Original

Before the
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Appeal No. 16947

Appeal of Kuri Brothers, Inc. v. Department of Consumer and Regulatory Affairs

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Motion of ANC 3F to Affirm and Order Appellants to Cease and Desist and Request for Stipulation and Admission

Advisory Neighborhood Commission ("ANC") 3F submits this Motion to the Board of Zoning Adjustment ("BZA") in support of full exercise of BZA jurisdiction on this appeal to affirm revocation of a Certificate of Occupancy ("CofO") and to order Kuri Brothers, Inc. ("Appellants" or "Kuri Brothers") to cease and desist from all repair garage uses of these premises.

In the interest of simplifying the BZA's work, ANC 3F asks that Appellants admit or stipulate that they operate a "repair garage" within the meaning of the Zoning Regulations at premises they occupy at 4221 Connecticut Avenue, N.W.

In support of this Motion, ANC 3F submits the attached "Memorandum of Law of ANC 3F in Support of Affirmance and Order to Cease and Desist". ANC 3F also attaches hereto photographs of Appellants' latest sign at the premises advertising "WE SERVICE AND REPAIR ALL CARS DOMESTIC & FOREIGN". ANC 3F will further submit Proposed Findings of Fact and Conclusions of Law if called for by the BZA.

Respectfully submitted,

David J. Bardin

David J. Bardin, Secretary,
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4401-A Connecticut Avenue, NW - #244
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Attachments: Memorandum of Law
Two photographs of Appellants' newest advertising sign (taken May 8, 2003)

12 May 2003

BZA
Case No. 16947
Exhibit No. 41

Board of Zoning Adjustment
District of Columbia
CASE NO.16947
EXHIBIT NO.41

Before the
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Appeal No. 16947

Appeal of Kuri Brothers, Inc. v. Department of Consumer and Regulatory Affairs

Memorandum of Law of ANC 3F
in Support of Affirmance and Order to Cease and Desist

Advisory Neighborhood Commission ("ANC") 3F submits this Memorandum of Law to the Board of Zoning Adjustment ("BZA") in support of full exercise of BZA jurisdiction on this appeal to affirm revocation of a Certificate of Occupancy ("CofO") and to order Kuri Brothers, Inc. ("Appellants" or "Kuri Brothers") to cease and desist from using these premises.

This Memorandum extracts and analyzes pertinent statutes (Appendix I) and regulations (Appendix II) that address four issues:

- Does BZA have plenary jurisdiction on an appeal, such as this (in contrast to civil infractions cases), to adjudicate the Zoning Regulations of the District of Columbia?

- In fashioning a remedy or remedies for violations (if any) of the Zoning Regulations, does the BZA have all the authority of the Mayor or his delegate, the Director of the D.C. Department of Consumer and Regulatory Affairs ("DCRA"), pursuant to those Zoning Regulations?

- If Appellants are in fact operating a "repair garage" in a C-3-A district for which the BZA has not approved a special exception, may DCRA issue Appellants any CofO for such operations?

- If Appellants' use of underground space at 2441 Connecticut Avenue, NW, leaves that building without any parking spaces (when the building formerly supplied parking spaces in that self-same underground area), does Appellants' use violate Chapter 21 of the Zoning Regulations?

I. BZA Jurisdiction and Powers

The BZA's functions are purely adjudicatory. BZA jurisdiction was set by Congress and may be changed only by an Act of Congress (with some exceptions that do not apply here).

Congress created both the BZA and the Zoning Commission ("ZC") before the 1973 Home Rule legislation; and that Home Rule law preserved both bodies. The BZA is the Court of the ZC.

- A Zoning Commissioner sits on each BZA panel, listens to the evidence and arguments, participates in decisional discussions, and votes.

- The ZC may, on its own motion, take up to itself for *sua sponte* review *de novo* any case (or issue in a case) decided by the BZA in order to assure consistency with the Zoning Regulations.

The BZA's principal function (and its sole function in this case) is to implement Zoning Regulations adopted by the ZC. Whereas the ZC both legislates and adjudicates, the BZA has no legislative authority. (The BZA does not even adopt its own rules of practice and procedure, that being a prerogative of the ZC. Nor does the BZA have executive or mediation functions.)

Here, the BZA has jurisdiction because Kuri Brothers filed this statutory appeal challenging the DCRA decision to revoke a CofO for Appellants' use of premises at 4221 Connecticut Avenue, NW (Square 2051, Lot 5). Exhibit 1.

