

LAW OFFICES
GRIFFIN, MURPHY, MOLDENHAUER & WIGGINS, LLP

MARK G. GRIFFIN (DC, MD)
BRIAN P. MURPHY (DC, MD)
ASHLEY E. WIGGINS (DC, MD, VA)
MERIDITH H. MOLDENHAUER (DC, MD, VA)
ERIC M. DANIEL (MD, DC)

DIRECT DIAL (202) 530-1482
DIRECT E-MAIL MMOLDENHAUER@WASHLAW.COM

April 9, 2013

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

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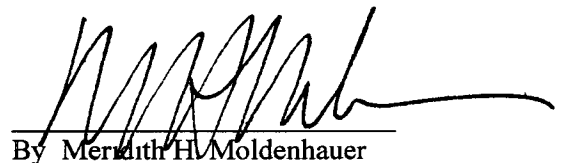
Re: Application No. 18474 – Opposition Findings of Fact and Conclusions of Law

Dear Chairman Jordan

On behalf of the Party in Opposition, we submit these Findings of Fact and Conclusions of Law

Sincerely,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS, LLP


By Meredith H. Moldenhauer

Enclosures

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

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18474
EXHIBIT NO. 54

Board of Zoning Adjustment
District of Columbia

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 18474 of Wagtime, LLC, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for special exception relief for animal boarding use (§735), pet grooming use (§736), and animal shelter use (§739) and for variance relief for use of an outdoor deck in connection with an animal boarding use (§§ 735.3 and 735.6), the pet grooming use (§736.5) and animal shelter use closer than 200 feet from residential use (§739.6) to permit the continued use of a structure and roof deck for animal boarding use, pet grooming use, and animal shelter use and an apartment unit in the C-2-A District at premises 1232 9th Street NW (Square 368, Lot 911).

HEARING DATE: March 5, 2013

DECISION DATE: April 23, 2013

DECISION AND ORDER

Wagtime, LLC (“Applicant” or “Wagtime”), submitted this self-certified application on September 7, 2012, as the lessee of property located at 1232 9th Street NW (Square 368, Lot 911)(the “Property”). The Applicant sought special exception relief as described above to permit the continued use of the illegally constructed, noncompliant operation of the animal boarding use, pet grooming use, and animal shelter use at the Property. The Applicant was opposed by a Party in Opposition. On December 13, 2012, the Applicant requested to defer the December hearing in order to amend the Application to include variance relief for use of outdoor facilities, relief the Applicant previously indicated it could operate without. The Board of Zoning Adjustment (“BZA” or “Board”) convened a hearing on the application on March 5, 2013. At the conclusion of the Hearing, the Board closed the record and requested Findings of Fact and Conclusions of Law.

Agency Report Pursuant to 11 DCMR § 3113.13, the Office of Zoning published notice of the hearing on the application. The Office of Planning (“OP”) filed a report with the Board on December 11, 2012 recommending approval of the proposed special exception use (See Exhibit 30) and supplemented the report. ANC 2F submitted a report to the Board dated December 12, 2012. (Exhibit 31).

Applicant’s Case. Leila M Jackson Batties, of Holland & Knight, LLP, represented the Applicant. The Applicant presented two witnesses in support of the application: Lisa Schreiber, on behalf of Wagtime, LLC, and Steven E. Sher, Director of Zoning and Land Use Services at Holland & Knight, LLP. The Board qualified Mr. Sher as an expert in planning and zoning.

Party in Opposition’s Case. Meridith H. Moldenhauer, of Griffin, Murphy, Moldenhauer & Wiggins, LLP, represented the Party in Opposition. The Party in Opposition presented two witnesses in opposition of the application: George Beheshtian, on behalf of Nayereh Sahrapour, owner of 1230 9th Street NW; and Stephen DuPont, architect, on behalf of the Party in Opposition. The Board qualified Mr. DuPont as an expert in architecture.

