TESTIMONY NOTES [OF ARMANDO LOURENCO
Case # 17092 - March 30, 2004]

Good afternoon, Chairman Griffis and Members of the Board.

My name is Armando Lourenco and I am a private consultant on building and land-use regulatory matters. Immediately prior to my working as a private consultant, I served as the Administrator of Building and Land Regulation Administration, of the Department of Consumer and Regulatory Affairs. I also served as the Acting Zoning Administrator of the District of Columbia, from July 1998 to August 1999.

I was retained by Mid-City Development to review the Zoning Administrator's decision that is now under appeal. I am here to testify before you on the respective findings. I do it based my experience and background as a regulatory officer in land use matters under the Zoning Regulations the District of Columbia. My findings are also tempered by the particular appreciation of the difficulty of the judgments involved that comes from having actually walked more than one mile in the proverbial shoes of the Zoning Administrator.

Based on my review, I am firmly convinced that the Certificates of Occupancy issued to the applicant were issued in error. Furthermore, it is my opinion that, in the process of issuing the original temporary Certificate of Occupancy, the Zoning Administrator exceeded his authority and made decisions that were more properly within the authority of the Board of Zoning Adjustment and of the Zoning Commission. The relevance of the precedent established in that process goes well beyond the specifics of this case and as such should be considered by the Board in its deliberations on this appeal.

FIRST LET ME ADDRESS WHAT I CONSIDER TO BE A JUDGMENT ERROR ON THE PART OF THE ZONING ADMINISTRATOR.

§3203.8(a) requires any established use to be *"designated on the Certificate of Occupancy in terms of a use classification (...) established by"* the Zoning Regulations. Every now and then a use is proposed that is not specifically established in the regulations, such as the case of the "dog boarding" facility in question. On such cases, the longstanding practice of the Office of the Zoning Administrator, for districts where similar uses are authorized, has been to compare the proposed non-established use to other uses established in the regulations and to make a judgment based on the analogies between the compared uses. As for the differences between the proposed use and the established comparable uses, the Zoning Administrator is expected to assess the relative impact of those differences based on their external effects on the proposed location and surrounding premises. This has been generally accepted to be within the interpretive authority of the Zoning Administrator, and the record seems to support that such was the thought process that led to the issuance of the first conditional Certificate of Occupancy to WagTime. Where we believe the Zoning Administrator erred was in his conclusion that dog boarding was a matter of right use in a C-3-A zoning district.

BZA
Case No. 17092
Exhibit No. 83

Board of Zoning Adjustment
District of Columbia
CASE NO. 17092
EXHIBIT NO. 83

The best insight that the record provides us as to the rationale used by the Zoning Administrator to make that determination is the "Memorandum of Points and Authorities" filed by Corporation Counsel on behalf of DCRA.
Two important points can be inferred from that memorandum:

- First, that DCRA's determination that a dog boarding facility is allowed as a matter of right in a C-3 District was based mainly on the similarity of dog boarding to veterinary hospital services.
- Second, that such determination was correct because *"such a facility must be operated in compliance with the District's animal control and noise control regulations."*

I must confess that I have difficulty understanding this second argument. It sounds as if Corporation Counsel advocates abandoning zoning regulation controls because all uses must comply with other municipal regulations anyway. Extending that logic, one could defend the location of a "gasoline service station" in an R-1 zone because such a facility must be operated in compliance with the District's fire prevention, air quality control and transportation regulations. Or one could also argue for the location of an "off-premises alcoholic beverage sales" use in a residential district because such a facility must be operated in compliance with the District's alcoholic beverage control regulations and their patrons must comply with laws against public drunkenness and other police regulations aimed at maintaining public order.

The fallacy of the conclusion of Corporation Counsel's memo is patent. Corporation Counsel's use of other municipal regulations as the panacea to justify a questionable zoning determination could easily be stretched to any zoning district where those regulations apply, starting at R-1-A. What is at issue here is whether the Zoning Administrator applied the Zoning Regulations correctly, not whether he considered other municipal regulations, which may work towards or against the goals of the Zoning Regulations, and in any case are not within the purview of the Zoning Administrator or of this Board.

