

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17444¹ of Kuri Brothers, Inc. pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA) on August 4, 2005 to revoke Certificate of Occupancy No. 33951 for the use of the premises at 4221 Connecticut Avenue, NW, as an “Automotive Service Center”, and from the administrative decision of August 4, 2005 to revoke Certificate of Occupancy No. 33914 for use of the premises at 4225 Connecticut Avenue, NW. as an “Automotive Service Center”.

HEARING DATES: April 25, 2006, September 19, 2006, October 3, 2006, and November 28, 2006

DECISION DATES: April 25, 2006, March 6, 2007, and April 3, 2007

DECISION AND ORDER

This consolidated appeal was filed on September 30, 2005 with the Board of Zoning Adjustment (the Board). The appeal challenges decisions by DCRA to revoke two certificates of occupancy for the premises located at 4221 and 4225 Connecticut Avenue, NW (the “4221 C of O” and the “4225 C of O”). On April 25, 2006, the Board voted to deny the appeal of the 4221 C of O revocation without a hearing because none of the pertinent facts had changed since the Board upheld (and the Court of Appeals affirmed) the revocation of the immediately preceding C of O for the same use. In addition, the Board concluded that it lacked the subject matter jurisdiction to consider the constitutional claims raised by Kuri. After a full hearing regarding the 4225 C of O, the Board found that the C of O had been properly revoked and denied that portion of this appeal. A discussion of the facts and law follows.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

This appeal was filed with the Board on September 30, 2005 (Exhibit 1) challenging DCRA’s decisions to revoke two C of Os authorizing Kuri Brothers to use its premises at 4221 and 4225

¹ The appeal number of this case was erroneously referred to as including an “A” during certain portions of this proceeding.

BZA APPEAL NO. 17444

PAGE NO. 2

Connecticut Avenue, NW, as an "Automotive Service Center". In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 3F (the ANC within whose Commission the boundaries of the subject property is located), the property owner and DCRA.

Parties

Appellant

Appellant, Kuri Brothers, Inc., (Kuri) is a corporation organized under the laws of the District of Columbia, and is the lessee of the premises at 4221 and 4225 Connecticut Avenue. Kuri is also the owner and operator of "Van Ness Auto Care", a business which is located at the property. Kuri was represented by the law firm of Roetzell & Andress, LPA, initially by Tamir Damari, Esq., and later by Stanley Goldschmidt, Esq., and Thomas Rosenberg, Esq.

DCRA

The Appellee, DCRA, is the agency of the government of the District of Columbia that is authorized, among other things, to issue certificates of occupancy. Title 12A DCMR, § 110. DCRA was represented by Assistant Attorney General, Matthew Green, Jr., Esq. The Zoning Division of DCRA is headed by the Zoning Administrator (ZA) and is part of the Building and Land Regulation Administration (BLRA), which is, in turn, part of DCRA. The ZA is charged with administering and enforcing the Zoning Regulations. *Id.* At the time this appeal was filed, William Crews was the ZA. Mr. Crews testified at the public hearing on behalf of DCRA.

The Affected ANC

ANC 3F, as the affected ANC, was automatically a party to the appeal by virtue of 11 DCMR § 3199.1(a) and was represented at the public hearings by Commissioner Karen Perry.

ANC Report

In a resolution dated April 10, 2006, issued after a regularly scheduled monthly meeting with a quorum present, the ANC voted to oppose the appeal (Exhibit 14). Among other things, the ANC stated in its report that Kuri had been unlawfully operating an automobile repair garage at the 4221 property for "at least 16 years". The ANC report also described the operations at the 4225 property, noting that there was an existing motor vehicle fueling station, a service office for customers of the 4221 repair garage, and two service bays for automobile repairs. The ANC filed several documents detailing past enforcement steps taken by DCRA regarding the 4221 property; *i.e.*, prior civil infraction cases initiated against Kuri by DCRA for illegally operating a repair garage and prior Board appeals (Exhibit 19). The ANC also filed a supplemental report supporting DCRA's revocation of the 4225 C of O for an "automobile service center", stating that it did not object to the gas station use or the two existing service bays, as long as the service

bays were used for “minor repairs [which were] incidental to a gas station” (Exhibit 26). The supplemental report also stated that it “[did] not support [Kuri’s] claim of laches [or] estoppel” (Exhibit 26).