FINDINGS OF FACT

1. The subject Property is located at Lot 911 in Square 368 and has street frontage along 9th Street, N.W., Washington, D.C.
2. The Property is improved with a 3-story masonry building that occupies the entire lot
3. The proposed use includes a second floor roof deck facility for the keeping of animals.
4. The roof deck is *not* illustrated on the submitted plans, Applicant's Exhibit 28C, or the Applicant's Prehearing Statement.¹
5. The cellar is used for pet grooming, animal boarding and animal shelter operations.
6. The first floor is used for the pet store, animal boarding and animal shelter operations
7. The second floor is used for animal boarding and animal shelter operations.
8. Other than the first floor pet store, each of these uses is currently beyond the scope of the issued Certificate of Occupancy, which lists a Pet Retail Store occupying 1500 square feet on the first floor as the only permitted use at the Property.
9. The Applicant testified at the hearing that Wagtime's staff members use the third floor for showering and as a place for lunch during work hours. Hearing Transcript, p 79
10. The third floor is labeled as a vacant residential unit.²
11. Due to the impact of the District's Zoning Regulations and permitting process on its prior operations, Wagtime has had a uniquely thorough understanding of the Zoning Regulations with respect to animal boarding, animal shelter, and pet grooming uses in the District at all relevant times. See Timeline, attached hereto for more detail.
12. Lisa Schreiber is an owner of Wagtime, LLC.
13. The owner of the Property and Applicant is LesRon, LLC, which is owned and operated by Leslie Schreiber, Lisa Schreiber's mother
14. The Applicant submits no evidence, no documentation, no written Zoning Determination letter, no Zoning Opinion letter, and no email or other correspondence with DCRA, the

¹ Under 3125 7, "Approval of an application shall include approval of the plans submitted with the application " and § 3125 8 provides that, "an application shall be required to carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board, unless the Board orders otherwise " Therefore, the Board cannot grant relief for an outdoor roof deck facility for which the Applicant has submitted no plans or dimensions

² The Application is self-certified, however, the Board has reason to believe the structure exceeds the maximum non-residential FAR due to the Applicant's use of the 3rd floor for business purposes

Zoning Administrator, the Office of Zoning or otherwise establishing a governmental action upon which the Applicant claims it relied.

15. Until 2008, Wagtime operated on only the first floor.
16. During 2008 and 2009, roughly a year after LesRon LLC purchased the Property, the structure was substantially renovated.
17. Following renovation and without a valid C of O, Wagtime used the entire structure for pet grooming, animal boarding, and animal shelter operations.
- 18 As a change order, not initially anticipated, the Applicant added the roof decks as a luxury amenity in February 2009
- 19 A permit was never obtained for construction of the deck.
- 20 At no point did the Applicant amend or reapply for a proper Certificate of Occupancy that encompassed the various uses or the expansions of use at the Property.
21. Square 368 is split zoned with an R-4 District occupying much of the northern, western, and southern portion of the Square and a C-2-A District occupying the eastern portion along 9th Street.
22. Most of M Street and N Street between 9th Street and 10th Street are large, brick, attached dwellings or lots with anticipated residential development.
- 23 10th Street between M Street and N Street is almost exclusively attached residential dwellings
- 24 Considerable residential development is proposed for nearby lots, including the Blagden Alley Residences at 817 M Street NW and 1212 9th Street NW, a mixed-use project stretching from 1216 9th Street to 1228 9th Street, a large condominium project at 1250 9th Street, and the Naylor Court Stables at 10th which came before the Board in March, 2012. See BZA Case No. 18318

CONCLUSIONS OF LAW

I. Variance Relief

The Use Variance Standard is Applicable

The Board concludes that the relief requested is evaluated under the use variance standard. During the Hearing, the issue of the Zoning Commission's Notice of Proposed Rulemaking, Z C Case No. 12-11, regarding additions to 11 DCMR 3103 were discussed. Commissioner Jordan cited these provisions as providing "definitive guidelines in regards to

what's an area variance and what's a use variance."³ The proposed text supports the conclusion that the variance sought in this instance is a use variance, not an area variance. Under §3103.5(a) of the Zoning Commission's Proposed Rulemaking, ZC Case No 12-11, a request to permit a "use that is not permitted by right or special exception" is defined as a use variance. In this instance, the Applicant's request to permit the use of external yards and external facilities, expressly prohibited by the special exception provisions in §735.6 and §736.5, is therefore a use variance under the Proposed Rulemaking. The Zoning Regulations and proposed rulemaking do not provide for a hybrid variance.