GOING BACK TO THE MAIN ISSUE OF THE SIMILARITY OF USES, Corporation Counsel states that :

> *"Veterinary hospitals provide overnight boarding for dogs that are awaiting or recovering from treatment. It follows that a dog boarding facility is a "service... use similar to" a veterinary hospital, and, like a veterinary hospital, is permitted as a matter of right in a C-2 District."*

The fallacy of this syllogistic abuse is so crude that dispenses further analysis.

Using the same reasoning, if guests are temporarily lodged in hotels; and inmates are temporarily lodged in jails; it would follow that any distinction between the two uses in the Zoning Regulations would be superfluous and a detention facility could be judged a matter of right use in a CR zone, by similarity with a hotel, based on the same defective logic applied by Corporation Counsel in the WagTime case. Of course that would be absurd.

One can not disregard the difference between ailing dogs kept indoors and often sedated – as occurs typically in animals under treatment or observation kept overnight

in a veterinary hospital – and healthy adult dogs exercising outdoors as a group, the same way one can not ignore the difference between the adverse potential impact of the presence of a jail vs a hotel just because in one aspect – temporary boarding of individuals – they have a similarity. In both cases all aspects of external effects should be considered and compared to determine whether any difference would affect significantly the enjoyment of the properties adjacent to or nearby the proposed use.

What the Zoning Administrator failed to apply correctly, and Corporation Counsel failed to address, in the case of the WagTime Certificates of Occupancy, was exactly the proper methodology to assess the adverse external effects that come from the presence of multiple healthy adult dogs in the same exercise open air enclosure, a characteristic that is normally absent from veterinary hospitals. The external effects – including noise and odor – of the dog boarding use have an impact on the adjacent owners enjoyment of their properties that is significantly more adverse than the effect of the type of service that was used as the term of comparison by the Zoning Administrator.

That is one of the reasons why I believe the determination was erroneous and the "dog boarding" use should not have been considered similar to a veterinary hospital use.

There is another detail that should not be overlooked in this case: the Certificates of Occupancy issued to WagTime list "dog boarding" as a principal use. The comparison to "veterinary hospital" found only one similarity to an accessory use – overnight boarding – that is incidental to veterinary hospital services. The hasty conclusion of similarity drawn by Corporation Counsel blurs the fact that the intensity of the accessory use is naturally lower than if the use is the principal use of the facility. In this case, the difference in intensity of the use is not only quantitative; it rises to the level of a qualitative difference. It is clear that if dog boarding was conducted only as an accessory use – for example accessory to a pet shop – it would be subordinated to the needs of the principal use and it would be present only to the extent that the operation of the principal use would dictate it. In that case – as an accessory use – its presence would have a much lesser external impact and it would not be objectionable in a C-3 zone.

I would like to call your attention to two BZA cases dealing with similarity of uses – Appeals numbers 12845 and 13714. They are worth reviewing here for the insight they provide on the decision making process of the Zoning Administrator. In both cases, a stricter standard of similarity than in the present case was upheld by The Board of Zoning Adjustment and, in the first case, was affirmed by the D.C. Court of Appeals.

The methodology used by the Zoning Administrator to determine similarity of uses in those cases was based on characteristics common to all of the specified allowable uses. At issue was the determination of similarity of certain professional practitioners to architects, dentists, doctors, engineers and lawyers [current §501.3]. The criteria used by the Zoning Administrator and upheld by BZA were (1) ethical standards, (2) professional licensing and (3) professional education. The Board's

decisions were to uphold the determination that those practitioners – a financial analyst, an economist, a public affairs consultant and a lobby – were not similar to architect, dentist, doctor, engineer and lawyer because they did not meet the professional licensing criterion, although they met one or both of the other two criteria.

In the present case, DCRA argued, through Corporation Counsel, that the Zoning Administrator's determination under appeal was based on similarity of the proposed use to "veterinary hospital" service use [§721.2(x)], pursuant to §721.4. Their argument is based solely on one aspect of one of the service uses listed in §721.2. The methodology upheld in the two BZA cases I cited was based on multiple common characteristics.

