number of dogs that may be boarded at a veterinary hospital, or at a pet store, and no limitations on the use of outdoor space at either type of facility. *Id.* at 358-359.

10 Appellants presented testimony that pet shops commonly house up to 15 to 20 puppies in glass enclosed cases. The Board finds that while this testimony may accurately reflect the operations of some veterinary hospitals and pet stores, under existing District of Columbia zoning regulations, there are no limitations on the manner in which dogs are cared for at either facility.

PROPOSED CONCLUSIONS OF LAW:

1. In the District of Columbia, 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 C-2 Districts. *See* 11 DCMR § 741.1. Because the C-3 zoning district is *less restrictive* than C-2, certain uses that would require special exception approval in the more restrictive zone, such as fast food restaurants, may be allowed as a matter of right in the less restrictive zone. *See* 11 DCMR Sec. 43.4.

2. A "service or retail use" is permitted as a matter of right in a C-2 District if the use is "similar to" to one or more of the matter of right uses listed in 11 DCMR §§ 721.2 and 721.3. *See* 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)). As discussed above, existing District of Columbia zoning regulations do not place limitations on either of these uses.

4. Therefore, if use as a dog boarding facility is "similar to" use as a veterinary hospital or use as a pet shop, then a dog boarding facility is a matter of right use in a less restrictive C-3 District. Ms. Ogunneye testified that the two most important factors in considering a similarity of use under 11 DCMR § 721.4 are: 1) the degree to which the uses are normally associated with one another; and 2) the degree to which the uses generate similar external effects.

5. 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.

6. 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.

Respectfully submitted,

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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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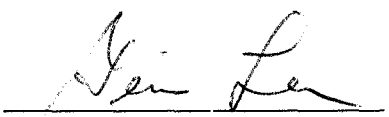
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