- The statute that confers jurisdiction is D.C. Code § 6-641.07, including subsections (f) and, especially, (g)(4) which empowers the BZA both to "**affirm**" the DCRA's revocation of a past CofO and to "**make such order as may be necessary to to carry out its decision ... and to that end** [the BZA] **shall have all the powers of the officer or body from whom the appeal is taken.**"

- So BZA's powers on this Appeal, conferred by Act of Congress, include power to do whatever DCRA might have done.

As the BZA ruled, in this case, on January 28, 2003, after consulting with Corporation Counsel, the sole issues for the BZA in this case concern compliance with the Zoning Regulations. (Appeals in civil infractions cases were held to be a different kettle of fish.) On this Appeal the BZA has *de novo* jurisdiction

- to determine the facts and whether the occupancy violates the Zoning Regulations of the District of Columbia;
- the BZA is not limited to DCRA's process or rationale for its own decision, nor is the BZA concerned about Appellants' compliance or non-compliance with DCRA regulations.

Having invoked and triggered BZA jurisdiction, Appellants may not escape from it unless they seek and receive permission of the BZA to withdraw their Appeal. (ANC 3F would object strongly to any such request.)

II. Appellants' Use Violates the Zoning Regulations

The Zoning Regulations do not permit Appellants' occupancy and use as a matter of right:

A. Appellants' activities described in the testimony of Inspector Hooks and in Appellants' own advertisements, submitted by Commissioner Perry as well as Inspector Hooks, show that Appellants operate a repair garage in a C-3-A zone. That violates the Zoning Regulations applicable to a C-3-A district (unless Appellants apply for a Special Exception,

which they have not done) and the BZA approves such Special Exception (which it cannot do in this case).

Appellants' operations described in this record (continuing Koo Yuen's operations) differ materially from earlier operations and uses on this site (or at unrelated, other sites which Appellants seek to inject into BZA evaluation of this case) because those other uses involved ancillary and accessory activities, expressly addressed by Zoning Regulations, incidental to gasoline service stations, automobile accessories sales, or automobile and truck sales.

B. Appellants' uses of all the underground space for its repair garage activities have preempted use toward providing minimum parking facilities required by Chapter 21 of the Zoning Regulations.

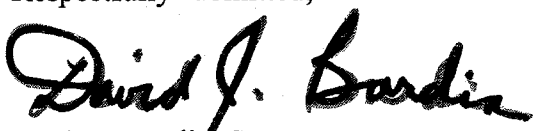
- There is only one entrance to this underground space;
- that basement once provided parking spaces;
- when first leased to Koo Yuen in 1989 (at the time when the building was renovated and converted from automobile dealerships to leased offices, restaurants, and other premises) Koo Yuen promised that "existing portions" of the premises leased to him that were used for parking would be used for the "sole purpose of parking vehicles."

Today, there are no underground parking spaces at 4221 Connecticut Avenue available to the office or restaurant tenants upstairs. Appellants' use has "closed all of the parking formerly provided to the commercial businesses and tenants of this three-story building" (as Commissioner Perry testified), and put 4221 Connecticut in violation of the Zoning Regulations.

CONCLUSION

Revocation of the CofO should be affirmed and Appellants ordered to cease and desist from all repair garage uses of the premises.

Respectfully submitted,



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Appendix I: BZA Statutory Jurisdiction over this Appeal
Appendix II: Pertinent D.C. Zoning Regulations

APPENDIX I: BZA STATUTORY JURISDICTION OVER THIS APPEAL

Congress has clearly assigned to this Board jurisdiction over:

> "Appeals ...by any person aggrieved, ... , by **any decision ... granting or withholding a certificate of occupancy, or any other decision based in whole or in part upon any zoning regulation or map** adopted under" the Zoning Act. [Emphasis added.]

DC Code § 6-641.07 (2001). This section, includes the following definition of this Board's jurisdiction:

> "(e) The Board of Adjustment shall not have the power to amend any regulation or map.
>
> (f) Appeals to the Board of Adjustment may be taken by any person aggrieved, ... by any decision of the Inspector of Buildings[1/] granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other decision based in whole or in part upon any zoning regulation or map adopted under this subsection ... The Mayor of the District of Columbia may require and fix the fee to be charged for an appeal, ...; provided, that no citizens' association, or association created for civic purposes and not for profit shall be required to pay said fee. There shall be a public hearing on appeal.
>
> (g) Upon appeals, the Board of Adjustment shall have the following powers:
>
> (1) To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, or determination, or refusal made by the Inspector of Buildings 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 this subchapter ... ;
>
> (2) To hear and decide, in accordance with the provisions of the regulations adopted by the Zoning Commission, requests for special exceptions or map interpretations or for decisions upon other special questions upon which such Board is required or authorized by the regulations to pass;
>
> (3) ...
>
> (4) In exercising the above-mentioned powers, the Board of Adjustment may, in conformity with the provisions of this subchapter ... reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from or may make such order as may be necessary to carry out its decision or authorization, and to that end shall have all the powers of the officer or body from whom the appeal is taken.
>
> (h) ....
>
> (i) Nothing herein contained shall prohibit the Zoning Commission from providing by regulation for appeals to it from any action of the Board of Zoning Adjustment."

