BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Wagtime LLC, pursuant to 11 DCMR §§ 3100 and 3101, from the March 2, 2005 administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue a Notice of Revocation of Certificate of Occupancy No. C069395 for the premises at 1412 Q Street, N.W.	)	BZA Appeal No. 17325

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DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' MEMORANDUM IN SUPPORT OF INTERVENORS' MOTION TO DISMISS WAGTIME'S APPEAL

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") agrees with Intervenors' contention that the issue of whether "dog boarding" is actually a principal use of Wagtime, LLC's ("Wagtime") facility is not "ripe" for consideration by the Board of Zoning Adjustment ("Board" or "BZA"). (Motion to Dismiss Wagtime's Appeal ("Motion") at 7-8) Because DCRA's decision to revoke the facility's C of O followed directly from the Board's decision that DCRA had erred in issuing the C of O, Intervenors' appeal must be dismissed. 11 DCMR § 3126.11 (prohibiting "new appeal or application on the same facts" within one year of Board's order).

Wagtime appeals from the Zoning Administrator's March 2, 2005 decision to issue a Notice of Revocation with respect to Certificate of Occupancy Number C069395. (BZA Appeal No. 17325 ("Appeal") Exh. 5) That C of O, which was issued by DCRA on January 28, 2004, authorized Wagtime to use the 1412 Q Street facility for "24HR. DOG BOARDING AND GROOMING WITH ACCESSARY RETAIL SALE OF PET SUPPLIES." (Appeal Exh. 2) In BZA Appeal No. 17092, DCRA's decision to issue the

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C of O was successfully appealed to the Board, which held in its October 15, 2004 Decision and Order 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." (Appeal Exh. 4 at 8) As the property owner, Wagtime was a party to that appeal. (Appeal Exh. 4 at 1) Based on the Board's decision to grant the appeal, DCRA then revoked the C of O "pursuant to 12A DCMR § 110.5.3 (2005), which authorizes the Director to revoke a Certificate of Occupancy that has been issued in error." (Appeal Exh. 5)

Once the Board determined that "dog boarding" could not be permitted "as a principal use" at 1412 Q Street, N.W. (Appeal Exh. 4 at 8), DCRA had not choice but to revoke the C of O, which expressly authorized "dog boarding" as one of the facility's two principal uses. Neither the Board nor DCRA needed to determine whether dog boarding actually *was* a principal use of Wagtime's facility. Even if the facility had never been used for dog boarding, DCRA would have been compelled to conclude that a C of O that permitted "dog boarding" as a principal use was a C of O "that ha[d] been issued in error." (Appeal Exh. 5)

Wagtime's contention "that dog boarding is only a small percentage of its business and thus does not rise to the level of a princip[al] use" has no bearing on whether DCRA erred when it issued to Wagtime a C of O that authorized dog boarding as one of two principal uses. (Appeal Exh. 6) Moreover, Wagtime fails to acknowledge that the Board's decision in BZA Appeal No. 17092 was more than a determination that "dog boarding as a principal use is not permitted as [a] matter of right in the C-3-A zone." (Appeal Exh. 6) BZA Appeal No. 17092 was an appeal "challenging DCRA's decision to issue a certificate of occupancy (C of O)" for Wagtime's premises at 1412 Q

Street, N.W. (Appeal Exh. 4 at 1) After the Board's Decision and Order granting the appeal became effective, DCRA did not have the discretion to make its revocation of the C of O contingent on "a factual finding that the dog boarding services provided by this business [were] its princip[al] use." (Appeal Exh. 6)

In ruling that DCRA could not permit dog boarding as a "principal use," the Board left undecided the issue of whether DCRA could permit a pet grooming shop, veterinary hospital, or pet store to board dogs as an *accessory* use. After receiving DCRA's Notice of Revocation, Wagtime might have sought and obtained a new C of O that permitted (1) dog grooming and retail sale of pet supplies as principal uses, and (2) indoor boarding of a small number of dogs as an accessory use. In that case, Wagtime's contention that dog boarding was "only a small percentage of its business" would be relevant to the issue of whether it was in compliance with the new C of O.

However, the issue in this appeal is not whether Wagtime is in compliance with a C of O authorizing dog boarding as an accessory use, but whether DCRA erred in issuing a C of O that authorized "dog boarding and grooming" as the principal uses of Wagtime's facility. That issue was fully resolved by the Board in BZA Appeal No. 17092 and may not be relitigated by Wagtime at this time. *See* 11 DCMR § 3126.11; *Towles v. District of Columbia Bd. of Zoning Adjustment*, 578 A.2d 1128, 1130-31 & n.3 (D.C. 1990) (*res judicata* prevented same parties from relitigating same claim before BZA).

As this appeal demonstrates, if the Board issues an order granting an appeal from DCRA's decision to issue a C of O, and if DCRA then proceeds to revoke the C of O on the ground that it was issued in error, the property owner cannot, in an appeal from

DCRA's revocation decision, relitigate the question of whether DCRA erred in issuing the C of O.

Conclusion

For the foregoing reasons, DCRA respectfully requests that the Board grant Intervenors' Motion to Dismiss.

Respectfully submitted,

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Dated: June 23, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2005, I caused true and correct copies of the foregoing District of Columbia Department of Consumer and Regulatory Affairs' Memorandum in Support of Intervenor's Motion to Dismiss Wagtime's Appeal to be mailed, first-class postage prepaid, to the following:

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and faxed to Ed Donohue, Esq. (fax: 202-452-0067) and Andrea C. Ferster, Esq. (fax: 202-331-9680), and hand-delivered to:

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