GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

KOO L. YUEN AND
VAN NESS INCORPORATED

APPELLANT.

v.

BZA NO. 93-0006-CI
(OAD NO. 92-1683-E)

DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS (DCRA)

APPELLEE.

DECISION AND ORDER

PROCEDURAL MATTERS:

Appellants filed a notice of appeal on December 22, 1992 from the ALJ's decision upholding DCRA's fine. Appellants filed a second notice of appeal on May 28, 1993 from the ALJ's decision not to grant a stay of his 1992 order pending appeal. A transcript of those proceedings became available in February 1994. On April 8, 1994, a Motion to Intervene was filed by the Advisory Neighborhood Commission (ANC) 3F, JMB/Van Ness Limited Partnership, and Van Ness South Tenants Association, Inc., to which appellant objected. The Motion to Intervene was granted. On December 6, 1994, appellant filed a Motion for Extension of Time to File Argument and Motion for Oral Argument, to which the intervenors objected. The Motion for Oral Argument was granted. On January 3, 1995, the intervenors filed a Motion To Strike the appellant's Opposition to Motion for Intervention and Reply to Opposition of Movant Intervenors. The intervenors' Motion to Strike was denied. On January 5, 1995, appellant requested 30 minutes for each side to present oral argument, which was objected to by DCRA and the intervenors. The request was denied.

Board of Zoning Adjustment
District of Columbia
CASE NO.16947
EXHIBIT NO.34A2

DECISION

This case involves fines and sanctions levied on appellant for operating a repair garage without a certificate of occupancy. (11 DCMR 3203.1). This matter was heard on May 20, 1992, before Administrative Law Judge Rohulamin Quander (hereinafter "The ALJ") of the Office of Adjudication, Department of Consumer and Regulatory Affairs. The Decision and Order of the ALJ, dated November 23, 1992, affirmed the Notice of Infraction; fined the appellant a total of $525.00, which included $25.00 court costs; ordered that the Building and Land Regulation Administration, DCRA, vacate Certificate of Occupancy No. B156843; and ordered the appellant to immediately cease and desist the operation of the automobile repair business at 4221 Connecticut Avenue, N.W., until such time as a proper certificate of occupancy is obtained. On February 23, 1993, the ALJ denied all post hearing motions. The decisions of the ALJ came to be heard before the Board of Zoning Adjustment (BZA) on April 5, 1995, on the transcripts of record, the briefs filed, and arguments of counsel. For the reasons set forth in this Decision and Order, the BZA affirmed the decision of the ALJ and denied the appeal.

The appellant was charged with a violation of 11 DCMR Section 3203.1 for using the premises of 4221 Connecticut Avenue, N.W., Washington, D.C. as a repair garage without a certificate of occupancy. The general prior use of the property had been an automobile dealership with an automotive service facility in the basement level. The appellant contends that in 1989 he went to obtain a certificate of occupancy and described the intended use of the garage to the zoning staff person as an automotive service station. He claims that at that time, he was told that the use he described was a matter-of-right use permitted in a C-3-A zone and, therefore, he applied for and was issued the type of certificate of occupancy that the staff person directed him to obtain (Certificate of Occupancy number B156843, "Retail Sale of Automobiles and Accessories Including Installation"). In 1990, the appellant was cited for a violation of 11 DCMR 3203.1 after an inspector observed an auto repair shop with 15 repair bays being conducted on the premises, which exceeded the use permitted by the certificate of occupancy that appellant had been issued. The appellant was ordered to pay $525.00, which included court costs for operating an automobile repair garage without a certificate of occupancy. On March 13, 1992, a citation was issued after the garage was again visited by a DCRA inspector. On his visit, the inspector observed 15 repair bays, car parts, tire storage, and a total of 14 cars. Upon further inspection, he found that Certificate of Occupancy No. B156843 was for "Retail Sale of Automobiles and Accessories Including Installation" and did not authorize an automobile repair shop. The inspector felt that what he observed amounted to major repair work constituting an automobile repair shop, far exceeding the sale and installation of car accessories permitted by the certificate of occupancy. Appellant claimed that he was providing only minor repairs and that these minor repairs were similar to those performed at other automobile repair garages which had similar certificates of occupancy and were actually located in more restrictive zones. He further claimed that most of his repair activity involved the installation of accessories for the vehicles in his shop. Appellant did admit, however, that he sold an average of only four cars per month.

