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February 19, 2012

VIA HAND DELIVERY

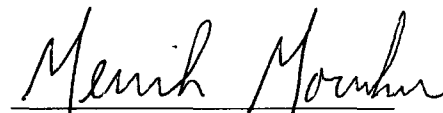
Chairman Lloyd Jordan
Board of Zoning Adjustment
441 4th Street, N.W., Suite 210S
Washington, DC 20001

Re: Application No. 18474 – Prehearing Statement in Opposition

Dear Chairman Jordan:

On behalf of the Party in Opposition, we submit this prehearing statement in Opposition to address issues relevant to the amendment of the application to include variance relief. A copy of this submission has been sent electronically to all parties as of the 14 day filing deadline. The submission will be received for official filing as of February 20th and thus seeks relief from §3112.10.

Sincerely,
GRIFFIN & MURPHY, LLP



By: Meredith H. Moldenhauer

CC: Leah Batties (via email)
Ms. Jennifer Steingasser, District of Columbia Office of Planning (via email)
Mr. Joel Lawson, District of Columbia Office of Planning (via email)
Mr. Stephen Mordfin, District of Columbia Office of Planning (via email)

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18474

EXHIBIT NO. 44

Board of Zoning Adjustment
District of Columbia
CASE NO. 18474
EXHIBIT NO. 44

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

**APPLICATION #18474
PARTY IN OPPOSITION**

PREHEARING STATEMENT IN OPPOSITION

This statement is submitted by Nayereh Sahrapour in opposition to Wagtime LLC's (the "Applicant") application for special exception relief pursuant to §§735, 736, and 739 of the Zoning Regulations to permit animal boarding, pet grooming, and animal shelter uses at 1232 9th Street NW (the "Property"). The Application was amended to include use variance relief from §§735.3, 736.5, and 739.6 of the Zoning Regulations to permit the use of external facilities at the Property.

I. Incorporation of Opposition Raised in the Statement of the Party in Opposition regarding the Special Exception Relief

The Party in Opposition filed a detailed opposition to the Applicant's initial special exception application. We reiterate and incorporate herein the concerns expressed in the Statement of the Party in Opposition dated November 26, 2012 and time-stamped on November 27, 2012. Those concerns include the impact of the existence and use of external yards and exterior facilities; the proximity of these uses to residential zones and existing and future residential uses; the noise, odor and waste created by these uses; and the questions raised regarding additional areas of relief.

II. Applying of the Use Variance Standard to the Amended Application

It is not clear in the Applicant's submission that the amended relief will be properly characterized as a use variance. The Applicant seems to concede that the more stringent standard should apply by labeling their support as an "undue hardship." We seek to confirm this threshold question that the relief requested is analyzed under the use variance standard.

In *Palmer et al., v. Bd. of Zoning Adjustment for the District of Columbia*, 287 A.2d 535, 540-41 (D.C. 1971), the court established that “area variances have been allowed on proof of practical difficulty only while use variances require proof of hardship, a somewhat greater burden.” An area variance, which relates to restrictions such as side yard, rear yard, setbacks and lot occupancy requirements, does not alter the character of the zoned district. A use variance, in contrast, relates to whether or not the use applied for is permitted in the particular district.

In this instance, the Applicant seeks a use variance. Use of external facilities in connection with animal boarding, pet grooming, and animal shelter uses involves an expressly prohibited use specifically excluded by the conditional special exception language. The Zoning Regulations allow a structure of the same dimensions taking up the same area if it were used in a different way. *See* BZA Order No. 17656, p5-6 attached hereto as **Exhibit A**. Here, it is not the dimension of the roof deck, but the use of the deck for dogs in connection with boarding, grooming, and dog shelters that is at issue and requires a use variance. In other words, no variance is sought from any area dimension of the Applicant’s lot, only how the exterior facilities may be used.

III. The Application Fails the Three Prong Variance Standard

a. Lack of Exceptional Circumstance or Condition

The Applicant’s Property is not beset by any exceptional conditions. The Property is of no exceptional shape or size. The Applicant submits that the history of the Property’s use creates the exceptional condition here, however such a condition cannot be self-created. The Applicant cites reliance on a Certificate of Occupancy for operation as a pet store issued in May 2005, prior to the enactment of the Zoning Regulations related to these uses, as justification for an exceptional condition. However, the Applicant is barred from reliance on this Certificate of Occupancy because the Applicant was well aware of the various zoning issued associated with its desired uses when it applied for the limited 1500 square foot Certificate of Occupancy. The 2006 dog boarding, grooming, and shelter text amendments were the

direct result of the board's decision in BZA Case No. 17092. *See* BZA Order No. 17092, attached hereto as **Exhibit B** and ZC Order No. 05-21, attached hereto as **Exhibit C**. BZA Case No. 17092 was an appeal of Wagtime's Certificate of Occupancy at its prior 1412 Q Street location. The Board granted the appeal resulting in Wagtime's need to find a new location for their business. In the Board's Order in that case, dated October 15, 2004, under the heading "**The dog boarding use is not 'similar to' a veterinary hospital or pet shop,**" the Board concluded:

[A] dog boarding facility use is not similar to either a veterinary hospital or a pet shop use. The Board reaches this conclusion because it finds that the external effects generated from a dog boarding facility are more intense than those generated by either a veterinary hospital or a pet shop, especially the greater amount of noise and odor that is inherent in a dog boarding facility . . . Finally, the Board is persuaded that the greater intensity of noise and management of waste associated with a dog boarding facility distinguishes its use from either a pet shop or a veterinary hospital.

Less than two months after the Board's decision, the Applicant filed with DCRA, on December 12, 2004, an application for a "Retail Pet Shop" at 1232 9th Street NW. *See* Certificate of Occupancy, attached hereto as **Exhibit D**. Despite the specific language in the BZA's Order, the Applicant failed to list "Dog Care Center" or "Dog Day Care Center" as intended uses on the Certificate of Occupancy application.

A contractor at Corbett Construction, Mary Neff, stated under oath that both **before** and after construction in 2008-09 the Property was used for dog day care facility. *See* Portion of Deposition p18-19, attached hereto as **Exhibit E**. The Party in Opposition believes the Applicant knew full well the importance of disclosing the dog boarding, pet grooming, and animal shelter use on the application for their Certificate of Occupancy in light of the very clear conclusions of the Board, clearly stated in their Order to the Applicant, only two months earlier and thus omit those intended uses on the application. The Applicant lacks clean hands in seeking this equitable relief from the Board.

Furthermore, following the enactment of the new regulations requiring special exception relief for a dog care, grooming, and shelter, the Applicant expanded its use from 1 floor to the basement, first, and

second floor without applying for the necessary relief. The Applicant failed to inform the Board that it expanded the use in 2008-2009 and did not obtain a revised or modified Certificate of Occupancy. The delay in applying for the relief can in no way serve now as justification for an exceptional condition.

The Applicant claims that its lack of a rear yard and the lack of grass as evidence of an exceptional circumstance. However, the lack of a rear yard or grass is not exceptional in this area and Samuel Grouper's Memorial Park, Burke Park, and Kennedy Recreation Center are all within walking distance.

b. Higher Standard of Undue Hardship Not Proven

As stated in *Bernstein v. District of Columbia Bd. of Zoning Adjustment*, “[a]n Applicant for a use variance bears the heavy burden of showing that the property cannot be used for any purpose consistent with the zoning district.” 376 A.2d 816, 819-820 (D.C. 1997). The Applicant presents no evidence regarding use of the property that conforms with the zone or the special exception conditions. In this case, there are other uses, both matter of right and by special exception, to which the Property could be put. Furthermore, the Applicant must demonstrate that the hardship complained of is not self-created. A hardship is self-created if the applicant had prior knowledge or constructive knowledge or the hardship was self-imposed. Such knowledge or self-imposition bars a use variance. See *Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230 (D.C. 1973).

The Applicant cites the importance of the outdoor facilities to the operation of their business as grounds for meeting the undue hardship standard. Such a claim lacks credibility because when the Applicant sought zoning relief in the initial application, they did so hoping to be able to operate without exterior facilities. The Applicant repeatedly represented at the initial ANC Zoning Committee Meeting on November 28, 2012 and ANC Meeting on December 5, 2012 that they would conform to the conditions stated in the relevant special exception provisions and that the business would operate without

exterior facilities. Such amenity cannot demonstrate undue hardship if at first such relief was not contemplated.