Here, it is not the dimensions of the roof deck, but the use of the deck for animals in connection with the boarding, grooming, and dog shelter that is at issue. A use variance is proper because 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. For example, a roof deck facility associated with an office use or residential use would be permitted by the regulations. The variance sought is not regarding size, location, or placement of building, but rather the use for which the exterior facilities may be utilized. Thus, the Board concludes that the Applicant seeks a use variance.

No Exceptional or Extraordinary Conditions

The Board finds that there are no exceptional circumstances at the Property. First, the exceptional conditions, which the Applicant claims lead to an undue hardship, are self-created. Second, there is no detrimental reliance on actions by the District because the Applicant has not proven any government action upon which it relies.

a. Any Exceptional Circumstances or Conditions due to the Applicant's Certificate of Occupancy, if any, are Self-Created

The exceptional circumstances leading to the undue hardship complained of are self-created. In the context of a use variance, 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). Because the exceptional circumstances leading to the undue hardship complained of are self-created, the Board finds the Applicant's arguments unpersuasive.

The Applicant argues that the Property is affected by an exceptional situation or condition because the Applicant obtained a Certificate of Occupancy ("C of O") on May 9, 2005 prior to enactment of the text amendment related to the pet grooming, animal boarding and animal shelter uses. The Applicant is not entitled to rely on having obtained a Certificate of Occupancy for a retail pet shop occupying 1500 square feet as evidence of an exceptional circumstance or condition. The evidence demonstrates that the Applicant knew, at the time it applied for a C of O, that a retail pet shop was distinct from a dog day care center, animal

³ These provisions, as proposed text, are not binding.

boarding, pet grooming, and animal shelter uses. At the very least, the Applicant knew or should have known this distinction based on its involvement in BZA Case No. 17092. In that case, the Board limited Wagtime's Q Street location to operation as a retail pet shop only. Dog boarding was prohibited because it was not encompassed in the retail pet shop use listed on its C of O. The Applicant testified during the hearing that this decision greatly impacted its Q Street location.

Despite an understanding of its importance, the Applicant chose not to list its intended uses when applying for their C of O for the 1232 9th Street location. Furthermore, the Board has consistently concluded that when an owner applies for a certificate of occupancy the owner is "obligated to inform the Zoning Administrator of the intended use of the property." BZA Order No. 15265, p12. The Board is persuaded by the Party in Opposition's evidence that the Applicant intentionally omitted its intended uses, especially in light of its knowledge following the Q Street BZA decision. Had all uses been disclosed, including dog day care, the C of O upon which the Applicant now claims detrimental reliance would never have been issued.

Moreover, the subsequent enactment of the text amendment allowing pet grooming, animal shelter, and dog boarding uses does not create an exceptional circumstance. The text amendment reduced the restrictions on these uses by permitting them in the C-2 District by special exception when they previously were prohibited uses. The text amendment made the proposed uses easier to operate, therefore the Board is not persuaded that the text amendment creates an exceptional situation that justifies granting a variance.

b. No Detrimental Reliance on Actions by the District

The Applicant claims that it suffered from detrimental reliance on "discussions with the District" that its various uses were grandfathered when it decided to complete extensive renovations and build the roof deck at issue in this Application. The Board rejects these claims because the Applicant has not provided sufficient information to establish the governmental action upon which it allegedly relied and because Wagtime constructed the roof deck without a building permit

The Applicant has provided no evidence that any such "discussion with the District" occurred and could not specify with whom the discussion occurred⁴ Ms. Schreiber testified that they obtained no zoning determination letter, no opinion letter, or any other written confirmation evidencing their alleged reliance Hearing Transcript, p127. Performing interior renovations and constructing a roof deck in excess of the permitted square footage and beyond the scope of the use stated in their existing C of O is not an exceptional situation or circumstance. Even if the such discussions occurred, the roof deck was built two years after the text amendments were

⁴ Furthermore, under §735 7, animal boarding use in existence on July 11, 2005 with a Certificate of Occupancy for a "Dog Care Center" or "Dog Day Care Center" was permitted to continue the use of an external yard for the keeping of dogs if approved by the BZA as a special exception The Applicant had a Certificate of Occupancy for a Pet Store Retail Use not a Dog Care Center Furthermore, the grandfathering provision is for an external yard only, not animal boarding use in general The pet grooming and animal shelter uses have no such grandfathering provision Furthermore, the Applicant expanded said use in 2008-09 without seeking zoning relief

finalized which expressly prohibit external facilities and yards for animal boarding and pet grooming uses. The Applicant should have been aware of the applicable Zoning Regulations prior to constructing the deck, especially in light its extensive BZA experience with its Q Street operation and representation by experienced zoning counsel during the process. Allowing a claim of "discussions with the District" to carry weight, without documentation, sets a precedent that the Board is unwilling to support. The Board cannot give weight to mere testimony with no evidence or supporting documentation.