The citation charged appellant with "operating a repair garage without a certificate of occupancy" in motion of 11 DCMR 3203.1. This matter was heard by the ALJ on May 20, 1992, and the Decision and Order issued by the ALJ on November 23, 1992 determined that: the appellant failed to reflect the diverse nature of the business he was undertaking when first obtaining his certificate of occupancy; the appellant's claim of operating an automobile sales business is a fiction; and, the appellant operates an automobile repair business as his principal business for which he does not have a certificate of occupancy. Therefore, the ALJ concluded that the appellant was fully liable for violation of the certificate of occupancy laws of the District of Columbia for operating an automobile repair business without a valid certificate of occupancy. The appellant filed a timely appeal with this Board. The ANC-3F, JMB/Van Ness Limited Partnership and the Van Ness South Tenants Association, Inc. were permitted to intervene in this case and presented both their and the government's case during oral arguments.

On appeal, the appellant contended that the ALJ erred in determining that provision of minor automobile maintenance services is a use unauthorized by a certificate of occupancy for "Retail Sale of Automobiles and Accessories, Including Installation." To support his claim, appellant advanced arguments to the effect that: the Zoning Administrator had long interpreted the Zoning Regulations as allowing uses like his (claiming the language in the Zoning Regulations clearly encompasses tires and batteries as being in the class-automobile accessories); other similarly operated facilities that perform the same functions as does appellant's facility are permitted to operate under a less restrictive C of O; the ALJ did not consider the evidence; automobile accessories is a term of art in the automobile industry; under the restrictive interpretation applied by the ALJ, many other auto businesses would now have to obtain new certificates of occupancy; and, it is possible to have multiple principle uses for a business, as long as they are all permitted zoning uses.

The intervenors argued that repair is the primary use of the premises. The intervenors presented two responses to the appellant's argument that the Zoning Regulations were misinterpreted. First, the intervenors contended that the Zoning Regulations were correctly interpreted by the ALJ. To support this contention, they offered the following arguments:

a) The Zoning Regulations, as enacted by the Zoning Commission, distinguish between a repair garage and the retail use and sale of automobile accessories including installation. There is, however, no evidence that the appellant is selling auto parts. Instead, the intervenors believe that he is selling the service of automobile repair.

b) The sale of automobile accessories is listed as retail use; however, what the appellant is operating is a service establishment.

c) The attempt to pass out catalogues and other evidence which appellant presented is an attempt to introduce new evidence which is not of record, was not of record below and therefore, should be rejected and not considered.

d) The record clearly reflects that the principal activity in the establishment is not retail sale of automobile parts or accessories. Instead, the parts or accessories are incidental to providing the advertised service of different kinds of automobile services or repairs. This is not a permitted use.

e) The previous user of the basement, the automobile dealership, had actually occupied two to three stories of the structure, not just the basement. Therefore, in terms of previous uses, the repair garage was an incident to the permitted use of an automobile dealership. Thus, in renting just the repair garage premises and using it only as such, the appellant has made the garage into the primary use and the sale of autos and auto accessories an incidental use. This constitutes a change of use.

f) There is no evidence of record that the appellant is selling auto parts, but there is evidence of advertised repair service. In addition, the appellant does not deny that the advertisement is for an automobile repair service.

The intervenors further argued that this appeal was brought in an improper forum. The Board is being asked to reinterpret Zoning Regulations. This action, therefore, should be appealed under the Zoning Enabling Act and not the Civil Infractions Act. Thus, it is unnecessary to determine whether the interpretation of the ALJ was correct.

The intervenors' final argument was that the appellant's actions denied the community a special exception hearing at which time they would have been given the opportunity to express their beliefs as to the impact of the use on the surrounding area.