The Applicant also cites that it has a lease with the owner to use the premises for a pet store, animal boarding, pet grooming and animal shelter facility. The Applicant fails to explain that LesRon LLC is owned and operated by Leslie Schreiber, Lisa Schreiber's mother. In addition, LesRon LLC purchased the Property by deed dated August 1, 2007 recorded on August 14, 2007, one year after the Boarding, Pet Grooming and Animal Shelter text amendment became effective. Purchasing the Property and entering into a lease with knowledge that the property could not be used for the intended purpose does not create hardship for which a use variance can be granted.

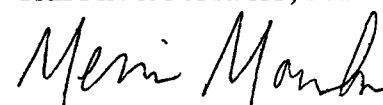
c. Detriment to the Public Good and Zone Plan

The Party in Opposition references in its prior submission, and incorporated its prior arguments for why the use applied for, even in the context of a special exception, would be a detriment to the public good. The primary reasons are related to the noise, odor, and waste created in a neighborhood that will see substantial growth in the number of residents in the near future. The Party is Opposition is in the process of renovating and opening a restaurant at its property. A restaurant use is permitted as a matter of right and would be substantially adversely affected by the smell of dog waste, constant dog barking and runoff from dogs being bathed outside.

IV. Conclusion

For the reasons stated, the Party in Opposition respectfully requests that the Board of Zoning Adjustment deny the variance relief and the special exception relief requested by the Applicant.

Sincerely,
GRIFFIN & MURPHY, LLP



By: Meridith H. Moldenhauer

EXHIBIT A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17656 of Alley Cat Mews, L.L.C., pursuant to 11 DCMR § 3103.2, for a variance to allow the construction of a detached one-family dwelling on an alley lot that does not directly abut an alley that is at least 30 feet in width and is not directly accessible from a public street along an alley or alleys of not less than thirty (30) feet in width, under subsection 2507.2, in the R-1-B District on an alley lot at the rear of Reno Road, Chevy Chase Parkway and Harrison Street, N.W. (Square 1877, Lot 37).

HEARING DATES: September 25, 2007, December 11, 2007, February 26, 2008,
April 8, 2008

DECISION DATES: October 2, 2007 and June 3, 2008

DECISION AND ORDER

This application was filed with the Board of Zoning Adjustment ("BZA" or "Board") on April 11, 2007 by Mr. Kenneth Woodring, the contract purchaser of the property that is the subject of this application ("subject property"), on behalf of Alley Cat Mews, LLC, ("Applicant"), the current owner of the subject property. The Applicant authorized Mr. Woodring's filing of the application. The self-certified application requested a variance from the minimum alley width of 30 feet mandated by 11 DCMR § 2507.2 in order to construct a one-family detached dwelling on an alley lot in an R-1-B zone district.

Although the Applicant initially characterized the relief it was seeking as an area variance, opponents to the application challenged that characterization and argued that the variance needed is properly a use variance. After providing the parties the opportunity to brief and argue the question, the Board decided at a public meeting on October 2, 2007 that the necessary relief is a use variance, and proceeded to consider the application under the more stringent use variance standard.

After two postponements, a public hearing on the merits of the application was held on April 8, 2008, and a decision scheduled for June 3, 2008. At the public meeting on June 3, 2008, the Board denied the application by a vote of 5-0-0.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated April 18, 2007, the Office of Zoning (“OZ”) provided notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 3/4G, the ANC within which the subject property is located, Single Member District 3G07, and the Councilmember for Ward 3. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing date in the *D.C. Register* and sent such notice to the Applicant, ANC 3/4G, and all owners of property within 200 feet of the subject property.

Request for Party Status. ANC 3/4G was automatically a party to this case. GreenPiece Park, LLC, a group comprised of surrounding property owners, and George and Margaret Eads, owners and residents of 3718 Harrison St., N.W., were granted party status in opposition to the application. The Eads were granted individual party status because, unlike the other neighbors, their property is contiguous to the subject property, separated only by an unimproved alley.

Applicant’s Case. The contract purchaser, Mr. Woodring, testified as to his research into the subject property and the need for variance relief. The project architect and a zoning expert also testified on the Applicant’s behalf.

Government Reports. The Office of Planning filed a report with the Board dated September 10, 2007, recommending denial of the application. OP determined that the application failed to satisfy the second and third prongs of the use variance test. OP found that the application did not meet the “undue hardship” test because there are other reasonable uses for the subject property. OP also indicated that construction of the proposed dwelling would impact the privacy and enjoyment of neighboring dwellings and rear yards, and that granting the variance would impair the intent, purpose, and integrity of the zone plan.

The D.C. Fire and Emergency Medical Services Department (“EMS”) provided the Applicant with a brief letter dated August 24, 2007, stating that, after reviewing the plans for the proposed construction, it had “no objection” to the application. Exhibit No. 28, Attachment C. Several months later, on April 28, 2008, at the request of the Board, and through OP, EMS filed a second, more detailed letter with the Board, stating that it “will not contest the construction based on fire department access roads as a (sic) life safety issues.” Exhibit No. 52. The second letter explains that random measurements were taken of the alleys surrounding the subject property, which were found to be 20 feet wide, and that a fire truck, from the company which would respond at the subject property, was ordered to drive the alleys to test safe access to the property. The letter states that the driver did “not have any trouble navigating the alleys.” *Id.* The letter goes on to state, however, that obstructions in the alleys, such as parked cars, would have to be dealt with as enforcement issues.

The Board did not receive any other government reports, but the OP report states that OP received responses from both the D.C. Department of Public Works and the Metropolitan Police

BZA APPLICATION NO. 17656
PAGE NO. 3

Department, neither of which expressed any concerns with the application.

ANC Report. ANC 3/4G filed a report with the Board dated June 22, 2007, stating that at a regularly-scheduled, properly-noticed meeting, with a quorum present, held on June 11, 2007, it voted 5-2 not to support the application. The report analyzed the three prongs of the variance test and concluded that none of them were met by the application.¹

Persons in Support or in Opposition. There were no letters of support for the application, but there was a petition with approximately 100 signatures in opposition to the application. The D.C. Councilmember for Ward 3 filed two letters in opposition, stressing that, in her opinion, granting the variance requested would “harm the public good.” Exhibits Nos. 27 and 40. The Mayor’s Office of Community Relations and Services also filed a letter in opposition to the granting of the variance, stating that approval of the application would be “detrimental to the quality of life in the neighborhood.” Exhibit No. 33.

FINDINGS OF FACT

The subject property and the surrounding neighborhood

1. The subject property is designated Lot 37 in Square 1877, and is located in an R-1-B zone district.
2. Square 1877 is bounded by Reno Road, N.W., to the west, Chevy Chase Parkway, N.W., to the east, and Harrison Street, N.W., to the north.
3. Square 1877 is shaped like an equilateral triangle, with Lot 37 at its center, and echoing its shape. Lot 37 therefore appears as a small triangle at the heart of the larger triangle of Square 1877.
4. The subject property is an undeveloped lot with an area of approximately 7,302 square feet, or 0.17 of an acre.
5. Lot 37 does not have street frontage, but is bounded to both east and west by alleys platted at 20-feet wide, which are in use as public alleys². On the other side of these alleys are the rear yards of homes that front on Chevy Chase Parkway or Reno Road.

¹Two of the ANC Commissioners filed a minority report in favor of granting the variance. Consistent with the ANC Act, subsection 3115.2 of the Zoning Regulations directs the Board to give “great weight” to the “written report of the ANC.” The Board concludes that this direction goes to the written report adopted by the ANC in accordance with its bylaws. Nevertheless the Board read and considered the minority report as it would all evidence before it.

² An “alley” is defined in the D.C. Code as “any public alley, as recorded in the records of the Office of the Surveyor, from its intersection with a street or another alley to its next intersection with a street or alley, or where it dead-ends,” D.C. Official Code § 9-201.01.

BZA APPLICATION NO. 17656

PAGE NO. 4

6. Immediately to the north of the subject lot and separated only by unimproved alley, is another undeveloped lot, Lot 38.
7. The subject property is triangularly-shaped and alley-bound.
8. There are five similarly-shaped and similarly alley-bound lots in the vicinity of the subject property

The proposed project

9. The Applicant purchased the property on August 7, 2006, for \$36,000 plus \$15,300 in closing costs for a total of \$51,300.
10. On December 13, 2006, the Applicant entered into a contract for the sale of the property with the contract purchaser, Mr. Woodring ("Contract Purchaser"), the terms of which do not bind Mr. Woodring to purchase the property if variance relief is not granted. See, April 8, 2008 Public Hearing Transcript (Tr.) at 220, lines 9-13. If variance relief is granted, Mr. Woodring will pay Applicant \$125,000 for the property.
11. The opposing parties have offered to purchase the property from Applicant for \$50,000, which would render a 39% profit over Applicant's purchase price and would be comparable to Applicant's purchase costs.
12. While Greenpiece's offer expired August 7, 2007, Mr. Eads, owner of lot 38, committed at the hearing to offer the Applicant at least the same amount as Greenpiece's last offer, even if the variance is denied. (Tr. at 437).
13. The Contract Purchaser proposes to construct a two-story detached one-family dwelling on the property, the front and side yards of which will face the rear yards of the homes on the other side of the improved alleys.
14. The property may be reasonably adapted for other uses permitted as of right or by special exception on this lot, such as an artist studio, storage, or parking. See, 11 DCMR §§ 2705.5 and 2705.6.³
15. The opposing parties would preserve the property as open land and use it for either a garden or community park, uses allowed by the Zoning Regulations.