Preliminary Matters

On October 2, 2006, DCRA filed a “Motion for Summary Judgment” with the Board, requesting that the Board sustain DCRA’s revocation of the 4225 C of O. DCRA’s motion for “summary judgment” was based upon prior determinations relating to the 4221 C of O. The Board heard argument on the motion and voted to deny the motion, finding there were material issues of fact in dispute, *i.e.*, the nature of the operations and activities at the 4225 premises. (T., November 28, 2006, p. 270-280)

On or about September 29, 2006, DCRA served Kuri with an “Order to Cease All Business Operations” at the 4221 premises. DCRA stated that Kuri continued to operate a repair garage at the premises despite DCRA’s revocation of the 4221 C of O, and decisions by the Board sustaining DCRA’s actions and the District of Columbia Court of Appeals affirming the BZA’s determination. (Tab marked as Exhibit 1 appended to Exhibit 29)

In response, Kuri filed a motion to stay DCRA’s enforcement of the “Order to Cease All Business Operations” at the 4221 premises (Exhibit 29). The Board denied Kuri’s request for a stay, finding there was no likelihood of success on the merits, denial of the stay would not cause irreparable injury to Kuri, granting the stay would harm the neighborhood, and, it is not in the public interest to grant a stay.

FINDINGS OF FACT

The 4221 Connecticut Avenue C of O.

1. DCRA issued C of O No. B 00181657, dated August 12, 1998 to Kuri for an “Automobile Service Center” at 4221 Connecticut Avenue, NW (1st 4221 C of O).
2. As a result of a changer in the property owner of 4221 Connecticut Avenue, DCRA issued C of O 33951 (2nd 4221 C of O), dated May 15, 2002. Although no change in use was requested, the actual description of the use was changed from “Automobile Service Center” to “Automotive Service Center”.
3. A little over a month later, on June 27, 2002, DCRA issued a written Notice of Intent to Revoke the 1st 4221 C of O. A final notice revoking the 1st 4221 C of O was issued August 19, 2002. Neither notice mentioned the 2nd 4221 C of O, which therefore remained in effect.
4. DCRA premised its revocation on 12A DCMR § 118.4.1 (now 12A DCMR § 110.5.1), which provides that a certificate of occupancy may be revoked, “if the actual occupancy does

not conform with that permitted”.

5. The Board denied Kuri’s subsequent appeal by written order dated September 8, 2003 (Kuri I).
6. The Board found that Kuri had been operating an automobile “repair garage” at 4221 Connecticut Avenue, NW and reasoned that since a repair garage was not a use permitted by right in a C-3 zone district, Kuri’s operations could not and did not conform with whatever its C of O intended to permit.
7. Kuri petitioned the District of Columbia Court of Appeal’s to review the BZA decision on September 24, 2003.
8. Almost a year later, on August 4, 2005, DCRA issued a notice of revocation for the 2nd 4221 C of O. This time, DCRA relied upon 12A DCMR § 110.5.3, which authorizes the DCRA Director to revoke a C of O “found to have been issued in error.”
9. Kuri then timely filed the instant appeal.
10. In addition to asserting that the C of O was properly issued, Kuri also alleged that DCRA violated the Constitution of the United States by revoking the C of O without a hearing and by allowing others to engage in similar operations in the same zone district.
11. On Feb. 2, 2006, the District of Columbia Court of Appeals (DCCA) issued a decision affirming the Board’s decision in Kuri I. *Kuri Bros., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 891 A. 2d 241 (D.C. 2006).
12. The decision found that:
 - a. 4221 Connecticut Avenue, N.W., is in an area zoned “C-3-A”;
 - b. Operation of a "repair garage" is not permitted in a C-3-A zone without a special exception;
 - c. The BZA's finding that Kuri was operating a repair garage was supported by substantial evidence of record;
 - d. Kuri was never granted a special exception to operate a repair garage at 4221 Connecticut Avenue;
 - e. The BZA’s conclusion that the 1st 4221 C of O was not intended and could not be construed to allow operation of a repair garage was supported by substantial evidence; and
 - f. DCRA did not unreasonably delay enforcement once it became aware that Kuri was operating a repair garage on the premises and therefore *laches* was not an available defense.