The Board rejects the appellant's argument and notes that the appellant's establishment is clearly a repair shop based on the evidence and testimony as to the extent of the repairs done. New evidence presented by the appellant cannot be admitted, as this is not a de novo hearing. In addition, the neighbors' concerns regarding appellant's disregard of a previous notice of infraction is a factor to be considered. This Board concludes that the ALJ correctly determined that there was sufficient evidence to establish the fact that the sale of automobiles was incidental to the other uses of the premises. Therefore, even if accessories were sold, their sale and installation was merely incidental to the real and principal use of the property, repair. The Board further concludes that the ALJ was correct to conclude that this was not a car dealership of any sort, nor was this establishment operated for the principal use of sale of accessories. Therefore, the ALJ did not err in determining that the scope and type of automobile repair and maintenance services provided by the appellant was not authorized by a certificate of occupancy for "Retail Sale of Automobiles and Accessories, Including Installation." The evidence of record supports the ALJ's finding that sale of autos and accessories are incidental to the principal use of the premises as a repair shop. This, in and of itself, is a sufficient basis upon which to conclude that the type of certificate of occupancy appellant had was improper.

ORDER

The Board notes that the appellant had continued to operate his facility and therefore, the Board's takes no action on the appeal of the ALJ's decision to deny the appellant's Motion to Clarify Order or Stay of Sanctions Pending Appeal.

Having considered the record of the hearing before the ALJ and the decision of the ALJ, the Board of Zoning Adjustment finds that there was substantial evidence to support the decision and the amount of the fine. Accordingly, the Board of Zoning Adjustment **ORDERS** that the decision of the ALJ be **AFFIRMED.**

VOTE: 3-0 (*Laura M. Richards, Maybelle Taylor Bennett, Susan Morgan Hinton, Craig Ellis* to affirm; Angel F. Clarens to affirm by absentee vote).

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Madeliene H. Dobbins
MADELIENE H. DOBBINS
Director

FINAL DATE OF ORDER: MAR 30 1998

bza93-0006-CI/AZ/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 93-0006-CI
OAD NO. 92-1683-E

As Director of the Board of Zoning Adjustment, I certify and attest that on MAR 30 1998 a copy of the decision entered on that date in this matter was mailed first class, postage prepaid to each party in this case, and who is listed below:

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Attested By: Madeliene H. Dobbins
MADELIENE H. DOBBINS
Director

Date: MAR 30 1998

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January 21, 2000

VIA HAND DELIVERY

Mr. Armando M. Lourenco
Administrator, Building and Land
Regulation Administration
Department of Consumer and
Regulatory Affairs
941 North Capitol Street, N.E.
Room 2000
Washington, D.C. 20002

Re: Illegal Automobile Repair Garage in the Basement of 4221 Connecticut Avenue, N.W. (the "Property")

Dear Mr. Lourenco:

This law firm represents Grubb & Ellis Management Services, Inc., the Receiver appointed by Court order to manage this commercial property owned by 4221 Connecticut Avenue Associates Limited Partnership ("Landlord").

On behalf of the Receiver, I want to bring to your immediate attention and enlist the Department of Consumer and Regulatory Affair's ("DCRA") assistance in responding to a serious and longstanding public health and safety issue. The Property is leased by the Landlord to Van Ness, Inc. ("Tenant") and currently occupied by Kuri Brothers, Inc. which purports to be an authorized subtenant ("Subtenant"). The Property has been used continuously in violation of the Zoning Regulations which prohibit an automobile repair garage in a C-3-A zone.

GREENSTEIN DELORME & LUCHS, P.C.

This illegal use of the property as an automobile repair garage with fifteen (15) service bays has been on-going since at least 1990 when the Tenant was first fined for operating without the required certificate of occupancy. Again, in March 1992, the Tenant was issued a citation for operating the same prohibited automobile repair garage. On May 20, 1992, the Office of Adjudication found the Tenant had been operating an automobile repair garage without a certificate of occupancy and ordered that such use immediately cease and desist. Subsequently, after years of procedural delays by the Tenant, the Board of Zoning Adjustment on March 30, 1998 upheld the decision of the Office of Adjudication. Copy of BZA Order attached.

By order dated December 27, 1999 (attached), the Office of Adjudication once again found that the Property was being occupied illegally; this time by the Subtenant. Specifically, the order held that the Property was being used as an automobile repair garage which is not permitted under the D.C. Zoning Regulations, 11 DCMR 741, without a valid certificate of occupancy. Further, the Administrative Law Judge ordered the Subtenant to cease and desist operations at the Property unless and until it obtains special exception approval for use of the Property from the Board of Zoning Adjustment. To date, the Subtenant continues to operate the illegal automobile repair garage at the Property.