³ These latter uses do not require access through alleys at least 30 feet wide. See also, 11 DCMR § 201.1, and see Exhibit No. 41, at 4. (Table of uses permitted at the subject property.)

CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition” of the property, the strict application of the Zoning Regulations would “result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property....” D.C. Official Code § 6-641.07(g) (3) (2001), 11 DCMR § 3103.2. Relief can be granted only “without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.” D.C. Official Code § 6-641.07(g)(3), 11 DCMR § 3103.2.

Title 11 DCMR § 2507.2 mandates that a one-family dwelling erected on an alley lot must abut an alley of at least 30 feet in width and must have street access through alleys of at least 30 feet in width.⁴ Variance relief is needed because the Applicant proposes to construct a one-family dwelling bounded by alleys that are only 20 feet in width.

The threshold question for the Board in this case was whether the proper relief request was for an area variance or a use variance. The Applicant argued that area variance relief was required because it could not meet the area dimensions of the alley width. Opponents argued that a use variance was required because the use of a one-family dwelling is a prohibited use on an alley less than 30 feet in width. A showing of “practical difficulties” must be made for an area variance, while the more difficult showing of “undue hardship” must be made for a use variance. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972).

As noted by the District of Columbia Court of Appeals (“DCCA”) “[s]ome variances resist easy classification” and therefore, “[d]eterminations with respect to the treatment and classification of proposed variances are best made ... on an ad hoc basis, by the agency from whose regulations those variances are sought.” *Wolf v. D.C. Bd. of Zoning Adjustment*, 397 A.2d 936 at 941 and 942. (D.C. 1979) While cases involving elements of both use and dimension have been treated both ways by the Board and the Court of Appeals, the Board concludes that the relief needed in this case is clearly a use variance.

While a determination of whether a variance is a use variance or an area variance may turn on whether the relief granted would “change the character of the zoned district,” (*See, Wolf* at 942 and *Taylor v. D.C. Bd. of Zoning Adjustment*, 308 A.2d 230, 233 (D.C. 1973), respectively), that analysis is not appropriate in this case because pursuant to § 2507.2, the use is specifically

⁴ An alley lot is defined as “a lot facing or abutting an alley and at no point facing or abutting a street.” 11 DCMR § 199.1, definition of “Lot, alley.”

prohibited in *all* zone districts. Accordingly, the Board looks to the nature of the restriction. This case involves an affirmatively prohibited use. The Zoning Regulation allows a structure of the same dimensions taking up the same area if it is used in a different way; i.e. artist studio, garage. Further, no variance is sought from any area dimension of the Applicant's lot, only how the lot may be used. Accordingly, it is not the area, but the use that is at issue and relief from the prohibition set forth in 11 DCMR § 2507.2 requires a use variance.

To meet the burden of proof for a use variance, the Applicant had to first demonstrate an exceptional situation or condition of the property. The Applicant also had to demonstrate that, "by reason" of such exceptional condition, strict compliance with § 2507.2 would result in an "undue hardship" to the property owner. Lastly, the Applicant had to show that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

The subject property is not beset by an exceptional condition that results in an undue hardship upon the owner. There are at least five similarly-situated triangularly-shaped and alley-bound lots in the vicinity, *See*, April 8, 2008 Hearing Transcript, at 250, lines 2-4, and at 356-358. While the Applicant argues that the subject lot is the only triangular lot, other than lot 38, that is surrounded by public alleys on all sides that complies with the D.C. Fire Code, and that complies with all other zoning requirements in the R-1-B District, none of these conditions lead to an undue hardship upon the owner. As stated above, the exceptional condition of the property must be *the reason* for the undue hardship, but this is not the case here. None of these conditions causes the need for zoning relief.

The DCCA has interpreted "undue hardship." to mean that a property cannot be put to any use for which it can be reasonably adapted. *See, Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). ("A use variance cannot be granted unless a situation arises where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations.") *See also, Monaco v. D.C. Bd. of Zoning Adjustment*, 461 A.2d 1049, 1052 (D.C. 1983) ("An applicant for a use variance bears the heavy burden of showing that the property cannot be used for *any* purpose consistent with the zoning district.") (Emphasis in original); *Bernstein v. D.C. Bd. of Zoning Adjustment*, 376 A.2d 816, 819-820 (D.C. 1977) ("[I]t must be shown that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may be reasonably adapted.") In this case, there are other uses, both matter-of-right and special exception, to which the property could be put. *See* Exhibit No. 41 at 4, Finding of Fact Nos. 14 and 15.

Not only are there other reasonable uses for the property that would not require a variance, there is a commitment under oath by one of the parties in opposition, Mr. Eads, to offer to purchase the property at a price in excess of the Applicant's purchase price. While the record reflects, that the Applicant/owner will make a greater profit by sale of the subject property to the contract purchaser, if the variance is granted, a variance cannot be granted "to put property to a more profitable use." *See, Palmer supra* at 542. Since the contract purchaser does not yet own the

BZA APPLICATION NO. 17656
PAGE NO. 7

property, any hardship caused to him is irrelevant. In any event, the contract purchaser may now opt out of the purchase contract under such terms as he had bargained for.

Because the Board finds that the Applicant has not met the first two prongs of the variance test and therefore is not entitled to variance relief, it need not consider the third prong of the variance and determine whether the construction of the proposed dwelling would result in a substantial detriment to the public good or would substantially impair the intent, purpose and integrity of the zone plan.

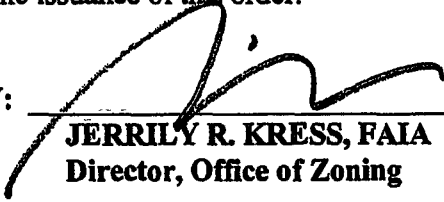
However, the Board is required to give great weight to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-523.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive. The Office of Planning recommended denial of the application, and ANC 3/4G voted 5-2 not to support the application. The Board has addressed the issues and concerns of the ANC and OP with respect to the first two prongs of the variance test as indicated above. With respect to the third prong, the Board concurs that the location of the dwelling would negatively affect the privacy and enjoyment of the homes and yards surrounding the subject lot and would be contrary to the standards of good urban design. Moreover, development of a one-family dwelling on the subject lot would impair the intent and integrity of the zone plan, as embodied in the Zoning Regulations, which severely limits residential uses on alley lots.

For the reasons stated above, the Board concludes that the Applicant has not satisfied the burden of proof under § 3103.2 with respect to an application for a use variance from the alley-width restriction of § 2507.2. Accordingly, it is **ORDERED** that the application be **DENIED**.

VOTE: **5-0-0** (Ruthanne G. Miller, Marc D. Loud, Shane L. Dettman,
Mary Oates Walker and Gregory N. Jeffries to deny.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this order.

ATTESTED BY: _____


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

FINAL DATE OF ORDER: DEC 15 2008

BZA APPLICATION NO. 17656

PAGE NO. 8

**PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT
UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17656

As Director of the Office of Zoning, I hereby certify and attest that on **DECEMBER 15, 2008**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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Chairperson
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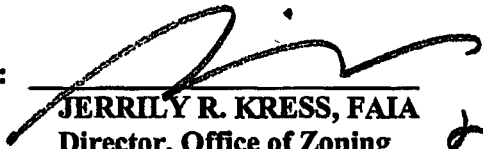
BZA APPLICATION NO. 17656
PAGE NO. 2

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ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR

EXHIBIT B

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**



Appeal No. 17092 of Stephanie Mencimer, et. al., pursuant to 11 DCMR §§3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Certificate of Occupancy No. CO57903, dated July 23, 2003, to WagTime LLC, for 24-hour dog boarding and grooming with accessory retail sales of pet supplies at premises located at 1412 Q Street, N.W., in the C-3-A/Arts District.

