APPEAL OF WAGTIME, LLC
FROM NOTICE OF REVOCATION OF
CERTIFICATE OF OCCUPANCY NO. 69395

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Allegation of Error

Wagtime, LLC ("Wagtime"), through counsel, hereby appeals the decision of the Zoning Administrator for the District of Columbia to issue a Notice of Revocation of Certificate of Occupancy ("C of O") No. 69395 issued to Wagtime on January 28, 2004. The C of O authorizes the use of the premises at 1412 Q Street, N.W. (Square 209, Lot 878) for twenty-four hour dog boarding and grooming with accessory retail sale of pet supplies.

In issuing the revocation notice, the Zoning Administrator has relied on the decision of the Board of Zoning Adjustment ("BZA" or "Board") issued October 14, 2005, in Appeal No. 17092 finding that C of O 69395 was issued in error in that "dog boarding as a principal use is not permitted as matter of right in the C-3-A zone district." However, the Zoning Administrator's reliance on this order is in error because the Board never made a factual finding that the dog boarding services provided by this business was its principle use, nor was there any evidence of record in Appeal Case No. 17092 to support such a finding. Rather, the Board simply found in Finding No. 22 that the "intensity of the use between a principal use and an accessory use would have a qualitative impact on the external effects on a neighboring community." That is, *if the dog boarding facilities were a principal use*, only then would it have a qualitative impact on the external effects on a neighboring community. In fact, Wagtime provided uncontraverted information to the Board that dog boarding is only a small percentage of its business and thus does not rise to the level of a principle use. Thus, unless and until the

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Board or the Zoning Administrator receives evidence demonstrating that dog boarding is the principal business of Wagtime, the C of O should not be revoked.

Request to Stay Enforcement of C of O Revocation

Wagtime further requests the Board to stay enforcement of the C of O revocation. In determining whether a stay should be granted, the Board must consider the movant's likelihood of success on the merits, that the movant will suffer irreparable injury if the stay is not granted, that there will be no harm to the respondent, and that the stay will promote the public interest. Each element is discussed in sequence below.

a. Likelihood of Success on the Merits

The first element in considering whether a stay should be granted is whether the movant has shown a likelihood of success on the merits of the underlying claim. See Kuflom v. District of Columbia Bureau of Motor Vehicle Services, 543 A.2d 340, 344 (D.C. 1988). The movant does not have to present a substantial case on the merits, but rather must simply make a meaningful showing of probable or likely success. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 599 F.2d 841, 843 (1977). "The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed ...may grant a stay even though its own approach may be contrary to [the] movant's view of the merits." Id.

In support of its assertion that it is likely to succeed on the merits, Wagtime offers the following:

(i) The Zoning Administrator and the Board based their decision on the appeal on the unsubstantiated finding that dog boarding is a "principal use" at Wagtime. In fact, as discussed in detail above, Wagtime provided uncontroverted information to the Board

that the boarding of dogs is a small percentage of its operation. The burden of proof was on the appellants to prove this element, which appellants did not do. Therefore, it is error for the Board to make assumptions about the nature of the principle use or rely on fact or information not in the record. This alone constitutes reversible error.

(ii) The Board erred when it stated that "the zoning regulations do not intend a dog boardinghouse use to be authorized as a matter of right, without any restrictions, particularly if it is adjacent to residential property." Order at page 7. DCRA testified that dog boarding takes place at veterinary hospitals and pet shops. Further, DCRA opined that the uses at veterinary hospitals and pet shops are "similar to" the use by Wagtime. Nevertheless, the Board apparently credited the testimony of lay witnesses over DCRA regarding the relative external effects generated by these various animal-related business and found, without any basis in the record, that a dog boardinghouse created greater external effects than the other two types of animal businesses.

Significantly, however, the Zoning Regulation do not place any limitations on veterinary hospitals or pet shops; both are permitted as a matter of right, and without restriction either as to size, numbers of animals, hours of operation or outdoor use of space. Further, the Zoning Regulations do not articulate a stricter standard for animal-related businesses adjacent to residential district. If the Zoning Regulations intended DCRA or the Board to evaluate this business against such a stricter standard, it knew how to say so, just as it has done for other certain uses. For example, fast food restaurants, permitted under 11 DCMR 721.3 (s) have very specific conditions of approval related to trash, traffic and other external impacts. Also, 11 DCMR 721.2 (e) allows bowling alleys ion the C-2 districts provided they are soundproofed.

The Zoning Commission has not placed similar restrictions on veterinary hospitals or pet stores. For the Board to do so in this case, as an accommodation to the appellants concerns about one particular operation, is an abuse of discretion. If the Zoning Commission intends to restrict animal-related operations when they occupy space nearby or adjacent to residential areas, it can amend the regulations. The Board cannot do so simply as a response to neighborhood opposition.