For at least ten (10) years, the Tenant and its successor have been operating an automobile repair garage at the Property illegally despite the District's on-going enforcement efforts. This is not simply a technical violation, but a substantial and deliberate pattern and practice of illegal conduct which poses an on-going and increasing public health and safety danger. It is the Receiver's concern that these inherently dangerous industrial activities are taking place in the basement of a building in close proximity to a high density residential area in such a way as to pose imminent safety concerns to the repair workers, occupants of the adjoining residential and commercial buildings and the community-at-large.

GREENSTEIN DELORME & LUCHS, P.C.

The Receiver is pursuing all its remedies under the lease to correct this serious situation, but believes that the full range of enforcement measures, including health, fire, environmental, building and other agency inspections are warranted to address this serious public safety concern.

At your earliest opportunity, we would like to meet with you and the members of DCRA's compliance and inspection sections to discuss the appropriate enforcement measures. I will contact your office to set up this meeting as soon as possible.

Very truly yours,

GREENSTEIN DELORME & LUCHS, P.C.

By: _____
John Patrick Brown, Jr.

JPB/dmh
Enclosure 129434

cc: The Honorable Anthony A. Williams
The Honorable Kathy Patterson, Ward 3, City Council
Mr. Lloyd J. Jordan, Dir., DCRA
Mr. Vincent Ford, DCRA
Mr. Philip Kogan, ANC 3F
Ms. Priscilla M. Ford, Grubb & Ellis (w/o encl.)
Abraham J. Greenstein, Esq. (w/o encl.)
Richard W. Luchs, Esq. (w/o encl.)
James D. Sadowski, Esq. (w/o encl.)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
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TEL. (202) 442-8167

DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS

Petitioner

Case No. 99-OAD-1821-E
Citation No. 032834

V.

Kuri Brothers, Incorporated

Respondent

DECISION AND ORDER

Procedural History

Respondent Kuri Brothers Incorporated, was issued Notice of Infraction #033729 of April 27, 1999, for operating an automobile repair garage within a C-3-A zoned area without a Certificate of Occupancy. At the request of the Respondent, a hearing was held before the Honorable Lennox J. Simon, Administrative Law Judge (ALJ), D.C. Department of Consumer and Regulatory affairs (DCRA), Office of Adjudication (OAD) on August 11, 1999. The hearing was convened pursuant to DCRA Civil Infractions Act of 1995, D.C. Law6-42, D.C. Code6-2701et seq; and the D.C. Administrative Procedures Act, D.C. Code, Sec. 1-1501 et seq

Present at the hearing were: Yvonne Rockett, Zoning inspector; Tore Bello, Zoning technician; Michael D. Johnson, Zoning Administrator; Matther Green, Jr, Esquire, Counsel for DCRA; Priscilla M. Ford, Receiver / intervenar; Pat Brown, Esquire and James Sadowski, Esquire, Counsel for Receiver; Kris Kuri, Respondent; Stephen Hessler, Esquire, counsel to Respondent; and Koo Yuen/ Vaness, Incorporated, Respondent's landlord.

As a preliminary matter Prior to the hearing, Grubb & Ellis Management Services, Inc., court appointed Receiver of the subject property located at 4221 Connecticut Avenue, N. W., Washington, D.C., through its attorney James Sadowski, Esquire, of the law firm of Greenstein, Delorme and Luchs, LLC, moved to intervene in this action, and be permitted to present evidence and testimony at this hearing. The Receiver contended that it had a clear interest in the proceedings because the lessor of the premises obtained an improper certificate of occupancy, and the sub-lessor then "piggybacked" upon the improperly issued Certificate of Occupancy and obtained their own Certificate of Occupancy for an "Automobile Service Center". The (ALJ) after hearing the proffers of all parties involved denied this motion thereby disallowing intervention and proceeded with the hearing on the merits..