13. It is not disputed that the operations at 4221 Connecticut Avenue existing as of the date that the 2nd 4221 C of O was revoked did not materially differ from the operations found by the BZA in Kuri I to fall within the definition of a repair garage.
14. As explained in greater detail in the conclusions of law, because the facts in Kuri I are identical to those before the Board in this appeal, the conclusions made in Kuri I, as summarized in Finding of Fact No. 6 above, and as affirmed by the DCCA, is binding upon the parties.

The 4225 Connecticut Avenue C of O

A. Events leading to the Appeal

15. The subject property is located at 4225 Connecticut Avenue, NW, Square 2051, Lot 5 (the 4225 premises). The property is owned by Van Ness, Inc. and leased by Kuri.
16. DCRA issued C of O No. 33914, dated May 15, 2002, to Kuri for an “Automotive Service Center” at 4225 Connecticut Avenue, NW, 1st Floor, (the 4225 C of O).
17. At that point in time, Kuri did not operate the gasoline filling station located on the premises, but took over that operation at some time between 2003 and 2004 (Hearing transcript (Tr.) pp. 366-367).
18. Kuri advised DCRA of the type of repairs that would be carried out on the premises. The operations Kuri engaged in at the 4225 premises prior to the revocation, as described in Findings of Fact 30 through 36, *infra*, are substantially similar to what DCRA intended to authorize when it issued the certificate of occupancy.
19. Kuri does not claim to have made significant improvements to the property after receiving the C of O.
20. The 4225 C of O was revoked by a notice of revocation issued on or about August 4, 2005, the same date on which the 2nd 4221 C of O was revoked.
21. The notice asserted that DCRA had concluded that “an automobile service center² use was not an appropriate use in a C-3-A zone” and that the revocation of a similar C of O for “that same operation at a different location” had been affirmed by the BZA in Kuri I.
22. Kuri timely appealed this administrative decision, asserting that the Zoning Administrator has the discretion to issue C of O’s for uses other than those expressly stated in the Zoning Regulations and has done so in many similar instances.

² As pointed out by the Appellant in its proposed findings of facts, the C of O was issued for an Automotive Service Center, not an Automobile Service Center.

23. Kuri also asserted the same constitutional claims it made in the first portion of this appeal, but also asserted that DCRA's enforcement actions against the 4225 premises was motivated by its animus towards Kuri arising from the as yet unsuccessful efforts to close the 4221 Connecticut Avenue operations.

B. Permitted uses on the subject property

24. The property is located in the C-3-A zone district.
25. A gasoline service station operates on the premises.
26. The definition of a "gasoline service station" specifically excludes a "repair garage", but includes "incidental services" and the "minor repair of tires, batteries, or other automobile accessories", 11 DCMR § 199.1.
27. In addition to the matter of right uses permitted in a C-3 zone, 11 DCMR § 741.4 also permits as a matter of right any "[o]ther service or retail use similar to that allowed [in a C-3 zone district]..., including assemblage and repair clearly incidental to the conduct of a permitted service or retail establishment on the premises."
28. Accessory uses are also allowed if "customarily incidental and subordinate to the uses permitted in C-3 Districts", 11 DCMR § 742.3.
29. Operating an automotive "repair garage" in a C-3 zone requires special exception approval by the Board, 11 DCMR § 743.1.
30. A "repair garage" is defined as "a building or other structure, or part of a building or structure, with facilities for the repair of motor vehicles, including body and fender repair, painting, rebuilding, reconditioning, upholstering, equipping, or other motor vehicles maintenance or repair", 11 DCMR § 199.1.