Furthermore, a detrimental reliance argument is generally found in the context of the government erroneously issuing a building permit or Certificate of Occupancy in error leading to a detriment to the party now seeking zoning relief. Claiming detrimental reliance upon failing to obtain a proper Certificate of Occupancy is a far greater hurdle, which this Applicant has failed to overcome. In BZA Case 17852, the Board denied a use variance application to allow establishment of a nail salon business in the R-5-B District where the Applicant had been operating under an erroneously issued home occupation C of O. With respect to detrimental reliance on an action by the District, Commissioner Turnbull concluded that no such exceptional circumstance or hardship could be found because "in this case . . . [w]e've got an absence of someone going for a Certificate of Occupancy rather than being issued a Certificate of Occupancy for ten years and reliance upon a government issued document." In this instance, Wagtime failed to seek the proper C of O, zoning relief, and building permits at the beginning of its operation and upon expansion of its operation.

Moreover, in the context of illegal construction, the Board has supported applicants who are subsequent purchasers with clean hands but not a knowledgeable party that engaged in illegal construction. In this instance, it was Wagtime that built the roof deck without proper building permits rather than a prior owner. Wagtime cannot claim that it had no knowledge of the illegal construction, an issue at the forefront of the Board's mind in prior detrimental reliance cases.

In sum, approving the zoning relief requested by the Applicant would require extending the detrimental reliance standard well beyond what the Board has historically reserved for a very narrow set of circumstances. Therefore, the Board finds the Applicant's detrimental reliance argument unpersuasive.

For these reasons, the Applicant has not demonstrated an exceptional circumstance or condition at the Property.

No Practical Difficulties or Undue Hardship

In the context of a use variance, the Applicant must demonstrate an exceptional situation or condition of the property and that such exceptional condition results in an "undue hardship" to the Applicant. The Board finds that the Applicant's argument that strict application of the Zoning Regulations would result in a practical difficulty and undue hardship due to financial infeasibility is unpersuasive.

First, the Applicant has provided no evidence, other than unsupported general statements, that operation without a roof deck would be financially infeasible. Second, there is no evidence

that other matter-of-right uses at the Property are not feasible. The Board has consistently asked for supporting documentation for such claims and refuses to deviate from that valuable policy in this instance.⁵ Third, the Property can be operated without relief based on the Applicant's prior use of the Property without a roof deck and initial special exception relief application for operation without a roof deck.

a. No Evidence to Support Financial Infeasibility

The Applicant has failed to demonstrate that the claimed \$35,000 expenditure on the roof deck is an undue hardship. Stephen DuPont aptly pointed out that based on the itemized listing roughly 1/3 of that expenditure was for ground floor fencing. Hearing Transcript, p 164. The claim is further discredited by a lack of supporting evidence. The Board has recently made quite clear that an argument of financial infeasibility must be accompanied by appropriate documentation. While financial infeasibility can be grounds for demonstrating practical difficulty, the Applicant must demonstrate *through appropriate documentation* that he is not "merely seeking the most profitable use for his land," *Palmer v Bd of Zoning Adjustment for the District of Columbia*, 287 A.2d 535, 541-42 (D.C. 1972), but rather that the property cannot be "put to any conforming use with a fair and reasonable return arising out of the ownership thereof" *Russell v District of Columbia Bd. of Zoning Adjustment*, 402 A.2d 1231, 1236 (D.C. 1979).⁶ Appropriate documentation includes but is not limited to construction budget, breakdown of costs, and a profit and loss analysis.