ISSUES PRESENTED

Whether Respondent was operating an automobile repair business on April 27, 1999, at 4221 Connecticut Avenue, N.W. without a Certificate of Occupancy in violation of Title 11 DCMR 3203.1?

FINDINGS OF FACT

After a careful evaluation and analysis of the evidence and information, the ALJ finds as a matter of fact that:

1. Respondent Kuri Brothers is incorporated under the laws of the District of Columbia, and Is located at 4221 Connecticut Avenue., N.W., (basement level) N.W., Washington, D.C.

2. On August 12, 1998, Certificate of Occupancy No. B00181657 was issued to the Kuri Brothers, Inc. at 4221 Connecticut Avenue N.W., (basement level) for the purpose of operating an "Automobile Service Center". (Gov't. Exhibit No. 3A)

3. The subject property located at 4221 Connecticut Avenue, N.W. Washington D.C. is located in a C-3-A zone area, and is owned by Koo Yuen / Van Ness Incorporated. Respondent Kuri Brothers., Inc, has subleased its basement space from Koo Yuen/Van Ness Inc.

4. The subject property located at 4221 Connecticut Ave., N.W., is under the control of Grubb & Ellis Management Service, Inc., who were appointed receivers on January 8, 1998, by the D.C. Superior Court to manage the premises.

5. The Zoning Regulations distinguished between a repair garage and a retail use, and the sale of automobile accessories including installation. (Testimony of Inspector Rockett)

12. The purpose of the D.C. zoning regulations is to insure the protection of the health welfare and safety of the public by bring order to the location of businesses and residential dwellings. In the instant matter "Repair Garages/Automobile Service Centers" produce exhaust fumes, noise and pollution. This is the reason such entities are located in industrial zones. "Repair Garages/Automobile Service Centers" are interchangeable terms, and mean the same thing. Therefore, they should be treated as the same entity.

13. Pursuant to Title 11 DCMR 3203.1, it is unlawful to use any structure, land , or any part of any structure, or land for any purpose other that a one family dwelling until a Certificate of Occupancy has been issued to the person stating that the use complies with the provision of this title and the D.C. building code.

14. The ALJ concludes that the subject Building is zoned C-3-A, which permits specific service, retail, and residential uses as a matter of right. Under the D.C. Zoning Regulations, a repair garage is not permitted use in a C-3-A zone area. "Repair garage is defined in the Zoning Regulations 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 vehicle maintenance or repair activities.

15. Pursuant to 11 D.C.M.R. §199, pp. 1-17 (July 1995) (Definitions). a repair garage is only permitted as a matter of right in the C-M Industrial District, and is subject to the standard of external effects, including noise, emissions of fumes, vibrations, and other external effects.

16. The ALJ finds the testamentary and documentary evidence of the Government witnesses to be very credible

17. Respondent is a violation of 11 DCMR 3203.1, by operating his automobile repair garage at 4221 Connecticut Avenue, N.W. Washington, D.C. without a Certificate of Occupancy which permits such operation.

ORDER

Therefore it is Ordered this 27th day of December 1999, that NOI#032834 is hereby and the same is Upheld. Fine imposed is $500.00, Court cost is $40.00, for at total assessment of $540.00 made payable to the District of Columbia Treasurer.

6. On April 27, 1999, DCRA's Zoning inspector Yvonne Rockette conducted an inspection of Respondent's business and personally observed Respondent's employees working on automobiles: repairing head lights and engaging in under the hood mechanical repair work. As a consequence, NOI #03283 in the amount of $500.00 was issued to Respondent. (Testimony of Inspector Rockett)

7. Respondent's automobile repair garage is located in a zone C-3-A area in Washington, D.C., and, Zone C-3-A does not permit the operation of an automobile repair garage. Only areas Zoned for C-M industrial will permit the operation of an automobile repair garage (Testimony of Inspector Rockett)

8. Respondent is engaged in the business of offering automobile repair services however, Respondent does not have a certificate of occupancy which permits the operation of an automobile repair garage at its current location. (Testimony of Inspector Rockett and Gov't. Exhibit #3A & 3B)

CONCLUSIONS OF LAW

9. The Respondent has an invalid Certificate of Occupancy for an "Automobile Service Center." While an "Automobile Service Center" is not a defined or recognized term under the D.C. Zoning Regulations. The term denotes the same type of activity which is prohibited in a C-3-A zoned area, repair garage,"

10. The current and longstanding use of the basement space at the subject property has been as an automobile repair garage. In a previous Decision and Order issued November 22, 1992, ALJ Rohulamin Quander made a finding that that the lessor, Mr. Yuen/Van Ness, Inc. operated an automobile repair garage in the basement of the property without a valid Certificate of Occupancy. This decision was subsequently affirmed by the D.C. Board of Zoning Adjustment (BZA) in an opinion written March 30, 1998.