What should the Zoning Administrator have done differently in the present case, you ask? For instance, noise was an obvious matter of concern for the Zoning Administrator from the start. That is evidenced in the four conditions of the temporary Certificate of Occupancy restated in the Zoning Administrator's letter of July 30, 2003. It is also clear in Corporation Counsel's conclusion that references the noise control regulations. Therefore, the Zoning Administrator should have scrutinized the various uses listed in §721.2 for the noise factor. It would have revealed that the common characteristic of those uses is that they are of such a nature that they do not produce significant exterior noise levels. In two cases the list imposes additional conditions aimed at reducing exterior noise levels – in item (e) soundproofing of bowling alleys, and in item (q) excluding outdoor storage in plumbing or heating shops – further proof that exterior noise should have been one of the criteria used by the Zoning Administrator.

Even if one were to focus only on the obvious aspect of the presence of animals – as was argued by Corporation Counsel in relation to the veterinary hospital and by the Zoning Administrator's office in relation to a pet shop – an important distinction that was missed by the Zoning Administrator is that both a pet shop and a veterinary hospital are licensed facilities under District of Columbia law, that are subject to periodic inspections and license renewal and are held to detailed public health sanitary standards and standards for animal health and welfare. A dog boarding facility, to the best of our knowledge, is not a licensed facility within that meaning. Again, the Zoning Administrator failed to consider this important common characteristic of the two animal facilities listed in §§721.2 and 721.3.

The relevance of this fact is highlighted by the importance attached by The Board of Zoning Adjustment, in the cases cited previously, to the absence of a professional license of what, at first glance, might seem occupations similar to the listed licensed professionals. BZA Order No. 12845 cites, in findings of fact, that the Zoning Administrator testified, and the Board so found, that *"as to the second criteria, professional licensing, all professionals listed (...)are licensed accountable for any malpractice."*

The fact that a dog boarding use is not subject to licensure by the D.C. government, in my view is another factor that makes this use dissimilar from pet shops and veterinary hospitals which are accountable before a licensing board, contrary to the dog boarding facility that has no detailed licensing requirements and, once a Certificate of Occupancy is issued – if not revoked by the Board – is set for life, so to speak.

NOW LET ME ADDRESS WHAT I CONSIDER TO BE PROCEDURAL ERRORS MADE BY THE ZONING ADMINISTRATOR WHICH MAY HAVE THE EFFECT OF BECOMING A PRECEDENT THAT WOULD REACH MUCH FURTHER THAN THE PRESENT CASE.

The first thing that attracted my attention during the review of the record was the fact that a conditional Certificate of Occupancy had been issued with conditions imposed on the use itself.

A Certificate of Occupancy certifies that a building or facility not only complies with the Zoning Regulations but that it also meets the Construction Codes. It is not uncommon for BLRA to issue a conditional Certificate of Occupancy when construction is substantially completed yet some code required items are not completely installed, when the building official deems that it is safe to temporarily occupy the premises pending completion of those construction items. The building official has the authority to make those judgment calls. The reason why you do not see conditional C of Os with use conditions is because the Zoning Administrator does not have a similar authority to waive – temporarily or permanently – zoning requirements.

With the possible exception of enforcement cases where the violator is given a period to take steps to abandon an illicit use, I can not think of a single example where anything other than a matter of right use was allowed to exist with the concurrence of the Zoning Administrator, even if only for a limited period. Certainly not formalized in a Certificate of Occupancy .

It would be helpful to the Board in reaching a decision on this case, to have an explanation from the Zoning Administrator of the reasons to have issued a conditional Certificate of Occupancy with conditions on the use itself.

A review of the Certificate of Occupancy application of 7/8/03 also denotes something unusual about the conditional Certificate of Occupancy: the application was cleared for issuance on 7/23/03 by the Zoning Administrator himself. It is unusual that a simple Certificate of Occupancy application needs to be cleared directly by the Zoning Administrator. That normally signals that there was an administrative hold on the issuance, which would not happen if there were no doubts that the use was matter of right. This is, however, consistent with a concern of the Zoning Administrator to ensure that the additional "commitments," listed in the Zoning Administrator's letter to Steve Sher of Holland and Knight, would be added as conditions of the temporary Certificate of Occupancy .