In this instance, at the time of the hearing the Applicant had provided nothing more than an exaggerated claim that the deck costs \$35,000 (more accurately less than \$23,000). Nothing has been provided to the Board, in writing or during the hearing, to substantiate the costs of constructing the deck. No comparison as to the relative feasibility of operating with the benefit of a roof deck amenity as opposed to without a roof deck has been provided beyond mere generalities about the need for additional staff to walk the dogs more frequently and the limited

⁵ See BZA Case No. 18511, March 5, 2013, p 50-54 (Chairmen Jordan, Sorg, and Turnbull acknowledge that there is an exceptional circumstance and undue hardship, and the applicant claims financial infeasibility of a matter of right project, but the Board ask for more detailed financial data to support that argument), BZA Case No. 18446, November 27, 2012, p39-43 (Chairman Jordan, in the face of an economic feasibility argument without financial data, states "it's something that we have done in other cases, required that kind of evidence to support the argument that you're making." Chairwoman Sorg states, "[I]n all of these cases, big or small, developer or homeowner, the record I think would show that **we have always received cost estimates and we have always received market analyses**" (emphasis added); See also BZA Case No. 18115, October 19, 2010, p29-30, BZA Case No. 17014, July 1, 2003, p30-31.

⁶ The Court in *Palmer v Bd. of Zoning Adjustment for the District of Columbia*, 287 A.2d 535 (D.C. 1972) states that to demonstrate economic infeasibility, an applicant must prove that the property cannot be "put to any conforming use with a fair and reasonable return arising out of the ownership thereof" *Id* at 541-42 (emphasis added). In *Russell v District of Columbia Bd. of Zoning Adjustment*, 402 A.2d 1231 (D.C. 1979), the court distinguished an applicant seeking a fair and reasonable return from an "applicant merely seeking the most profitable use for his land." *Id* at 1236. It is for the Board to decide, on a case-by-case basis, on which side of this line an application falls. *Tyler v District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362 (D.C. 1992).

green space in the urban location that Wagtime has opted to operate in.⁷ The Board concludes that it must maintain consistent rulings and will not support relief based on financial infeasibility without substantiated documentation or support.

The Applicant's claim that it would be unable to recoup costs invested in a valuable real estate investment property is not persuasive. In fact, the Board roughly calculates that based on a \$2.3 million investment and rental income of \$45/sq. ft. per month for the commercial space and \$1000/month for the 1-bedroom apartment, the Applicant could achieve a capitalization rate of 10%. A 10% cap rate is well beyond the 7%-8% industry standard capitalization rate in the area. Thus, even with the limited information provided by the Applicant, the Board concludes that the Applicant is "merely seeking the most profitable use for his land" and will not grant a variance on that basis.

b. No Evidence that Other Matter of Right Uses are Not Feasible

In addition to providing no supporting documentation for claimed expenditures, the Applicant has provided no supporting documentation to indicate that the Property cannot be put to any matter-of-right use. The District of Columbia Court of Appeals 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.")

The Applicant has provided no evidence that LesRon, LLC cannot rent to another retail pet store, animal boarding, animal shelter, or pet grooming operator that would not need a roof deck. Furthermore, the Applicant has provided no evidence that the existing structure and roof deck cannot be put to a different matter-of-right or special exception use, including the extensive lists under §701 and §721

c. The Applicant Can Operate at the Property Without Variance Relief

Under *Bernstein v D.C. Bd. of Zoning Adjustment*, "[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." 376 A.2d 816, 819-820 (D.C. 1977). The Applicant has not demonstrated that the Property, without the roof deck, cannot be used in a manner consistent with the Zoning Regulations or would be precluded for a use to which it may reasonably be adapted. The Property could reasonably be used by this Applicant as a pet grooming, animal boarding and animal shelter *without* a roof deck. In fact, this exact alternative was initially proposed by the Applicant prior to amendment of the Application. Furthermore, this exact alternative is how the property was operated prior to construction of the roof deck for five years. Hearing Transcript, p 100 (Ms. Moldenhauer. " you used then the space for about five years

⁷ The Board notes that there are a number of dog friendly parks located within walking distance including the Shaw Dog Park outside the Shaw Recreation Center, the Kennedy Recreation Center, Mt. Vernon Square, Bundy Playground, Samuel Gompers Memorial Gardens and Burke Park, and Logan Circle

without having an outdoor facility? You conducted your business without having or needing an outdoor facility?" Ms Schreiber "Yes")

Moreover, the Applicant is requesting that the Board, through the variance process, grant it a competitive advantage by authorizing its new illegally constructed deck so that it may maximize profit and capitalize on this luxury amenity. Many dog boarding facilities currently operate in the District, including City Dogs Daycare and others, without such outdoor facilities.