(iii) The Order is otherwise arbitrary and capricious and not in accordance with the law. For example, the Board spent a great deal of time during the hearings discussing certain conditions proferred by Wagtime and made a part of a previously issued certificate of occupancy. Those conditions, the appropriateness of imposing such conditions on a use that the Zoning Administrator deemed to be by-right, and the extent to which Wagtime complied with them, occupied much of the debate. The Board seems to have agreed with the appellants that the Zoning Administrator's use of these conditions is a tacit admission that the use is not exactly compatible with the zone. In other words, if you have to create conditions to control the nature of the occupancy, it must mean that the use should not be permitted in the zone. That an applicant for a certificate of occupancy would agree to impose upon itself certain operating conditions is simply not legitimate grounds to revoke the right to occupy space. It does, in fact, amount to an arbitrary and capricious decision, that should not be allowed to stand.

Thus, Wagtime meets the first element in determining whether a motion for a stay should be granted.

b. Irreparable Injury

Wagtime will suffer irreparable injury if the motion to stay is denied. While it is true that injuries in terms of money, time and energy expended in the absence of a stay may not rise to the level of being "irreparable" in some instances, it is equally true that an injury deemed to be insufficient to justify a stay in one case may well be sufficient to justify a stay in another. See Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (1958); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 599 F.2d 841, 843 (1977). Revocation Notice leaves Wagtime with few options. It has a long-term lease at its present location, and has made a substantial investment in improvements to the leased space. Wagtime has a large number of customers who want to have their pets groomed, walked and occasionally boarded at Wagtime. There are a number of large hotels that regularly use the services at Wagtime for the pets of the hotel's customers. If Wagtime cannot serve these needs, those customers will be lost, and possibly for good. Not only do the Wagtime's employees live, work and raise their families in the community, but the business focuses on serving the neighborhood.

This is not to say that there aren't other options for pet owners. In fact, there are a few establishments nearby to Wagtime that offer retail, grooming and animal boarding. Upon information and belief, those businesses operate with certificates of occupancy that simply state the use as "pet shop" and yet overnight boarding is regularly provided as a service for walk-in customers. If the Board will permit it, Wagtime would like an opportunity to demonstrate that the enforcement contemplated by the DCRA—the revocation of the certificate of occupancy, is selective and discriminatory. If allowed to stand, Wagtime will likely be forced out of business,

surely an irreparable injury. There will be a loss of jobs, loss of business and the forced closure of a legitimate commercial enterprise.

These injuries to the Appellant are far greater than the mere payment of the fine. Neither of these injuries can be adequately compensated by monetary relief. Indeed, as the court stated in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., "[t]he destruction of a business is, of course, an essentially economic injury. It is not, however, one of the 'mere' economic injuries . . . insufficient to warrant a stay. The economic injuries disparaged [are those] for which 'adequate compensatory or other corrective relief will be available at a later date.'" 559 F.2d at 843, n.2. In this case, the significant damage to the Appellant's public image, combined with the potential of having its certificate of occupancy revoked, are each so severe that adequate compensatory or other corrective relief will not be available at a later date to return the Appellant to the status quo. As such, the balance of equities weighs in favor of granting the requested stay since the Appellant will suffer irreparable harm if the stay is not granted.

c. No Harm to Respondent

The issuance of a stay would not substantially harm DCRA, or appellants. The DCRA has not initiated any enforcement proceedings against any other businesses that currently provided animal boarding. If the DCRA agrees with the Board that such a use is not permitted in the C-3 district, it should enforce against all such businesses. Wagtime showings of probable success and irreparable injury weigh against the revocation of the certificate of occupancy.

Appellants have worked diligently for the past year to try to force Wagtime to close its business. Appellants have used every device available to them to ensure the outcome they desire. However, appellants would not be harmed by the issuance of the stay and the full and fair

consideration of the issues by the Office of Administrative Hearings. There are no pending health or safety issues, nor has Wagtime been cited for any. This is really a simple matter of the appellants not liking the use that is lawfully permitted under a fair interpretation of the zoning regulations. Justice demands that a stay be issued to allow for a hearing on the proposed revocation.

d. Public Interest

A stay in this matter would promote the public interest in sound procedure and judicial economy. The public has an interest in ensuring that laws and regulations are enforced and fairly and evenly. At one of the hearings on this appeal, the chairman of the Board asked, rhetorically, whether under appellants interpretation dog boarding would even be allowed in manufacturing districts like M or CM. Incinerators, motorcycles repair garages and detention centers are allowed, but because dog boarding is not an enumerated use, it apparently is banned from any location in the District of Columbia. One would think that at a minimum, the animal-owning public should have an opportunity to have this resolved following a hearing on the merits. Accordingly, the public interest will be protected by resolving the issues raised in this case and preserving orderly procedure.

For the foregoing reason, the C of O should not be revoked and the Board should stay enforcement action of the revocation.

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