C. Activities conducted at the 4225 premises

31. At the times the subject C of 0 was revoked, the 4225 premises had six to eight gas pumps, a small express food mart and three service bays. Two of the service bays had lifting capacity and were to be used for automobile repairs. The third bay is without lifting capacity and served as an office area and as a flat service bay.
32. In the addition to and separate from the fueling of motor vehicles, Kuri offered maintenance and repair services including oil and tire changes, fluids checks, exhaust, brake, and air conditioning work, tune-ups, electrical, heating and tire repairs, emissions tests, and such work as was required to cure defects noted in Department of Motor Vehicle safety inspections.

33. The business did not offer “body and fender repair, painting, rebuilding, reconditioning, or upholstery”, 11 DCMR § 199.1 (definition of “repair garage”).
34. On a typical day there would be anywhere between three and twenty cars on the 4225 premise being given these services. (Exhibit 38, p. 8, para. 3, citing T., p. 358).
35. The Sales and Invoice Summary submitted by Kuri indicates an average customer bill of \$311.50 for repair services.
36. According to Kuri, “the repair business is based on the model of the customer dropping off a car in the morning on the way to work and picking up the car by the end of the day. When there are too many cars to be worked on simultaneously, the excess cars are parked in the neighboring underground garage, and not on the neighborhood streets.” (Excerpt from Appellant’s Proposed Findings of Fact and Conclusions of Law, Exhibit 38, p. 8, para. 2, citing T., p. 342).

CONCLUSIONS OF LAW

Jurisdiction

Section 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07, authorizes the Board of Zoning Adjustment to “hear and decide appeals where it is alleged by the Appellant that there is error in any order, requirement, decision, determination, or refusal made by the [Director of the Department of Consumer and Regulatory Affairs] or the Mayor of the District of Columbia or any other administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to [the Act]”. Among Appellant’s assertions is that its C of Os were revoked without a hearing, which Appellant believes violates the procedural due process guaranteed by the Fifth Amendment to the Constitution of the United States.³ Appellant also alleges that DCRA violated the Constitution because it has allowed others to engage in the same activities and because this enforcement action was motivated by DCRA’s animus towards Kuri.

The rules that establish the grounds and the process for revoking a certificate of occupancy are not in the Zoning Regulations, but in § 110 of the Construction Codes Supplement (DCMR 12A). The Board has no jurisdiction to hear allegations of error concerning the DCRA Director’s interpretation of a provision not contained in the Zoning Regulations, *Appeal No. 03-0001 (Peter Choharis)*, 51 DCR 8210 (2004). Neither can it declare this or any other regulation unconstitutional, *Appeal No. 17504 of JMM Corporation*, 54 DCR 9871 (2007) (Board can hear, but not decide, an applied takings claim). Similarly, DCRA motivations for taking an enforcement action are not germane to the question of legal error, at least in terms of this Board’s

³ Although the Fifth Amendment does not apply directly to the states, it does so apply to the District. *Bolling v. Sharpe*, 347 U.S. 497, 499 (U.S. 1954).

administrative mandate. Therefore, the Board dismissed this aspect of the appeal as being beyond its subject matter jurisdiction.

The 2nd 4221 C of O Revocation

The Board voted to deny the appeal of the 2nd 4221 C of O revocation without a hearing. It did so because there was no dispute that the repair operations taking place at the subject property had not changed materially since the 1st 4221 C of O was revoked. Because the facts had not changed, neither should the result.

Kuri is bound by the Board's prior determination under the doctrine of issue preclusion, which "prevents the same parties from relitigating an issue actually decided in a previous final adjudication whether on the same or a different claim." *Rhema Christian Center v. District of Columbia Bd. of Zoning Adjustment*, 515 A.2d 189, 193 (D.C. 1986). A similar circumstance was presented to the Board in *Appeal No. 16679-A of Spring Valley Wesley Heights Citizens Association*, 52 DCR 6007A (2005), which challenged a building permit because it authorized the same substandard driveway as the Board had rejected in a prior proceeding involving the same property. The Board summarily granted the appeal because the:

issue had already been litigated and decided by the Court of Appeals... [T]he Board has already concluded that the original garage permits were erroneously issued due to the too-narrow easement width, and nothing has changed with respect to the width of the easement since this conclusion was made. ... [T]he Intervenor is bound by the Board's earlier conclusion and cannot re-litigate it.