The application also bears a handwritten note by the Zoning Administrator that reads *"Conditional C of O pending commitment completion (?) as noted in Holland & Knight letter dated July 11, 2003."* The issuance of such a conditional Certificate of Occupancy obviously needed clarification, which explains why the Zoning Administrator issued the letter of July 30, 2003 to Holland & Knight, WagTime's counsel, restating the conditions. In that letter the Zoning Administrator affirms that *"the conditional issuance is based on the following commitments (...)"* so the so-called commitments were one of the bases for the issuance.

There are only two courses of action the Zoning Administrator is authorized to take to dispose of a Certificate of Occupancy application:

- The first is to approve it without use conditions if it is a matter-of-right use.
- The second is to deny it and refer it to Board of Zoning Adjustment if it is not a matter-of-right use.

While the Zoning Administrator's concern in this case to impose additional conditions to mitigate the exterior effects of the proposed use is understandable, in my opinion it raises two important procedural questions:

- The first problem is that the Zoning Administrator lacks objective criteria to guide him in his determination that the additional conditions are sufficient to make the use acceptable at the proposed location (who is to say that "20 dogs," or the "hours of 9-to-5," are the appropriate thresholds?).
- This first problem actually results from the second, which is that the Zoning Administrator lacks specific authority to impose those limitations; the only entities that have the authority to impose special conditions on the use of premises are the Zoning Commission or the Board of Zoning Adjustment, and the determination of the appropriate limitations on the use (be it the number of dogs exercising outside or their outdoor exercise hours) has to be made collegially by one of those collective bodies.

I note also that, for matter-of-right uses, there is no authority to impose additional conditions – either by the Zoning Commission, the Board of Zoning Adjustment or the Zoning Administrator – beyond those contained in the Zoning Regulations.

The paradox created by the unusual conditional Certificate of Occupancy issued on July 23, 2003 to WagTime becomes more clear if we use a more common example – the case of a child development center. As you know, in Zone R-4 a child development center is a matter of right use for up to 16 individuals [§330.5(d)]. In Zones R-5-D and R-5-E, it becomes matter of right use for up to 25 individuals [§350.4(g)].

Now, let's imagine that the Zoning Administrator had decided to issue a Certificate of Occupancy for a child development center in a Zone R-5-B and – because the zone was more restrictive than R-5-D – he had decided to arbitrarily limit the occupancy to 20 individuals. No one would have any difficulty in identifying this arbitrary limitation as a double error in the application of the regulations:

– The first error was to fail to refer the application to Board of Zoning Adjustment (in effect the applicant would be entitled to a child development center of up to 16 individuals but had to obtain a special exception from the Board of Zoning Adjustment to have 20 individuals);

– The second error was to usurp the authority assigned to the Zoning Commission, by amending the text of §350.4, which only the Zoning Commission is authorized to do (in fact, issuing the Certificate of Occupancy for 20 individuals in Zone R-5-B would have amounted to the ad hoc creation of a new subsection similar to §350.4(g) for zones R-5-B and R-5-C).

It is very easy to identify the procedural errors in the example I just gave. Well, I submit that issuing a Certificate of Occupancy for a dog boarding use with the condition that no more than 20 dogs could be in the outdoor portion of the facility is a decision that is tainted by exactly the same two errors:

- First, it is an admission that the use is not exactly matter-of-right and needs additional use conditions, for which the correct procedure would have been a referral to The Board of Zoning Adjustment;
- Second, the Zoning Administrator in essence amended §741.2 of the regulations to allow as a matter of right a use that could be codified as *"dog boarding, provided that the outdoor portion of the facility shall have no more than twenty (20) dogs at any time."*

Where does the Zoning Administrator get the authority to do all that? And I leave you with this rhetorical question.

CONCLUSION

Having concluded that the Certificates of Occupancy issued to WagTime were issued as a result of a combination of erroneous judgments, misapplication of the rules and exercise of authority not vested in the Zoning Administrator, I believe the Board should uphold the appeal, revoke the current Certificate of Occupancy and require the Applicant to obtain a variance from the Board before reapplying for a Certificate of Occupancy.