Thus, the Board finds that there is no practical difficulty or undue hardship imposed on the Applicant upon strict application of the Zoning Regulations. The Board is not convinced that it is obligated to grant a variance to an Applicant who has purchased a property in an area that is incompatible with animal boarding, animal shelter, and pet grooming use or purchased a structure that does not meet its needs.

Harm to Public Good and Zone Plan

The requested relief cannot be granted 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. For the same reason the Applicant has not met the special exception standard with respect to noise, odor, and waste, the Applicant has not demonstrated that there will be no substantial detriment to the public good.

II. Special Exception Relief

Pursuant to § 3104 of the Zoning Regulations, the Board is authorized to grant special exceptions only where, in its judgment, the relief will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property. The Party in Opposition raised significant areas in which the Applicant failed to meet this standard. Additionally, certain special exceptions must meet the conditions enumerated in the particular sections pertaining to them. Relief granted through a special exception is presumed appropriate, but must be denied if the Applicant cannot meet the specific regulatory requirements for the relief requested.

Here, the Applicant's proposal to operate animal boarding, pet grooming, and animal shelter uses does not meet the regulatory requirements for the relief requested. The Board cannot confirm that this facility could continue operation with no objectionable condition to adjacent properties resulting from animal noise, odor and waste. In light of the substantial number of animals and proximity to residential uses, taking proper measures to control odor, noise, and waste are especially important. Due to its proximity to existing and future residential uses, the noise, odor, and waste generated will create an objectionable condition.

The Party in Opposition is in the process of renovating and opening a restaurant at its property.⁸ A restaurant use is permitted as a matter of right and would be substantially adversely

⁸ As held in BZA Case No. 17337-A of N Street Follies, Ltd, the special exception conditions regarding adverse effects on neighbors apply not only to residential neighbors but also commercial neighbors.

affected by the smell of dog waste, constant dog barking and runoff from dog urine being cleaned off the outdoor facility and dogs being bathed outside. The Board has received evidence of adverse effects on the Party in Opposition as well as other current and future neighbors⁹ in this rapidly developing area. The extent of the current adverse impact while substantial, will continue to grow as residential buildings are developed and more high end retail and restaurant uses in the community open.

a. Adverse Impact of Noise on Neighbors

Under §735.3, animal boarding “shall take place entirely within an enclosed and soundproof building in such a way as to produce no noise or odor objectionable to nearby properties.” In addition, “[t]he windows and doors of the premises shall be kept closed and no animals shall be permitted in an external yard on the premises.” The proposed Wagtime use, with its more than 150 dogs, would have an adverse effect on the noise, privacy and enjoyment of neighboring properties. In an email entered into the record during the hearing, dated October 12, 2012, a disgruntled neighbor states with respect to noise:

Over the past few months we've been experiencing frequent periods of disturbing noise from Wagtime's 9th Street facility. . . Of particular concern are your use of outdoor areas - the use of a rooftop deck seems to be a particular area of uncontrolled noise. . . . Now the level of barking noise has been entering our home and that of a number of neighbors. I've have at least a half-dozen neighbors who are property owners on the 900 block of M Street NW independently complain to me about the disturbing noise and the nuisance. . . . We've heard the barking sounds interrupt our normally quiet environment 7 days a week from early morning until late evening.

The Applicant denied any adverse effect and failed to provide methods or mitigation for such adverse conditions.

b. Adverse Impact of Waste and Odor on Neighbors

Under all three special exception provisions, all animal waste “shall be placed in closed waste disposal containers and shall utilize a qualified waste disposal company to collect and dispose of all animal waste on a weekly basis.” 11 DCMR §§735.4, 736.3, and 739.4. The evidence indicates that dog waste has repeatedly been placed in an open, unsealed container at the rear of the Property that permits foul odor to waft throughout the area. The Applicant has stated that it will wash all indoor floors with a water/chemical mixture that breaks down urine.