Id. at 6014.

The same principles apply here. No change occurred in the operations taking place at the 4221 Connecticut Avenue address between the dates of the first and second revocations. The Board in *Kuri I* found that those operations constituted a repair garage and the DCCA found there was substantial evidence to support that conclusion. The Board also concluded that since a repair garage is not a matter of right use, and Kuri was never granted a special exception, those operations must exceed whatever its C of O might have allowed. The DCCA agreed with this as well. Nor does it matter that the first word of the use in the 2nd 4221 C of O changed from "automobile" to "automotive". Based upon the representations of the parties, the DCCA found that "the new C of O (# CO33951),...merely reflected a change of property ownership," *Kuri*, 891 A.2d at 244.

That DCRA cited a different ground for the revocation is also irrelevant. Just as "an appellate court may sustain a correct judgment on a ground different from that adopted by the trial court", *Max Holtzman, Inc. v. K & T Co., Inc.*, 375 A.2d 510, 513 (D.C. 1977), this Board may sustain this revocation based upon 12A DCMR § 110.5.1 (different occupancy than authorized) rather than 110.5.3 (C of O issued in error).

Nevertheless, the Board's disposition of the second portion of this appeal also permits it to sustain this revocation based upon the C of O being issued in error. As will be explained below, the Board has determined the 4225 Connecticut Avenue operations are less intensive than a repair garage, but nevertheless exceed what DCRA could have lawfully authorized. If DCRA erred when it issued a C of O for an "automotive repair center" at the 4221 premises, it follows that it also erred when it issued a C of O for the exact same use at the 4221 Connecticut Avenue location.

The 4225 Appeal

This portion of the appeal concerns how the Zoning Administrator may satisfy the requirement of 11 DCMR § 3203.8 (a) that uses designated on a C of O shall "be in terms of use classification that is established by this title" when the ZA believes that the use in question falls within the scope of § 741.4. That subsection follows §§ 741.2 and 741.3, which list specific uses allowed in a C-3 District. Subsection 741.4 then indicates that:

Other service or retail use similar to that allowed in §§ 741.2 and 741.3 shall be permitted in a C-3 District, including assemblage and repair clearly incidental to the conduct of a permitted service or retail establishment on the premises.

Clearly the section recognizes that there are other permitted uses in a C-3-C District other than those stated in §§ 741.2 and 741.3. The question then is how those uses get described on a C of O? Appellant offered testimony of former Zoning Administrator Gladys Hicks, who indicated that the past practice of DCRA was to select a term that best described the use, which DCRA did in this instance when it selected "automotive service center". Bill Crews, the Zoning Administrator in place at the time of the hearing, acknowledged the past practice, but believed it violated § 3203.8 (a) because such a description was not a "use classification ... established" in Title 11. (Tr. 451). Instead, Mr. Crews testified that certificates of occupancy issued in these circumstances indicate; (1) the "service or retail use" that the § 741.4 use is "similar to" or "clearly incidental to"; and (2) the nature of the § 741.1 use. As an example, Mr. Crews noted that he had recently approved a C of O for a "braiding salon", which was a use similar to a "beauty shop". The C of O was issued using both terms (Tr. 452).

The Board agrees with Mr. Crews and finds that the use designated on the 4225 C of O was not "in terms of use classification that is established" in Title 11. For this C of O to have been lawful it should have stated "Gasoline service station existing on May 12, 1958⁴ - automotive service center" as the designated use.

However, even if it had done so, its issuance would still have been in error because it conferred more authority to Kuri than is permitted as a matter-of-right. Specifically, the Board finds that the term "automotive service center" as it was understood by DCRA at the time this C of O was

⁴ This use is permitted in C-1 zones pursuant to § 701.1 (h) and is carried through to the C-3 zone by §§ 721.1 and 741.1.

issued, involved activities that were not “clearly incidental to the conduct of a permitted service or retail establishment on the premises”.