11. On April 21, 1998,the lessor, Mr. Yuen/Van Ness, Inc., after the BZA ruled against him, filed a new application for a Certificate of Occupancy and indicated that the new operation would be an "Automobile Service Center" even though no such an entity existed in the D.C. Zoning Regulations. The Respondent Kuri Brothers Inc, (sub-lessor) has elected to "piggyback" upon this "Automobile Service Center" concept used by mr. Yuen/Van Ness, Incorporated.

FURTHER ORDERED: that Respondent Kuri Brothers, Inc Cease and Desist the operation of its Automobile repair garage at 4221 Connecticut Avenue, N.W., until such time that its obtains an exception from the District of Columbia Board of Zoning Adjustment.

Lennox J Simon
Administrative Law Judge, D.C.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
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NOI No: #32834

CERTIFICATE OF SERVICE

I hereby certify that the attached Decision and Order rendered on 12/27/99 for the above referenced case was Mailed postage prepaid on 12/29/99 to the respondent at the address listed above.

Stacey Washington for
~~Belva D. Newsome~~, Chief Administrative Law Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Appeal No. 00-0001 (No. 99-OAD-1821-E) of the administrative determination of Lennox J. Simon, Attorney Examiner/ALJ, Department of Consumer and Regulatory Affairs ("Appellee"), Office of Adjudication, made on December 27, 1999, finding Kuri Brothers, Inc. ("Appellant") in violation of 11 DCMR § 3203.1 – Building used as other than a single family dwelling without a certificate of occupancy (Auto Repair Garage).

DECISION AND ORDER

This case involves a notice of infraction (#0033729) for operating an automobile repair business without a Certificate of Occupancy, in violation of 11 DCMR § 3203.1, on April 27, 1999. The notice of infraction was issued pursuant to 11 DCMR § 3203.1, which prohibits the use of a building as other than a single family dwelling without a certificate of occupancy.

This matter was heard on August 11, 1999. The opinion of the Administrative Law Judge ("ALJ") assigned to this case, Mr. Lennox J. Simon, was issued on December 27, 1999, upheld the issuance of the notice of infraction.

On March 19, 2002, a hearing on this appeal was held before the Board. Representing the Appellant was Tamir D. Damari, Esq., from the Law Offices of Stanley H. Goldschmidt. Representing the Appellee was Matthew J. Green, Esq.

Requests for intervention were submitted to the Board by ANC 3F, Van Ness South Tenant's Association, Inc., and Charles E. Smith Residential. All three requests were denied during the Board's March 19, 2002, hearing by a vote of 3 to 1 to 1, with one member not present, not voting.

At its decision meeting of April 2, 2002, the Board voted 3 to 0 to 2 to grant the appeal, with two members not present, not voting.

Background

On August 12, 1998, Certificate of Occupancy No. B00181657 was issued to the Kuri Brothers, Inc. at 4221 Connecticut Avenue, N.W., basement level, for the purpose of operating an "Automobile Service Center" in a C-3-A District. The term "Automobile Service Center" is neither used nor defined in the Zoning Regulations. The ALJ for this case found that an

BZA
ZONING COMMISSION
District of Columbia
Case 00-0001
Exhibit 33

"Automobile Service Center" was the same thing as a "Repair Garage"[1] and that both terms should therefore "be treated as the same entity". (Finding of Fact #12).

The ALJ also found that the Appellant had an invalid Certificate of Occupancy (Conclusion of Law #9) noting a Repair Garage is not permitted as a matter of right in a C-3 District. The ALJ therefore concluded that the Appellant was operating his automobile repair garage "without a Certificate of Occupancy which permits such operation" (Conclusions of Law #17) and upheld the notice of infraction.