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

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on September 22, 2003 challenging DCRA's decision to issue a certificate of occupancy (C of O) authorizing WagTime, LLC (WagTime) to use its premises as 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. Following a public hearing in this matter, the Board voted to grant the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for January 24, 2004. In accordance with 11 DCMR §3113.4, the Office of Zoning mailed notice of the hearing to the Appellants, ANC 2F (the ANC within whose Commission the boundaries of the subject property is located), the property owner and DCRA.

Parties

Appellants

The original Appellants in this case, Stephanie Mencimer, Erik Wemple, John Weaver, and Forrest R. Smith, were later joined by Gary Ridley and Mark Rabbage. Each of these individuals authorized Andrea Doughty, Bonn Macy and Erik Wemple to represent them before the Board.

The Property Owner

The property owner, WagTime, (the Owner or WagTime), was represented by Edward Donohue, Esq., of Cole, Raywid & Braverman, LLP. As the property owner, WagTime is automatically a party under 11 DCMR §3106.2.

DCRA

DCRA was represented by Assistant Attorney General for the District of Columbia, Bennett Rushkoff, Esq.

Intervenor

Mid-City Development (Mid-City), also referred to as the "Intervenor", requested party status as a proponent of the appeal. The request was granted without objection from the other parties and Mid-City was represented by Andrea Ferster, Esq.

The affected ANC

ANC 2F, an automatic party to the Appeal, submitted a letter stating that it "[did] not take a position in favor of or opposing the above referenced appeal." (Exhibit 23). It did not submit any evidence or argument during the public hearing.

Persons in Support and in Opposition

The Board received numerous letters in support and in opposition to the appeal.

FINDINGS OF FACT

The Property

1. The subject property is located at 1412 Q Street, NW (Square 1209, Lot 0878) in the C-3-A/Arts zone district, and borders the R-5-B zone district.

The Appellants

2. The Appellants and their authorized representatives are the Owner's neighbors. Stephanie Mencimer and Erik Wemple reside at 1414 Q Street. John Weaver and Forrest Smith reside at 1416 Q Street. Gary Ridley and Mark Rabbage reside at 1408 Q Street. Andrea Doughty resides at 1417 Q Street, and Bonn Macy resides at 1445 Q Street.

The Intervenor

3. Mid-City Development is the record owner of Lot 98 in Square 0209, a parcel of land and buildings located across the public alley immediately to the rear (south) of WagTime's premises. Because Mid-City is developing 85 condominium units at its property, it is significantly more affected by the WagTime C of O than other persons in the general public.

The Certificate of Occupancy

4. WagTime filed an application for a C of O with DCRA on or about July 8, 2003. The application proposed the following use: "24 hour dog boarding and grooming with accessory retail sale of pet supplies," consisting of 1,248 square feet of occupied space.

5. After filing the C of O application, WagTime proffered to DCRA "the following commitments regarding the use of the outdoor space at the rear of the building": (a) there would be no more than 20 dogs outside at any one time; (b) the use of that area would occur only between the hours of 9:00 am and 5:00 pm; and (c) all use of the outdoor space would be supervised by employees of the business. Wagtime also noted that it was "continuing to investigate what [it] 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."

6. On July 23, 2003, DCRA issued WagTime a temporary C of O which was to expire on January 31, 2004. In a letter dated shortly thereafter, dated July 30, 2004, DCRA stated that it had "no legal basis" for withholding the C of O, and additionally stated that the temporary C of O was conditioned upon the above commitments proffered by WagTime, which DCRA would monitor over the six-month period. The Board credits DCRA's assertion that the conditions were imposed because they were proffered by WagTime during the C of O application process.

7. When DCRA issued the C of O, it recognized that the proposed use did not fall within any of the service or retail establishments listed in sections 721.2 or 721.3, of the Zoning Regulations, the matter of right use classifications expressly designated within the C-3 zone. As a result, DCRA went on to consider whether the proposed boarding use in the C-3 zone was a "service or retail use similar to" expressly allowed matter of right uses in the more restrictive C-2 zone, to wit: a "public bath, physical culture, or health service" (11 DCMR §721.2(s)), a "veterinary hospital" (11 DCMR §721.2(x)), and a "pet shop" (11 DCMR §721.3(p)). The evidence further indicates that, of the three uses analyzed for comparison, DCRA considered the veterinary hospital use the most "relevant" use, finding that "dogs stay overnight and get cared for" in both instances.

The Appeal

8. Appellants filed this appeal challenging the temporary C of O on September 22, 2003, focusing on DCRA's finding that a dog boarding use is similar to a veterinary hospital use and/or pet shop.

9. The case was first heard on January 20, 2004, at which time Mid-City Development was granted party status as an "Inteviewer" and proponent of the appeal. Following the presentation of the Appellants' case on January 20, 2004, the hearing on the appeal was continued to March 30, 2004.

10. On January 28, 2004, three days before the scheduled expiration of the temporary C of O, DCRA issued a second C of O to use the premises for "24 hr. dog boarding and grooming with accessory retail sale of pet supplies." The second C of O (the permanent C of O) was not accompanied by any conditions and did not have an expiration date.

11. On March 23, 2004, Appellants filed an appeal challenging DCRA's decision to issue the permanent C of O.

Preliminary Matters

12. Prior to the March 30 continuation date, the parties made written submissions and/or sought various types of relief from the Board, specifically:

- (a) The Appellants moved to amend the appeal to include the permanent C of O issued by DCRA on January 28, 2004 (Exhibit 74).
- (b) The Owner moved to dismiss the appeal on the ground that it was moot because the temporary C of O had expired on January 31, 2004 (Exhibit 77).

- (c) The Owner opposed Mid-City's proposed expert testimony by Armando Lourenco, and requested that Mid-City's testimony be limited in time (Exhibit 71).
- (d) Mid-City moved to strike letters submitted in support of WagTime because they had been submitted by various neighbors and customers of Wagtime rather than by WagTime directly (Exhibit 73).

13. At the start of the March 30 public hearing, the Board ruled on the preliminary matters as follows:

- (a) The Board granted the Appellants' motion to amend the appeal to include the permanent C of O.
- (b) The Board denied the Owner's motion to dismiss on the ground of mootness. Even with the expiration of the temporary C of O, the Board found there was a live case or controversy stemming from the permanent C of O as to whether dog boarding is a permitted use in the zone.
- (c) The Board originally deferred the questions regarding Mid-City's case presentation and expert testimony, but ultimately ruled that Mr. Lourenco could provide expert testimony. The Board also found that Mid-City was not limited to a "5 minute" presentation merely because that time limit had been discussed at a prior proceeding.
- (e) Mid-City's motion to strike the letters was denied, and WagTime was given leave to proffer the letters in support as direct evidence in support of its case.

The Dog Boarding Use

14. WagTime offers "cageless" boarding facilities and represents that it is the only "indoor/outdoor" dog boarding facility in the northwest Washington, D.C. area.

15. Appellants and Mid-City maintain that dog boarding facilities have operational characteristics that are different from those of veterinary hospitals and pet shops. They refer to such characteristics as: the age of the dogs, the frequency and duration of overnight and outdoor stays, and the different levels of noise and waste that are generated at the different facilities. Through testimony and argument, Appellants and Mid-City asserted that, as compared to veterinary hospitals and pet shops, the dogs at boarding facilities are older, require more overnight stays, and require more time outdoors. They also asserted that the operation of a dog boarding facility generates greater amounts of noise and waste than the operation of a veterinary hospital or pet shop.

16. The Board finds that dog boarding facilities and veterinary hospitals share certain common operational characteristics. The most obvious and significant of these characteristics is the fact that both uses involve the overnight stay of dogs.

17. The Board also finds that as compared to both a pet shop and a veterinary hospital, the operations of a dog boarding facility are characterized by greater amounts of noise and waste, and greater numbers of overnight and outdoor stays.

18. The Board credits the testimony of Ruth Berman, qualified by the Board as an expert in dog kennels. Ms. Berman testified that, as distinguished from veterinary hospitals and pet shops,

most jurisdictions do not permit dog kennels within 200 feet of neighboring properties due to the greater noise levels and outdoor use associated with them.

19. The Board credits the testimony of Karen McCabe, based upon her experience as a former veterinary hospital technician. Ms. McCabe testified that dog boarding facilities are not similar to veterinary hospitals because overnight stays are typical at boarding facilities and only occasional at veterinary hospitals.