The Board credits Kuri’s contention that the activities being carried out at the 4225 premises were more or less what DCRA thought it was authorizing when the C of O was issued. Therefore, the Board concludes, based upon findings of facts 30 through 36, that the Zoning Administrator, in May of 2002, believed that the term “automotive service center” meant a facility, other than a repair garage, where motor vehicles are dropped off in the morning and picked at the end of the day for such services as oil and tire changes, fluids checks, exhaust, brake, and air conditioning work, tune-ups, electrical, heating and tire repairs, and emissions tests.

Kuri urged the Board to focus on the nature of the work performed rather than the relation of that work to the existing gasoline station use. Kuri relied upon the fact that the term “minor repairs” is not defined in 11 DCMR § 1991.1. However, the term “minor repair” is found only in the definition of “gasoline service station” and used to identify what types of repair may be performed without the need for a separate C of O. Here, Kuri has recognized the need for a C of O for the type of repairs being undertaken; which makes the entire issue of “minor repair” irrelevant.

Alternatively, Kuri argues in its proposed conclusions of law that “the phrase ‘Automotive Service Center’ must be understood to allow activities beyond those which may be performed at a gasoline service station but short of all of those activities that may be performed at a repair garage” (emphasis supplied). The Board disagrees that any repair use less intensive than a repair garage is permitted. Subsection 741.4 does not focus on the intensity of a proposed repair use, but rather on the relationship between the existing and proposed uses, requiring that the latter must be “clearly incidental to the conduct of a permitted service...establishment on the premises,” in this instance a gasoline service station.

The Board must first look to the meaning of the term “incidental”, a term which is not defined in the Zoning Regulations. Section 199.2(g) of the Regulations provides that “[w]ords not defined in this section shall have the meanings given in Webster’s Unabridged Dictionary. Relevant portions of the definition of “incidental” are: “subordinate or attendant in position or significance.” Webster’s Third New International Dictionary, (Unabridged) (1986). Since a use that is “subordinate to the uses permitted in C-3 Districts” is considered an accessory use under 11 DCMR § 742.3, the focus becomes whether the repair operations will be attendant in position or significance to the gasoline service station operations.

In the Board’s view, the automotive service center use authorized in 2002 by the then Zoning Administrator was to be and remains entirely independent of the gasoline service station use. At least three factors support this conclusion. First, customers in need of repairs drop off their cars for the day; they do not get their cars repaired in connection with the purchase of gasoline. Second, the average car repair bill exceeds \$300, whereas the average cost for gasoline does not

come close to this amount. Third, the volume of the repair business is significant (three to twenty cars per day) and is not driven by the gas station business. In addition, not only were these activities occurring at the time that the C of O was issued, but Kuri was not even operating the gasoline service station activity to which it claims these repair operations were clearly incidental.

An additional factor to consider when determining whether an activity falls within the matter of right uses permitted by § 741.4 is whether the proposed use would tend to have adverse impacts separate from the existing use. The potential for such impacts would warrant a conclusion that the proposed use is not one that would customarily be permitted as of right. In this instance, the additional amount of vehicular traffic and the potential for queuing on public space makes it unlikely that an automotive service center should be permitted as of right in a mixed use commercial zone such as C-3-A. At a minimum, such a use would require the type of case-by-case review undertaken in special exception proceedings. Kuri's assertion that this niche of repair work did not exist when the current version of the Zoning Regulations was adopted in 1958 only proves this point. For if true, it is for the Zoning Commission, not the Zoning Administrator, to determine the locations and circumstances under which this new use may be permitted.

For these reasons, the Board finds that the certificate of occupancy authorized activities that were not clearly incidental to the gasoline service station use, but authorized a separate and distinct use involving activities that exceeded what could have been permitted as a matter of right in a C-3 zone district. DCRA erred in issuing the certificate of occupancy, but did not err in revoking in on that ground.

Kuri nevertheless argues that DCRA should be precluded from revoking the C of O by invoking the equitable doctrines of estoppel and laches.⁵ Kuri claims (1) that the District Government explicitly authorized the current uses at the property; and (2) DCRA has routinely authorized "automobile service centers" in the C-3-A zone, and that these businesses operate in a manner which is identical to Kuri's use of the property. As will be explained below, Kuri has not established the elements of estoppel or laches.