The Zoning Regulations summarize (but do not define) the BZA's jurisdiction in the BZA Rules of Practice and Procedure. 11 DCMR § 3100.2.

1/ Inspector of Buildings' duties transferred to DCRA. DC Code § 6-641.07 (2001), Historical Notes (Misc.).

APPENDIX II: PERTINENT D.C. ZONING REGULATIONS

[Sections (§§) refer to Title 11 of the D.C.Municipal Regulations ("DCMR") (Feb. 2003 ed.)]

Chapter 1 The Zoning Regulations
- 101 Interpretation and Application
- 199 Definitions

Chapter 7 Commercial Districts
- 701 Uses as a Matter of Right (C-1)
- 702 Accessory Uses and Buildings (C-1)
- 721 Uses as a Matter of Right (C-2)
- 722 Accessory Uses and Buildings (C-2)
- 741 Uses as a Matter of Right (C-3)
- 742 Accessory Uses and Buildings (C-3)
- 743 Uses Subject to BZA Approval (C-3)

Chapter 21 Off-Street Parking Regulations
- 2100 Authority to Require Parking Spaces
- 2200 Schedule of Requirements for Parking Spaces

Chapter 32 Administration and Enforcement
- 3203 Certificates of Occupancy

101 INTERPRETATION AND APPLICATION

101.5 No building, structure, or premises shall be used, ... except in conformity with this title.

199 DEFINITIONS

199.1 When used in this title, the following terms and phrases shall have the meanings ascribed:

Automobile laundry - a structure or portion of a structure, the principal use of which is the washing of automobiles or other motor vehicles with the use of a chain or other conveyor and blower or steam cleaning device.

Garage, mechanical parking - a building or other structure without repair or service facilities in which parking is accomplished entirely by means of elevators and in such a manner that there is no human occupancy other than by the elevator operators except on the main floor.

Garage, parking - a building or other structure, or part of a building or structure, over nine hundred square feet (900 ft.^{2}) in area, used for the parking of motor vehicles without repair or service facilities. The term parking garage may include a parking garage accessory to the principal use, but shall not include a mechanical parking garage.

Garage, private - a building or other structure, or part of a building or structure, over nine hundred square feet (900 ft.^{2}) in area, used for the parking of one (1) or more motor vehicles and having no repair or service facilities.

Garage, public storage - a building or other structure, or part of a building or structure, in which any repair, greasing, washing, or similar services are incidental to its primary use for the parking of motor vehicles.

Garage, repair - 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.

Gasoline service station - an area of land, including any structures on the area, used for the retail sale of motor fuel and lubricants and incidental services such as lubrication and hand washing of motor vehicles, and the sale, installation, or minor repair of tires, batteries, or other automobile accessories. The term gasoline service station shall not include an automobile laundry or a repair garage.

Parking space - an off-street area accessible and of appropriate dimensions to be used exclusively for the temporary parking of a motor vehicle. (31 DCR 3585)

Use, accessory - a use customarily incidental and subordinate to the principal use, and located on the same lot with the principal use.

199.2 For the purpose of this title, ... :

....

(f) The words "occupied" and "used" shall be considered as though followed by the words "or intended, arranged, or designed to be used or occupied, offered for occupancy"; and

(g) Words not defined in this section shall have the meanings given in *Webster's Unabridged Dictionary.*

701 USES AS A MATTER OF RIGHT (C-1)

701.1 The following service establishments shall be permitted in a C-1 District as a matter of right:

....

(h) Gasoline service station existing on May 12, 1958;

(i) Gasoline service station as an accessory use to a parking garage or public storage garage, subject to ... ; Provided, that ...

....

701.4 The following retail establishments shall be permitted in a C-1 District as a matter of right:

...

(c) Automobile accessories sales, excluding installation;

...