DECISION

This appeal of the ALJ's decision was brought pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Code § 2-1803.01, *et seq.* (2001)) ("Civil Infractions Act"). The Board's review is based on the record established before the ALJ. The Board "shall set aside any . . . order that is without the observance of procedure required by law or regulations . . . or any order that is unsupported by a preponderance of the evidence on the record." D.C. Code § 2-1803.03.

The first issue confronted by the Board in this appeal was whether to grant requests for intervention by a citizen group, a real estate company, and the local ANC. All three requests were denied. Neither the Civil Infractions Act nor the Zoning Regulations[2] provide for intervention in civil infraction appeals.

This action is an appeal of a civil infraction fine, which was assessed only against the Appellant. Moreover, even if there was an interest at stake, the requestors did not go so far as to assert that DCRA could not adequately protect their interests.

Turning to the merits of the appeal, the Board finds that the ALJ for this case erred in upholding the notice of infraction issued to the Appellant because DCRA did not observe the procedure required by DCRA's own regulations.

As stated on the notice of infraction, the Appellant was cited for "Operating an Auto Repair Business [without] a Certificate of Occupancy", in violation of 11 DCMR § 3203.1. The Appellant was issued, and submitted into the record a copy of, its certificate of occupancy for "Automobile Service Center". Because the ALJ concluded that the Automobile Service Center and Repair Garage are one in the same, and that Appellant was operating a Repair Garage on his

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[1] 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 vehicle maintenance or repair." 11 DCMR § 199.1.

[2] The Zoning Regulations provide for intervention in limited circumstances, in the Board's discretion, in appeals under the Zoning Act, D.C. Code § 6-641.07(f) and (g)(1) (2001), the representation or administration of the Zoning Act, 11 DCMR § 3112.15, but do not expressly provide for intervention in civil infraction appeals which were brought under the Civil Infractions Act, D.C. Code §§ 2-1803.02.

premises, the ALJ should have concluded that the Appellant's use was covered by its existing Certificate of Occupancy. Thus, the notice of infraction was issued in error.

The ALJ strays from the proper course when he declares in his order that the Appellant's Certificate of Occupancy is invalid. Although it is true that a Certificate of Occupancy cannot be issued for a Repair Garage in a C-3 District without a special exception, it is not within the ALJ's purview in this case to declare the Certificate of Occupancy to be invalid. Doing so is akin to revoking the certificate, which can only be done through the proper procedures.

Section 118.4.3 of the District of Columbia Construction Code Supplement (1999), title 12, DCMR, provides that "Any certificate of occupancy . . . shall be revoked by the Director, after notice, if due to any material circumstance, it is found to have been issued in error." Such notice is not only required by the above regulation, but also by the Due Process clause of the Constitution. *See, e.g., Transportation Leasing Co. v. Department of Empl. Servs*, 690 A.2d 487 (D.C. 1997) ("We have held that in general, an individual is entitled to fair and adequate notice of administrative proceedings that will affect his [or her] rights, in order that he [or she] may have an opportunity to defend his [or her] position.") (quoting *Ridge v. Police & Firefighters Retirement and Relief Bd.*, 511 A.2d 418, 424 (D.C. 1986). Any such revocation may then be appealed to the Board. Section 118.5 of the District of Columbia Construction Code Supplement (1999), title 12, DCMR; D.C. Code § 6-641.07 (2001).

The Board wishes to stress that DCRA therefore has a remedy in this situation, i.e., it may revoke the Certificate of Occupancy, after giving notice. However, issuing a notice of infraction for not having a Certificate of Occupancy before the revocation procedures are completed is premature.

Based on the above, it is hereby:

ORDERED that the appeal is **GRANTED** and the decision of the ALJ is **REVERSED**.

Vote: 3-0-2 (Geoffrey H. Griffis, David W. Levy, and Curtis Etherly to Grant; Carol J. Mitten not present, not voting; Anne M. Renshaw not voting, not having heard the case).

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

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
Jerrily R. Kress, FAIA
Director

FINAL DATE OF ORDER MAY 2 2 2002

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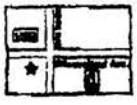
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