⁹ The Board has contemplated the importance of considering future impacts on the community. In BZA Case No 18095, regarding the Ronald McDonald House Charities of Greater Washington, DC's application for special exception relief to operate a religious group residence for 96 people, the Board imposed a 5-year time limit on their approval. Commissioner Turnbull supported the decision citing the unpredictability of the operation's impact on the neighboring community. Here, even though the Board denied the relief requested, had the Application been approved a time limit would have been appropriate so that the surrounding neighborhood, as well as the Board, could have an opportunity to evaluate whether or not the outdoor operations and outdoor facilities should be permitted to continue operating.

PARTY IN OPPOSITION'S PROPOSED DECISION AND ORDER

BZA APPLICATION NO. 18474

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odor. The Applicant has not stated a method for how the exterior facility will be cleaned or how the cleaning solution will be captured to prevent its flow outside of the exterior facility. Furthermore, Stephen Dupont, certified as an expert in architecture by the Board, Hearing Transcript, p165, stated concerns regarding the outdoor roof deck as follows.

[Y]ou can't keep the dogs from relieving themselves on the surface. And it's going to go between the cracks because that's the way that particular [concrete] surface is designed to work. So it's on the pavers. It's below the pavers on the roof. It's in the guttering system. And there's no way to successfully collect everything. It's going to be getting into all the pores of the various materials.

To control odor, the special exception provisions require that an air filtration system or an equivalently effective odor control system be used. 11 DCMR §§735.4, 736.3 and 739.4. Due to the Applicant's extensive exterior facilities, there is no way to control odors by means of an air filtration system. Therefore, the proposed use would also negatively affect the neighboring uses, with particular harm to the Party in Opposition, as a result of foul and noxious odors.

For the reasons stated above, the Board concludes that despite mitigation attempts by the Applicant, the application fails to satisfy the requirements of §3104 and is inconsistent with the specific conditions under §§ 735, 736, and 739.

It is therefore **ORDERED** that the application is hereby **DENIED**.

VOTE: _____ - _____ - _____

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

A majority of the Board members denied the issuance of this order

ATTESTED BY: _____

SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

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.
PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWOYEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY

AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401 01 *ET SEQ* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED· RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

TIMELINE OF WAGTIME OPERATIONS

<u>Date</u>	<u>Description</u>
May-04	BZA granted Appeal No. 17092. Board ruled that Wagtime's 1412 Q Street location was operating beyond its C of O. Specifically stating that a "dog boarding" use was <u>not</u> similar a "pet shop".
Oct-04	Board's decision issued in BZA Appeal No. 17092
Dec-04	Wagtime applied for a C of O for the Property Wagtime intended to operate a "dog boarding" establishment at the location but the C of O Application indicated only Retail Pet Shop as the proposed use
Sep-05	Wagtime begins its operation as a pet store, pet grooming facility, animal boarding facility, and animal shelter. No outdoor facility is being used.
Aug-06	Final rule making by text amendment permitting pet grooming under §736 and animal shelters under §739 by special exception, were published. 53 DCR 6363 (August 4, 2006). Prior to that time, these uses were prohibited in the C-2 District. Section 736 expressly prohibits "exterior facilities for the keeping of animals." Section 735 expressly prohibits "exterior facilities for the keeping of animals" and Section 739 expressly prohibits such facilities unless the use is 200 feet from all residential uses and all Residential Districts
Aug-07	LesRon LLC purchased the Property
Sep-07	Final rule making by text amendment permitting animal boarding, under §735 by special exception, was published 54 DCR 8943 (September 14, 2007) Prior to that time, this use was prohibited in the C-2 District. Section 735 expressly prohibits "exterior facilities for the keeping of animals." Section 735 explicitly limits "grandfathering" to an animal boarding use existing on July 11, 2005 under a Certificate of Occupancy for a "Dog Care Center" or "Dog Day Care Center" by special exception.
2008- 2009	Renovations Start Feb-09 First thought of deck. Request change order. Wagtime operating for almost 5 yrs with no outdoor facility Applicant used the entire 3 story structure for operations and presented no evidence that it amended or reapplied for the proper C of O that encompassed the various uses of the Property.