20. The Board credits the testimony of David Baker, qualified by the Board as an expert in pet shops and dog kennels based upon his experience providing services and products to both. Mr. Baker testified that in his opinion WagTime's facility is not similar to pet shops where: (a) the dogs only occasionally stay overnight; (b) puppies rather than grown dogs are housed; (c) the animals are "caged" rather than "uncaged"; and (d) the animals do not generally go outdoors.

21. The Board credits the testimony of Armando Lourenco, a former D.C.R.A. Zoning Administrator, qualified by the Board as an expert in the interpretation of D.C. zoning regulations. Mr. Lourenco testified that, in determining whether a proposed use is "similar to" an established comparable use, DCRA's longstanding practice is to compare and assess the relative impacts of the established and non-established uses based on the relative external effects on the proposed location and surrounding premises.

22. The Board also accepts Mr. Lourenco's opinion that in this type of case, a difference in the intensity of use between a principal use and an accessory use would have a qualitative impact on the external effects on a neighboring community – i.e. dog boarding as an accessory use at a veterinary hospital or pet shop would have a much lesser external impact upon a neighboring community.

23. The Board finds that dog boarding facilities are dissimilar from veterinary hospitals and pet shops because of the difference in sanitary and operational standards that apply to boarding facilities and the other uses. Dog boarding facilities are not subject to any regulatory or licensing program in the District that imposes sanitary or other operational standards. In contrast, both pet shops and veterinary hospitals must satisfy detailed operational and sanitary standards in order to receive a required license. See, 22 DCMR Chapter 700, Exhibit 81 (DC Register 6630, Sept. 2, 1988), amending 17 DCMR Chapter 29.

24. The Board also finds that other jurisdictions have regulated dog boarding/kennel uses by restricting proximity to neighboring properties and controlling impacts from noise and odor. See Attachment 42 to Exhibit 86.

CONCLUSIONS OF LAW

Positions of the Parties

Appellants concede that the "dog grooming" and accessory "retail uses" authorized by the C of O are permitted uses under the Zoning Regulations (p. 4 Statement of Appeal). WagTime argues, therefore, that the only relevant question is whether DCRA correctly found that the proposed "boarding" operations were "similar" to those uses permitted in the zone, in

other words, whether a dog boarding facility is “similar” to a veterinary hospital or pet shop. WagTime further argues that this appeal must be denied unless DCRA abused its discretion when it answered this question in the affirmative.

DCRA defends its decision to issue the temporary and permanent C of O under the regulatory scheme. It argues that it properly considered the degree to which the uses are normally associated with one another, and that the external effects – dog barking and generation of dog waste – of a dog boarding facility are similar to the external effects of a veterinary hospital and pet shop when the boarding facility operates in compliance with animal control and noise regulations..

Appellants and Mid-City allege that DCRA erred when it determined that dog boarding is permitted as a matter of right in the C-3-A zone. They contend that dog boarding is neither expressly permitted nor “similar to” any other uses that are expressly permitted.

The Pertinent Regulations

“Dog boarding” is not a defined term in the Zoning Regulations and matter of right uses in the C-3 zone are not specifically enumerated. However, a use is permitted in the C-3 zone as a matter of right if it is a use that is permitted as a matter of right in the C-2 zone 11 DCMR §741.1.

The permitted uses in the C-2 zone include a “service or retail use” that is “similar to” one or more of the matter of right uses listed in §§ 721.2 and 721.3 (See, 11 DCMR §721.4). As noted by all of the parties, the matter of right uses listed in these sections include use as a “veterinary hospital” (§ 721.2(x)), and use as a “pet shop” (§ 721.3(p)). Thus, the Board finds as a matter of law that a “dog boarding” use would be permitted as of right in the C-3 zone if it were found to be “similar to” either a veterinary hospital or a pet shop.

The Zoning Administrator failed to apply an appropriate methodology to determine whether a dog boarding facility was a use that was similar to the matter of right uses enumerated in Section 721.

In assessing whether a dog boarding facility was similar to a veterinary hospital or pet shop, the Zoning Administrator reviewed the uses specifically allowed in Section 721 to determine if the proposed use shared relevant qualities with them. In essence, the Zoning Administrator concluded that because veterinary hospitals and pet shops care for dogs and allow them to stay overnight, that a dog boarding facility was “similar” to these uses, and therefore, allowed under the zoning regulations as a matter of right.

The Zoning Administrator failed to examine any differences in external impacts between a dog boarding facility and a veterinary hospital and a pet store, despite the fact that the Zoning Administrator initially issued a temporary C of O and stated in connection with that C of O that DCRA would monitor the facility during the temporary 6- month period. Not only did the Zoning Administrator fail to examine the actual external impacts of the dog boarding facility at issue in this case during the temporary 6-month period of time, he failed to undertake research

and analysis of any kind **to assess external impacts**. According to DCRA's testimony at the hearing, DCRA's research was limited to past BZA decisions and Court decisions.

The Board credits the testimony of Armando Lourenco, a former Administrator of DCRA's Building and Land Regulation Administration and Acting Zoning Administrator, qualified by the Board as an expert in the interpretation of the District's Zoning Regulations, that in determining whether a proposed use is "similar to" an established comparable use, DCRA's longstanding practice is to compare and assess the relative impacts of the established and non-established uses based on the relative external effects on the proposed location and surrounding premises. Mr. George Oberlander, qualified by the Board as an expert witness in zoning, also testified that in determining similarity of uses, DCRA must look at external impacts.

Accordingly, the Zoning Administrator failed to properly evaluate whether the proposed dog boarding facility use was similar to a veterinary hospital or pet store because he failed to determine its external impacts.

The dog boarding use is not "similar to" a veterinary hospital or pet shop

The Board heard extensive evidence in this case with respect to the similarities and dissimilarities between a dog boarding facility and a veterinary hospitals and pet store. Based on the evidence presented, the Board concludes that a dog boarding facility use is not similar to either a veterinary hospital or a pet shop use. The Board reaches this conclusion because it finds that the external effects generated from a dog boarding facility are more intense than those generated by either a veterinary hospital or a pet shop, especially the greater amount of noise and odor that is inherent to a dog boarding facility. Wagtime's proffering of conditions in connection with its application for a C of O and DCRA's imposition of such conditions in connection with its issuance of the temporary C of O support a conclusion that even Wagtime and DCRA perceived a need to mitigate potential external effects stemming from the dog boarding use. The issue for DCRA was whether the proposed use had similar external effects as a veterinary hospital, not whether proffered conditions could mitigate those effects. Adding conditions to a certificate of occupancy cannot convert an unauthorized use into one permitted as a matter of right. Only the Zoning Commission can accomplish that change in status.

In addition, the Board notes that the current regulatory scheme governing animal facilities in the District subjects pet shops and veterinary hospitals to sanitation and ventilation standards, but dog boarding facilities are neither (Findings of fact 23) currently regulated nor even defined. Accordingly, they are not subject to the same licensing standards and requirements that may mitigate potential adverse impacts associated with the care of dogs.

Finally, the Board is persuaded that the greater intensity of noise and management of waste associated with a dog boarding facility distinguishes its use from either a pet shop or a veterinary hospital use. The Board notes that in those jurisdictions identified in the record, boarding facilities are strictly regulated differently from veterinary hospitals and pet stores so as not to create a nuisance due to potential noise and odor (Findings of Fact 18, 24). Accordingly, the Board finds that the zoning regulations do not intend a dog boarding use to be authorized as a matter of right, without any restrictions, particularly if it is adjacent to a residential property.

For all of these reasons, the Board concludes that the Zoning Administrator erred in determining that dog boarding as a principal use is permitted as a matter of right in the C-3-A zone.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the appeal is **GRANTED**
Vote taken on July 6, 2004

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis A. Etherly, Jr., and David A. Zaidain, by absentee ballot to grant the appeal, the Zoning Commission member not participating, not voting)

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

Each concurring Board member has approved the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: **OCT 15 2004**

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL. SG

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 17092

OCT 15 2004 As Director of the Office of Zoning, I hereby certify and attest that on a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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BZA APPLICATION NO. 17092

PAGE NO. 3

Washington, D.C. 20002

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rsn

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

EXHIBIT C

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION**



**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING**

and

Z.C. ORDER NO. 05-21

Z.C. Case No. 05-21

(Text Amendments – 11 DCMR)

(Animal Boarding – Text Amendment)

June 12, 2006

The Zoning Commission for the District of Columbia, pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Official Code § 6-641.01); having held a public hearing as required by § 3 of the Act (D.C. Official Code § 6-641.03); and having referred the proposed amendments to the National Capital Planning Commission for a 30-day period of review pursuant to 11 DCMR §§ 3025.3 and 3028.1; hereby gives notice of adoption of the following amendments to § 199 (Definitions), § 721 (Uses as a Matter of Right (C-2)), § 802 (Special Exceptions (C-M)), § 822 (Special Exceptions (M)), § 3104 (Special Exceptions), and by adding new § 735 (Animal Boarding) and new § 736 (Animal Boarding: External Yards).