The elements that must be shown in order to raise an estoppel against enforcement of a zoning regulation are: (1) that a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine. See, *Saah v. District of Columbia Bd. of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981); *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7 (D.C. 1978).

⁵ Kuri did not discuss these arguments in his Proposed Findings of Fact and Conclusions of Law (Exhibit 38). However, he raised these issues in his initial Appeal documents (Exhibit 1) and in his Pre-Hearing Brief (Exhibit 23). Consequently, the Board will address them herein.

Kuri claims to have relied in good faith on DCRA's issuance of the certificate of occupancy for "automotive service station". DCRA and the ANC point out that an ALJ had previously found such a use category suspect. However, Kuri believed that this ruling was erroneous and therefore could in good faith rely on DCRA's apparent agreement with that view. However, there will always be a degree of uncertainty whenever the Zoning Administrator authorizes a use under § 741.5, since that official is making an entirely subjective decision that this Board may later find erroneous. In any event, the Appellant has not shown or even alleged that any expensive and permanent improvements were made in reliance of the C of O approval. Indeed, the evidence showed that the repair functions were occurring before the C of O was applied for, but that Kuri requested the certificate in order to placate community concern. Nor has he shown that the equities strongly favor Appellant, but instead, they favor the public's interest in stopping an unlawful use and in encouraging DCRA to correct its errors.

Nor is DCRA guilty of laches. As noted by the DCCA in rejecting a similar claim made in Kuri I:

"Laches is the principle that 'equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant.'" *American Univ. Park Citizens Ass'n v. Burka*, 400 A.2d 737, 740 (D.C. 1979) (quoting *Russell v. Todd*, 309 U.S. 280, 287, 60 S. Ct. 527, 84 L. Ed. 754 (1940)). The party asserting laches has the burden of establishing both that it was prejudiced by the delay and that the delay was unreasonable. *Sisson v. District of Columbia Bd. of Zoning Adjustment*, 805 A.2d 964, 972 (D.C. 2002). In the zoning context, the defense of laches is judicially disfavored because of the public interest in enforcement of the zoning laws. *Id.* at 971. Accordingly, "laches is rarely applied in the zoning context except in the clearest and most compelling circumstances." *Id.* (internal quotation marks and citations omitted).

Kuri Bros., Inc. v. District of Columbia Bd. of Zoning Adjustment, 891 A. 2d 241, 248 (D.C. 2006).

Kuri has not established that the District's enforcement actions were delayed, let alone that he has been prejudiced in any way. It is apparent that DCRA waited until the BZA decided Kuri I before it sought to revoke the subsequently issued C of O. This cannot be legitimately considered a delay, but a reasonable enforcement decision. As noted in the estoppel discussion, Kuri did not undertake significant improvements during the period when Kuri I was pending, and any expenditure it did make was at its own risk.

Lastly, Kuri argues that revocation is contrary to public policy, relying chiefly on § 10-231 of the Retail Service Station Act of 1976, effective April 19, 1977 (D.C. Law 1-123; D.C. Official Code § 36-304.01), which prohibits the conversion of "a full service retail service station" into a "nonfull service facility." This legislation presumptively is only addressed to lawful operations and cannot be reasonably interpreted as favoring a policy of allowing the continuation of unlawful uses, such as those occurring at the 4225 premises. In addition, Appellant's admission

BZA APPEAL NO. 17444
PAGE NO. 13

that it is operating as a full service retail service station bolsters the Board's conclusion that this use is not clearly incidental to the existing gasoline station use.

ANC

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21), as amended; D.C. Official Code § 1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's written recommendations. As explained above, ANC 3F voted to oppose the appeal. For reasons discussed above, the Board finds the ANC's advice to be persuasive.

For all of these reasons, the Board concludes that the revocation notices were not issued in error. Therefore, for the reasons stated above, it is hereby **ORDERED** that the appeal is **DENIED**.

Vote taken on April 3, 2007

VOTE: 3-1-1 (Curtis Etherly, Jr., John A. Mann II, and Carol Mitten in support of the motion to deny; Ruthanne G. Miller voting against the motion to deny; and Geoffrey H. Griffis, whose term expired, 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: APR 09 2008

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.