701.5 Other service or retail use similar to that provided for in §§ 701.1 and 701.4, including assemblage and repair clearly incidental to the conduct of a permitted service or retail establishment on the premises, shall be permitted in a C-1 District as a matter of right.

702 ACCESSORY USES AND BUILDINGS (C-1)

702.4 Other accessory uses customarily incidental and subordinate to the uses permitted in C-1 Districts shall be permitted in a C-1 District.

721 USES AS A MATTER OF RIGHT (C-2)

721.1 Any use permitted in C-1 Districts under §701 of this chapter shall be permitted in a C-2 District as a matter of right.

721.2 In addition to the uses permitted in C-1 Districts by §701.1, the following service establishments shall be permitted in a C-2 District as a matter of right:

(a) Automobile laundry, with reservoir space for at least fifteen (15) automobiles;

(b) Automobile rental agency;

....

721.3 In addition to the uses permitted in C-1 Districts by §701.4, the following retail establishments shall be permitted in a C-2 District as a matter of right:

....

(c) Automobile accessories sales, including installations;

(d) Automobile and truck sales;

....

721.4 Other services or retail use similar to that permitted in §§ 721.2 and 721.3, including assemblage and repair clearly incidental to the conduct of a permitted service or retail establishment on the premises, shall be permitted in a C-2 District as a matter of right.

722 ACCESSORY USES AND BUILDINGS (C-2)

...

722.3 Other accessory uses customarily incidental and subordinate to the uses permitted in C-2 Districts shall be permitted in a C-2 District.

741 USES AS A MATTER OF RIGHT (C-3)

741.1 Any use permitted in C-2 Districts under §721 of this chapter shall be permitted in a C-3 District as a matter of right.

741.2 In addition to the uses permitted in C-2 Districts by §721.1, the following service establishments shall be permitted in a C-3 District as a matter of right:

....

(c) Gasoline service station as an accessory use to a mechanical parking garage, subject to the conditions for the accessory use set forth in §701.1(i); and

....

741.3 In addition to the uses permitted in C-2 Districts by §721.3, the following retail establishments shall be permitted in a C-3 District as a matter of right:

(a) Motorcycle sales and repair, only in C-3-C Districts; provided:

....

....

741.4 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.

741.5 The following uses shall also be permitted as a matter of right in a C-3 District:

(a) Mechanical parking garage, only in C-3-C Districts;

....

742 ACCESSORY USES AND BUILDINGS (C-3)

...

742.3 Other accessory uses customarily incidental and subordinate to the uses permitted in C-3 Districts shall be permitted in a C-3 District.

...

743 USES SUBJECT TO BZA APPROVAL (C-3)

743.1 A ... , or a repair garage in any C-3 District as a special exception, or a mechanical parking garage in C-3-A or C-3-B Districts, shall be permitted in a C-3 District if approved by the Board of Zoning Adjustment under §3104, subject to the special provisions of §706 and chapter 23 of this title.

2100 AUTHORITY TO REQUIRE PARKING SPACES

2100.1 All buildings or structures erected on or after May 12, 1958, shall be provided with parking spaces to the extent specified in §2101, except as permitted in §§2102 through 2108.

....

2100.3 No certificate of occupancy shall be issued for the use of a building or structure erected on or after May 12, 1958, unless the required parking spaces have been provided in accordance with the parking plan provided for in the approved building permit.

....

2101 SCHEDULE OF REQUIREMENTS FOR PARKING SPACES

2101.1 On or after May 12, 1958, all buildings and structures shall be provided with parking spaces a specified in the following table:

[excerpts]

USES	NUMBER OF PARKING SPACES REQUIRED
COMMERCIAL BUILDINGS	
Office - General, including television and radio broadcast studio:	
C-1, C-2-A, C-3-A	In excess of 2,000 ft.^{2}, 1 for each additional 600 ft.^{2} of gross floor area and cellar floor area.
Retail or service establishment except gasoline service station or auto repair garage:	
C-1, C-2-A, C-3-A, C-M-1, M	In excess of 3,000 ft.^{2}, 1 for each additional 300 ft.^{2} of gross floor area and cellar floor area.
Gasoline service station: All districts	1 for each 300 ft.^{2} of gross floor area, excluding any pump island canopy and any kiosk adjacent to the pumps used exclusively as an attendant's shelter
Repair garage: All districts	4 plus 1 for each 200 ft.^{2} of gross floor area

3203 CERTIFICATES OF OCCUPANCY

3203.8 Any use that is authorized by a certificate of occupancy may be established and continued pursuant to the terms of the certificate and the provisions of this title in effect on the date that the certificate is issued, subject to the following conditions:

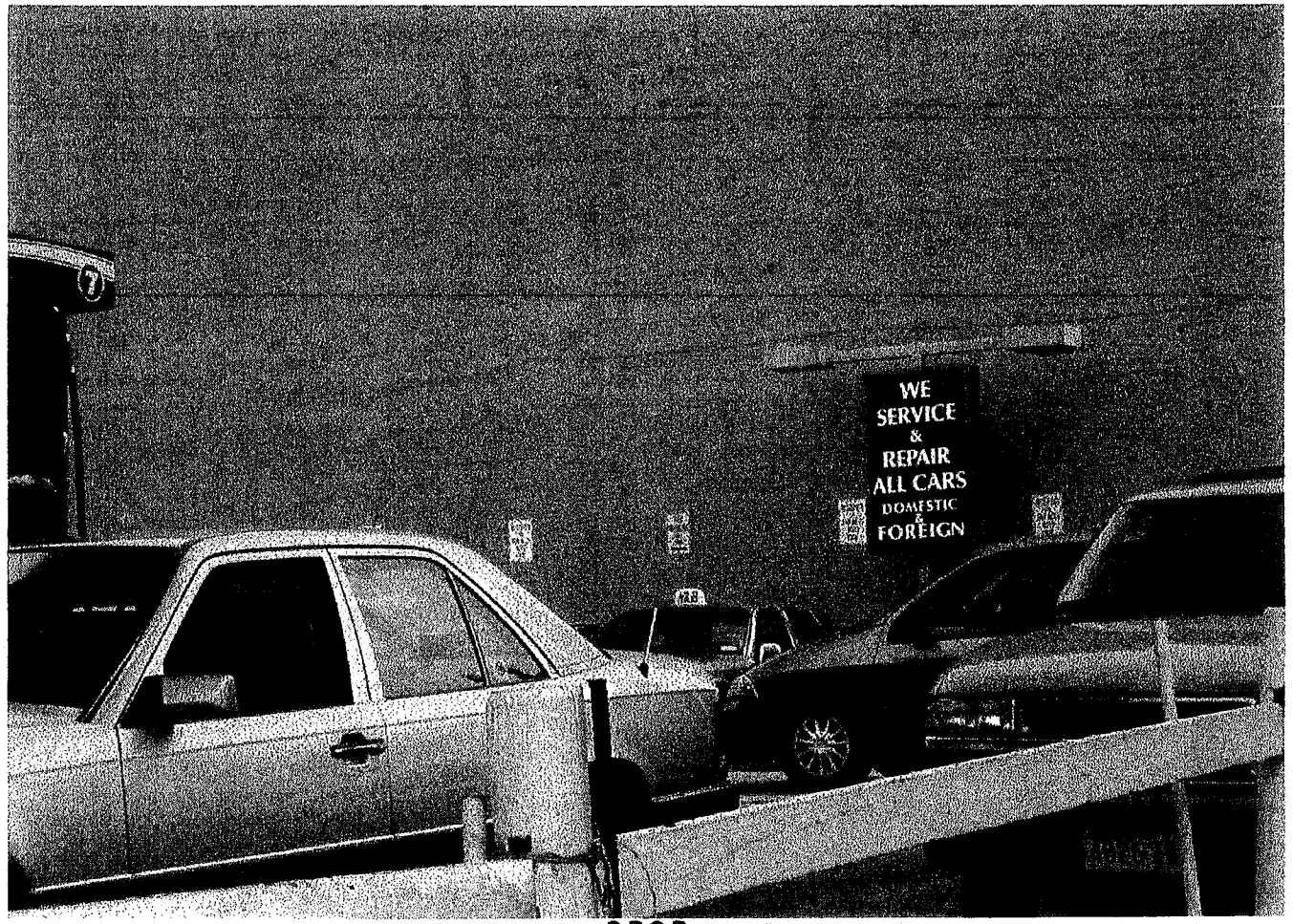
(a) The use shall be designated on the certificate of occupancy in terms of a use classification that is established by this title;

(b) ... ; and

...



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CERTIFICATE OF SERVICE

I certify that I have on this 12th day of May, 2003, served or caused to be served a copy of the foregoing

Motion of ANC 3F to Affirm and Order Appellants to Cease and Desist and Request for Stipulation and Admission

and

Memorandum of Law of ANC 3F in Support of Affirmance and Order to Cease and Desist

upon representatives of the parties by delivery of a copy of each by hand, or by e-mail, or by deposit in the U.S. Mail, first class, postage prepaid:

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