A Notice of Proposed Rulemaking was published in the *D.C. Register* on April 7, 2006, at 53 DCR 2678.

The Commission took final action to adopt the amendments at a public meeting held on June 12, 2006.

This final rulemaking is effective upon publication in the *D.C. Register*.

Set Down Proceeding

The Commission initiated this rulemaking in response to a petition from the Office of Planning, which requested that the Commission create a definition for animal boarding and to permit the use only as a special exception subject to specific requirements within specified zone districts.

The Commission set down the requested text amendments for a public hearing at its meeting of July 5, 2005.

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Existing Regulations

Animal boarding facilities are not currently permitted in any zone district, either as a matter of right or by special exception. The Department of Consumer and Regulatory Affairs (DCRA) had determined on July 23, 2003 that “24-hour dog boarding and grooming with accessory retail sale of pet supplies” was similar to a veterinary hospital, because dogs stay overnight at both uses, and was therefore permitted within the C-3-A Zone District. On July 6, 2004, the Board of Zoning Adjustment concluded that the Acting Zoning Administrator erred in determining that dog boarding is permitted as a matter of right within the C-3-A Zone District and granted Appeal No. 17092, because the external effects of a dog boarding facility are more intense than those of a veterinary clinic or a pet shop, both of which are permitted within the C-3-A Zone District. Specifically, the Board noted noise, odor, and animal waste created the more intense external effects.

Description of Text Amendment

This text amendment permits animal boarding facilities as a special exception use within the C-2, C-3, C-4 Zone Districts, subject to the following requirements:

1. The animal boarding use shall not abut a Residence District.
2. The animal boarding use shall take place entirely within an enclosed and soundproof building in such a way so as to produce no noise or odor objectionable to nearby properties. The windows and doors of the premises shall be kept closed and no animals shall be permitted in an external yard on the premises.
3. The animal boarding use shall place all animal waste in closed waste disposal containers and shall utilize a qualified waste disposal company to collect and dispose of all animal waste at least weekly. Odors shall be controlled by means of an air filtration system (for example, High Efficiency Particulate Air “HEPA” filtration) or an equivalently effective odor control system.
4. The Board may impose additional requirements pertaining to the location of buildings or other structures; entrances and exits; buffers, barriers, and fencing; soundproofing; odor control; waste storage and removal (including frequency); the species and/or number, and/or breeds of animals; or other requirements, as the Board deems necessary to protect adjacent or nearby property.

This text amendment also permits animal boarding facilities as a special exception use within all C-M and M Zone Districts, subject to the following requirements:

1. An animal boarding use may be permitted as a special exception if approved by the Board of Zoning Adjustment under § 3104, subject to the requirements of this section.
2. The animal boarding use shall be located and designed to create no condition objectionable to adjacent properties resulting from animal noise, odor, or waste.

3. The animal boarding use shall not abut a Residence District.
4. External yards or other exterior facilities for the keeping of animals shall not be permitted.

Relationship to the Comprehensive Plan

The proposed text amendments will implement many of the Comprehensive Plan themes, goals, objectives, and policies, including §§ 102 and 1301, improving neighborhoods; §§ 200 and 1301, economic development; and § 1211, environmental protection.

The Comprehensive Plan, under § 102.2, recommends controlling the physical qualities that make neighborhoods desirable places to live in order to ensure that the character of these neighborhoods is maintained and improved. The addition of special exception requirements for animal boarding facilities will help to control the potential for adverse impacts as a result of animal boarding.

Public Hearing

The Commission held a public hearing on the proposed text amendment on November 3, 2005. The Commission discussed other animals that may be boarded and other related uses that may board animals as an accessory use, such as veterinary hospitals. The Commission requested that the Office of Planning return in December with a proposal for a text amendment to add uses related animal boarding to the Zoning Regulations, including definitions for those uses.

Residents, representatives of neighborhood associations, and owners of dog boarding establishments within the District spoke in favor of the text amendment. Concern was raised regarding dog grooming establishments boarding dogs as an accessory use, but without the need for a special exception.

Proposed Action

At the February 13, 2006 meeting, the Commission took proposed action pursuant to 11 DCMR § 3027.2 to approve the advertised text, with the modifications discussed below. A Notice of Proposed Rulemaking was published in the *D.C. Register* on April 7, 2006, at 53 DCR 2678, for a 30-day notice and comment period.

When it took proposed action, the Commission elected to use the phrase “animal boarding” rather than “dog boarding” so as to be more inclusive. The Commission also elected to incorporate into the special exception requirements for the C-2 through C-4 Zone Districts suggestions received on December 5, 2005 for controlling odor and waste from a group of citizens and business owners.

The proposed rulemaking was referred to the National Capital Planning Commission (NCP) under the terms of § 492 of the District of Columbia Charter. NCP, by report dated March 8,

2006, found that the proposed text amendments, to permit animal boarding within the C-2, C-3, C-4, C-M, and M Zone Districts subject to special exception review, would not adversely affect the federal interests nor be inconsistent with the Federal Elements of the Comprehensive Plan for the National Capital.

No other comments were received.

Final Action

At its properly noticed June 12, 2006 public meeting, the Commission took final action to approve the proposed text amendments, but when it took final action, it decided to add text to § 822 of the Zoning Regulations to make animal boarding facilities in M Districts subject to special exception review.

As it stated in its Notice of Proposed Rulemaking and in its referral to NCPC, the Zoning Commission intended to make animal boarding facilities subject to special exception approval in all Industrial Districts, including M Districts, when it took proposed action. The text below more accurately reflects the intent of the Commission when it took proposed action than the text that was published in the Notice of Proposed Rulemaking.

The Office of the Attorney General has determined that this rulemaking meets its standards of legal sufficiency.

Based on the above, the Commission finds that the proposed amendments to the Zoning Regulations are in the best interests of the District of Columbia and consistent with the purpose of the Zoning Regulations and the Zoning Act.

In consideration of the reasons set forth herein, the Zoning Commission hereby approves the following amendments to Chapters 1, 7, 8, and 31 of the Zoning Regulations.

Title 11 DCMR (Zoning) is proposed to be amended as follows:

- A. Subsection 199 DEFINITIONS is amended in the proper alphabetical order by adding the following new entry:

199.1 **Animal boarding** - Any premises, other than a veterinary hospital, pet shop, or pet grooming establishment, used as a commercial establishment for the overnight boarding and/or recurring daily care of animals for a fee. Any pet grooming establishment that permits ten or more animals on the premises at a time, or that permits the overnight stay of animals, is considered an animal boarding use.

B. Chapter 7, COMMERCIAL DISTRICTS, is amended as follows:

1. By adding new §§ 721.7 and 721.8 to read as follows:

721.7 Notwithstanding § 735, an animal boarding use in existence as of July 11, 2005, under a Certificate of Occupancy for a “Dog Care Center” or “Dog Day Care Center,” may be permitted to apply for a new Certificate of Occupancy as an animal boarding use if the use does not abut a Residence Zone, except that the continued use of an external yard shall require the approval of the Board of Zoning Adjustment as a special exception pursuant to § 736.

721.8 Any internal or external expansion of an animal boarding use permitted under § 721.7 shall require the approval of the Board of Zoning Adjustment as a special exception.

2. By adding new §§ 735 and 736 to read as follows:

735 ANIMAL BOARDING

735.1 An animal boarding use may be permitted as a special exception if approved by the Board of Zoning Adjustment under § 3104, subject to the requirements of this section.

735.2 The animal boarding use shall not abut a Residence Zone.

735.3 The animal boarding use shall take place entirely within an enclosed and soundproof building in such a way so as to produce no noise or odor objectionable to nearby properties. The windows and doors of the premises shall be kept closed and no animals shall be permitted in an external yard on the premises.

735.4 The animal boarding use shall place all animal waste in closed waste disposal containers and shall utilize a qualified waste disposal company to collect and dispose of all animal waste at least weekly. Odors shall be controlled by means of an air filtration system (for example, High Efficiency Particulate Air “HEPA” filtration) or an equivalently effective odor control system.

735.5 The Board may impose additional requirements pertaining to the location of buildings or other structures; entrances and exits; buffers, barriers, and fencing; soundproofing; odor control; waste storage and removal (including frequency); the species and/or number and /or breeds of animals; or other requirements, as the Board deems necessary to protect adjacent or nearby property.

736 ANIMAL BOARDING: EXTERNAL YARDS

- 736.1 External yards or other exterior facilities for the keeping of animals shall not be permitted.
- 736.2 Notwithstanding § 736.1, an animal boarding use existing on July 11, 2005, under a Certificate of Occupancy for a “Dog Care Center” or “Dog Day Care Center,” may continue the use of an external yard for the keeping of dogs if approved by the Board of Zoning Adjustment pursuant to § 3104 and the requirements of this section.
- 736.3 The yard shall be located and designed to create no condition objectionable to adjacent properties resulting from animal noise, odor, and/or waste.
- 736.4 The applicant shall demonstrate that the external yard will be fenced off for the safe confinement of the animals.
- 736.5 The applicant shall demonstrate that the external yard is located entirely on private property.
- 736.6 The Board shall establish the hours in which animals may be kept in the yard, provided that, no animals shall be permitted in the yard between 8:00 p.m. and 7:00 a.m.

3. By amending § 761, C-5 (PAD) DISTRICT USES, as follows (new text shown in **bold and underlined**):

- 761.1 Any use permitted in a C-4 District under § 751 shall be permitted in the C-5 (PAD) District as a matter of right, except that **an animal boarding use shall be prohibited and** a gasoline service station shall be permitted only as an accessory use to a parking garage subject to the conditions of § 701.1(i).

C. Chapter 8, INDUSTRIAL DISTRICTS, is amended as follows by adding new §§ 802.21 through 802.24 and 822.15 through 822.18 to read as follows:

- 802.21 An animal boarding use may be permitted as a special exception if approved by the Board of Zoning Adjustment under § 3104, subject to the requirements of this section.
- 802.22 The animal boarding use shall be located and designed to create no condition objectionable to adjacent properties resulting from animal noise, odor, or waste.

- 802.23 The animal boarding use shall not abut a Residence District.
- 802.24 External yards or other exterior facilities for the keeping of animals shall not be permitted.
- ***
- 822.15 An animal boarding use may be permitted as a special exception if approved by the Board of Zoning Adjustment under § 3104, subject to the requirements of this section.
- 822.16 The animal boarding use shall be located and designed to create no condition objectionable to adjacent properties resulting from animal noise, odor, or waste.
- 822.17 The animal boarding use shall not abut a Residence District.
- 822.18 External yards or other exterior facilities for the keeping of animals shall not be permitted.

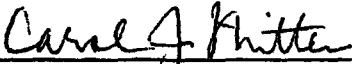
D. Chapter 31, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, is amended by adding to the table of special exceptions in § 3104.1, in the proper alphabetical order, the following new entry:

TYPE OF SPECIAL EXCEPTION	ZONE DISTRICT	SECTIONS IN WHICH THE CONDITIONS ARE SPECIFIED
Animal Boarding	Any C-2, C-3, C-4, C-M or M District	§§ 721.7, 721.8, 735, 736, 802.21 and 822.14

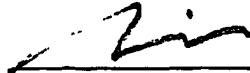
The Zoning Commission at its public meeting held on February 1, 2006 approved the application, subject to conditions, by a vote of 4-0-1 (Carol J. Mitten, Gregory N. Jeffries, Anthony J. Hood, and Michael G. Turnbull to approve; John G. Parsons not participating, not voting).

The Order was adopted by the Zoning Commission at its public meeting on June 12, 2006 by a vote of 4-0-1 (Carol J. Mitten, Michael G. Turnbull, Anthony J. Hood, and Gregory N. Jeffries to approve; John G. Parsons not participating, not voting).

In accordance with the provisions of 11 DCMR § 3028, this Order shall become final and effective upon publication in the *D.C. Register*; that is on **AUG - 4 2006**.



CAROL J. MITTEN
Chairman
Zoning Commission



JERRILY R. KRESS, FAIA
Director
Office of Zoning

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
ORDER NO. 05-21
Z.C. Case No. 05-21
(Text Amendments – 11 DCMR)
(Animal Boarding – Text Amendment)
June 12, 2006**

The full text of this Zoning Commission order is published in the “Final Rulemaking” section of this edition of the *D.C. Register*.

EXHIBIT D

**DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION
APPLICATION FOR CERTIFICATE OF OCCUPANCY**

Date

12/6/04

Receipt No.

CD-19687

Application Fee \$25.00 Non Refundable
Certificate Fee - Based on square footage

Cashier's No.

88180

INFORMATION ON PROPOSED BUSINESS	1. Premise Address <u>1232 9th Street, NW</u> Suite/Room No. _____	
	2. Business Telephone No. <u>202/234-8825</u> Fax No. <u>202/318-4014</u> Lot <u>0885</u> Square <u>0368</u>	
	3. Trade Name of Business <u>Wagtime</u>	
	4. Is Business Incorporated? Y/N <u>n</u> Partnership? Y/N <u>n</u> Sole Proprietor? Y/N <u>y</u> New/Existing <u>e</u>	
	5. Corporate Name <u>Wagtime, LLC</u>	
	6. President <u>Lisa Schreiber</u> Vice President _____ Secretary _____	
INFORMATION ON OCCUPANCY	7. Sole Proprietor <u>Lisa Schreiber</u>	
	8. Business Owner's Mailing Address <u>1412 Que St. NW WDC 20009</u> phone # (daytime) <u>202/234-8825</u>	
	9. Ownership Change ☐ Partial Occupancy ☐ New Bldg. ☒ Use change ☐ Load Change ☐ B.Z.A. No. _____	
	10. Proposed Use of Premises <u>Retail Pet Shop</u>	
	11. Prior Use of Premises <u>Bakery & catering</u>	
	12. Proposed Occupancy Load _____ Square Feet Occupied <u>1500</u>	
INFORMATION ON ENTIRE BUILDING	13. Floors to be Occupied <u>First</u> Basement? ☐ Yes ☒ No	
	14. Is this Business Sexually Oriented according to the DC Zoning Regulations? ☐ Yes ☒ No	
	15. Building Owner <u>Shaw Centre LLC</u> Telephone No. _____	
ATTESTATION & SIGNATURE	16. Building Owner's Address: <u>4801 Saint Elmo Ave. Bethesda, MD 20814</u>	
	17. Square feet <u>3755</u> Numbers of floors <u>3</u> Basement <u>y</u>	
	I certify that all of the statements on this application are true to the best of my knowledge and belief. I agree to comply with all applicable laws and regulations of the District of Columbia.	
	18. Owner of Business _____ Signature _____ Date _____	
ATTESTATION & SIGNATURE	If Authorized Agent for owner of Business (Attach Authorization)	
	19. Agent's Name <u>James F. Smith</u> Print Clearly _____ Signature _____ Date <u>12/6/04</u>	
	20. Agent's Address <u>Mr. Permit, LLC, 6 Logan Circle, NW, Washington, DC 20005</u>	

NOTICE

149

TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICE OR OFFICIAL
CALL THE INSPECTOR GENERAL AT 1-800-521-1639. ALL CALLS ARE CONFIDENTIAL

OFFICE USE ONLY

ADDRESS	Premise Address <u>1232 9th Street, NW</u> Suite/Room No. _____
ZONING DIVISION	Zone <u>C-2A</u> Overlay District <u>Y</u> N B.Z.A. No: _____ B.Z.A. approved date _____ Prior Use <u>Bakery & Catering 1st floor</u> Date of Last Certificate <u>7/16/99</u> Last Certificate No. <u>185691</u> Prior BZA No. _____ Accepted for filing by <u>Faye - O -</u> Date <u>5/9/05</u>
EXAMINERS USE	Use Change ☒ Yes ☐ No Inspections Required ☒ Yes ☐ No By _____ Date <u>12/6/04</u> Building Permit Required ☒ Yes ☐ No By <u>[Signature]</u> Date <u>12/6/04</u> Inspection Fee \$ _____ Issuance Fee \$ _____ By _____ Date _____ Approved for Issuance by <u>Faye - O -</u> Date <u>5/9/05</u>
C of O INSPECTION	Date of scheduled Certificate of Occupancy Inspection _____ Inspection Status ☐ Approved ☐ Disapproved By _____ Branch _____ Date _____ Inspector's Signature _____ Printed Name _____ Reason for Disapproval _____
C of O APPROVAL	☐ Approved ☐ Denied ☐ Canceled By _____ Reason for Denial/Cancellation _____ If Approved, Certificate of Occupancy No. _____ Date of Issuance _____
	Bldg. <u>5/4/05</u> Electric <u>5/4/05</u> Plumbing <u>4/25/05</u> Fire <u>5/6/05</u> Zoning _____

Please sign and return this Form

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
Clean Hands Before Receiving a License or Permit Act of 1996 Certification Form

Please read this from carefully and completely before signing. Any false information provided requires that the Department of Consumer and Regulatory Affairs proceed immediately to revoke the license or permit for which you are now applying, and fine you one thousand dollars (\$ 1,000.00). This Certification Form is required to be completed and submitted with any application for licensure or permit under the Clean Hands Before Receiving a License or Permit Act of 1996, effective May 11, 1996 (D.C. Law 11-118, D.C. Codes §47-2861 et seq.).

I, Lisa Schreiber as owner
(name) (owner/partner/corporate officer)
certify that WAGTime, LLC, trading as WAGTime, LLC
(business name) (trade name)

does not owe more than one hundred dollars (\$100.00) to the District of Columbia government as a result of:

1. Fines, penalties or interest assessed pursuant to the Litter Control Administration Act of 1995, effective March 25, 1986 (D.C. Law 6-100; D.C. Code §6-2911 et seq.);
2. Fines, penalties or interest assessed pursuant to the Illegal Dumping Enforcement Act of 1994, effective May 20, 1994 (D.C. Law 10-117; D.C. Code §6-2911 et seq.);
3. Fines, penalties or interest assessed pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1986 (D.C. Law 6-42; D.C. Code §6-2701 et seq.); or
4. Past due taxes.

I understand that if I knowingly provide false information on the *Certification Form*, the Department of Consumer and Regulatory Affairs will move to revoke the license or permit for which I am applying and fine me one thousand dollars (\$ 1,000.00). I further understand that the Department of Consumer and Regulatory Affairs may conduct an investigation to ascertain the veracity of the information contained in this *Certification Form*.

I understand that this Certification Form is now required as part of my application for a license or permit, and that by completing it, I am not guaranteed that my license or permit will be approved.

[Signature] owner
Signature and Title

11-16-04
Date

cc: Office of Tax & Revenue

For Tax Assistance Call (202) 442-6340

142 Subscribed and sworn to before me this 16 day of Nov. 2004
my commission expires.

Maria Talavera
Notary Public, District of Columbia
My Commission Expires 10-14-2006

[Signature]

EXHIBIT E

Page 14 1 A. Okay, go ahead. Well, it sounded like 2 you asked it. I have a college degree. 3 Q. I realize that. I just want to get 4 this down for the record. 5 A. Okay, go ahead. 6 Q. What's the highest level of education 7 that you've obtained? 8 A. With a degree? 9 Q. Yes. 10 A. A Bachelor of Science. 11 Q. And is there some other education or 12 training that you've completed? 13 A. I have 30 hours of a Master's in 14 business administration from George Mason. 15 Q. Do you have any licenses or special 16 certifications? 17 A. I am Green Advantage Certified, which 18 is similar to LEED. 19 Q. Do you have any other professional 20 licenses? 21 A. No, I don't not. And I don't even 22 call that a professional license. It's a	Page 16 1 me to answer. Okay? 2 Q. I understand, okay. Are there any 3 professional opinions or expert opinions that 4 you will be giving at the trial in this matter? 5 A. No. 6 Q. When did you first become involved in 7 the work at 1232 Ninth Street? 8 A. Well, in June, we started the job. 9 Q. June of? 10 A. '08. So before that, we were in 11 negotiations. 12 Q. Were you Corbett Construction's lead 13 person on this job? 14 A. Yes, for the office. 15 Q. Is there some explanation? 16 A. The lead person in the field is Phil 17 Spilker. 18 Q. Can you spell Phil's last name? 19 A. S-P-I-L-K-E-R. He's the project 20 superintendent. 21 Q. What was your title? 22 A. Senior project manager.
Page 15 1 certification. 2 Q. Do you have any other certifications 3 or professional licenses besides the Green 4 Advantage Certification? 5 A. I do not. 6 Q. When did you obtain your Green 7 Advantage Certification? 8 A. It's probably been two years. 9 Q. What does that let you do? 10 A. What does it let me do, nothing. 11 Q. Perhaps, I should ask it this way. 12 The Green Advantage Certification, what did it 13 train you in? 14 A. Recycling, site use, green practices, 15 green building practices. 16 Q. I may have already asked this. Have 17 you ever testified as an expert witness before? 18 A. No, and I do not consider myself to be 19 an expert witness. 20 Q. In anything involved in this lawsuit? 21 A. I have knowledge of this job. Okay? 22 So you should be more specific in what you want	Page 17 1 Q. Was there a contract for the work that 2 Corbett Construction was to perform at 1232 3 Ninth Street? 4 A. Yes. 5 Q. Would that have been in the files, the 6 two boxes? 7 A. Yes. Are you saying you don't have a 8 copy of it? 9 Q. I'm saying I don't for the entire -- 10 about how much was the contract price, if you 11 recall? 12 A. I don't remember. 13 Q. Was it more than \$500,000? 14 A. I think so, yes. 15 Q. Would there have been a scope of work, 16 a document that would have been a scope of work 17 in the two boxes for the that Corbett 18 Construction performed at 1232? 19 A. It's referenced through the plan, 20 which you only have a small portion of. 21 Q. Would you have had the complete set in 22 your two boxes?

5 (Pages 14 to 17)

1 A. Yes. I don't know why you need those.
2 We're talking about a very small portion of the
3 work that came up as a change order.

4 **Q. We'll get to that, Ms. Neff. It may**
5 **or may not be relevant. Part of what I'm doing**
6 **in a deposition is -- part of it is a fact**
7 **gathering exercise. I may ask you a lot of**
8 **questions.**

9 **Not everything I ask you is going to**
10 **necessarily come up at trial. Some of it is**
11 **very important. Some of it is not as**
12 **important. So just bear with me, I know parts**
13 **of this you may not think are relevant.**

14 **Can you just describe for me the work**
15 **that Corbett Construction did at 1232 Ninth**
16 **Street?**

17 A. We took a four-story townhouse and
18 renovated, that included many different things.
19 We renovated it and converted its use to a dog
20 day care facility.

21 **Q. What was it used as before?**

22 A. I don't know. Well, the tenant, who

1 was in there at the time, was using it as a dog
2 day care facility, but not the entire building
3 because some of it was just uninhabitable.

4 **Q. What was your understanding of what**
5 **the entire building was, what were the parts?**

6 A. What do you mean?

7 **Q. What was the footprint of the entire**
8 **building?**

9 A. That's shown on the plans.

10 **Q. I'm asking what you understood the**
11 **entire footprint of the building to be.**

12 A. It's shown on the plans as a basement
13 with a first floor on top that extends out to
14 the alley behind, and then a shorter second
15 floor. The first floor is the longest piece.
16 And you've got a document there that shows you
17 what it is. And then, the third floor is very
18 small on the top.

19 **Q. Did you understand it to be basically,**
20 **more or less, a rectangle that went straight**
21 **back?**

22 A. It is a rectangle that goes straight

1 back, but they're not all -- all the levels are
2 not equal.

3 **Q. The job that Corbett Construction**
4 **performed, did it encompass the entire**
5 **building? I mean, was Corbett Construction**
6 **renovating the entire building or just part of**
7 **it?**

8 A. Well, we weren't touching the outside
9 walls, but we were touching the inside walls
10 and doing some roof work.

11 **Q. In all of the levels?**

12 A. Yes. Not all at the same time, but
13 yes, because this space would be occupied while
14 we did the work.

15 **Q. What was the time period for when the**
16 **work was being performed?**

17 A. I think we originally had a 16-week
18 schedule to get everything done.

19 **Q. And that would have started from?**

20 A. June 30, 2008. I think we may have
21 started on the 26th, but that was just
22 preliminary investigations at which time we

1 discovered several things, including the party
2 wall.

3 **Q. And when was the work completed at**
4 **1232?**

5 A. The first, second -- well, everything,
6 no. The basement, second, and third floors
7 were done by the end of December of 2008. The
8 first floor was finished, I believe in March.

9 **Q. Was there always work being performed**
10 **at 1232 Ninth Street during that time period?**

11 MR. GLASER: I'm sorry, during which
12 time period?

13 MR. MALLOY: The time period of June
14 30th until the last day of work.

15 THE WITNESS: No, not every day.

16 BY MR. MALLOY:

17 **Q. Every week?**

18 A. Pretty much every week, but not every
19 day.

20 **Q. Why wouldn't there be work done every**
21 **day?**

22 A. Because the tenant would have to move