GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Appellee	*	
v.	*	Appeal No. 16947
KURI BROTHERS, INC. Appellant	*	

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APPELLANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appellant, Kuri Brothers, Inc. ("Appellant"), by and though Tamir Damari, its undersigned counsel, hereby submits these Proposed Findings of Fact and Conclusions of Law, and in support thereof states as follows:

I. FINDINGS OF FACT

1. Appellant is the operator of "Van Ness Auto Care", which is located at 4221 Connecticut Ave. N.W., Washington, D.C. (the "premises").

2. The instant appeal arises out of a Notice of Intent to Revoke Certificate of Occupancy Number B001816757 (the "Notice of Intent to Revoke") issued on June 27, 2002 by the District of Columbia Department of Consumer and Regulatory Affairs (the "D.C.R.A."), wherein the D.C.R.A. advised Appellant of the D.C.R.A.'s intention to revoke Appellant's Certificate of Occupancy for the premises (the "Certificate of Occupancy"). The Certificate of Occupancy had been issued to Appellant on August 12, 1998, and authorized Appellant to operate an "Automobile Service Center" at the premises.

3. The purported basis for the D.C.R.A.'s endeavor to revoke the Certificate of Occupancy was that Appellant was allegedly conducting "major" automotive repair at the premises and/or engaging in activities at the premises which were otherwise beyond the scope of those activities permitted under the Certificate of Occupancy. In this regard, the Notice of Intent to Revoke stated, inter alia, that:

BZA
Case No. 16947
Exhibit No. 44

Board of Zoning Adjustment
District of Columbia
CASE NO.16947
EXHIBIT NO.44

> This is official notice to you that the Department of Consumer and Regulatory Affairs, Building and Land Regulation Administration (the "Department") proposes to revoke Certificate of Occupancy Number B001816757, issued to Kuri Brothers, Incorporated. Said certificate was issued on or about August 12, 1998, and authorized Kuri Brothers, Incorporated to operate an "Automobile Service Center" at the premises located at 4221 Connecticut Ave. NW, in a C-3 zone area...At the time of the Certificate of Occupancy's issuance, you informed the Department that the corporation's intent was to sell small automotive parts and make installations of same. The Department created the category of 'Automobile Service Center' to facilitate your efforts. This facilitation did not include or permit any major automotive engine, body work or other automotive garage functions. ***By making major repairs and doing engine work you have operated outside the scope of this Certificate of Occupancy.***

Notice of Intent to Revoke, at page 1 (emphasis added).

4. The Notice of Intent to Revoke specified a number of "personal observations" purportedly made by D.C.R.A. officials between April 27, 1999 and June 5, 2002, who supposedly witnessed, among other things, prohibited "automotive mechanical repairs" and "engine repairs" being conducted at the premises.

5. The Notice of Intent to Revoke concluded by stating:

> You have the right to challenge this proposed action to revoke your certificate of occupancy. In order to exercise this right you must request a hearing in writing within fifteen (15) days of your receipt of this Notice...addressed to E. Savannah Little, Chief Administrative Law Judge...Please note that if you do not request a hearing within the time specified in this notice...you shall be deemed to have admitted the validity of the charges and specifications stated in this notice and a final notice of revocation will be entered against you.[1]

6. The Notice of Intent to Revoke was served upon a representative of Appellant on or about June 28, 2002. Upon being served with this Notice, Appellant's representatives (who are for the most part unfamiliar with legal and zoning matters, and

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[1] Notice of Intent to Revoke, at pages 2-3. It is important to note that, in its Notice of Intent to Revoke, the D.C.R.A. failed to specify the statutory and/or regulatory basis for its contention that "the charges and specifications stated in this notice" could be deemed admitted against Appellant "if you do not request a hearing within the time specified in this notice". In fact, the undersigned, having thoroughly reviewed the pertinent District of Columbia statutes and regulations, has been unable to identify ***any*** statutory and/or regulatory basis for this contention by the D.C.R.A.

who, understandably, did not understand the consequences of failing to respond to the Notice) desired to discuss the ramifications of the Notice with their landlord, Koo Yuen ("Yuen"), before proceeding to respond to the Notice. However, Yuen was out of the country on June 28, 2002, and was not apprised of the Notice of Intent to Revoke until he returned on approximately July 15, 2002 (i.e., two days ***after*** the expiration of the 15 day response-time unilaterally set by the D.C.R.A. for Appellant to respond to the Notice of Intent to Revoke).

7. Shortly thereafter, on July 22, 2002, appellant's counsel transmitted a letter via telecopy and U.S. Mail to Judge E. Savannah Little of the D.C.R.A.'s Office of Adjudication (the "Office of Adjudication"): (i) formally requesting a hearing before the Office of Adjudication on the Notice of Intent to Revoke; and (ii) explaining that Appellant had not requested a formal hearing earlier because Yuen was out of the country at the time the Notice of Intent to Revoke was served, and was not apprised of the Notice of Intent to Revoke until approximately July 15, 2002.

8. Judge Little did not respond to appellant's counsel's letter until August 9, 2002, at which time Judge Little unjustifiably denied Appellant's request for a formal hearing.[2] Shortly thereafter, on August 19, 2002, the D.C.R.A. issued a "Final Notice" to Appellant purporting to revoke Appellant's Certificate of Occupancy, and threatening criminal action against Appellant unless Appellant immediately surrendered its Certificate of Occupancy and ceased "all business operations at 4221 Connecticut Ave."

9. On September 11, 2002, Appellant timely appealed the D.C.R.A.'s revocation of its Certificate of Occupancy to this Board. Three substantive hearings were held on this appeal, on January 28, 2003, April 8, 2003 and May 13, 2003.

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[2] As discussed more fully below, each of the grounds given for this denial were clearly pretextual.

10. At the January 28, 2003 hearing, the principal issue addressed by the Board was whether it would hear the instant appeal based solely on the record before the Office of Adjudication, or, alternatively, whether it had the authority to conduct a "full-blown" evidentiary hearing and adjudicate this case on a *de novo* basis. Notably, although both Appellant and the D.C.R.A. maintained that this Board's review of this matter was limited to the record established before the Office of Adjudication, this Board nevertheless determined that it had the authority to conduct a *de novo* evidentiary hearing on this appeal. At the conclusion of the January 28, 2003 hearing, this Board re-scheduled this matter for an evidentiary hearing on April 8, 2003.

11. At the April 8, 2003 hearing, Appellant maintained that if this Board was, in fact, authorized to conduct a *de novo* evidentiary hearing, the burden of proof would be upon the D.C.R.A. to establish the propriety of the revocation of Appellant's Certificate of Occupancy. This Board disagreed, incorrectly concluding that the burden of proof was upon Appellant to demonstrate that the revocation of Appellant's Certificate of Occupancy was *improper*. Thereupon, this Board conducted evidentiary hearings on April 8, 2003 and May 13, 2003.

II. CONCLUSIONS OF LAW

Appellant will establish herein that: (i) notwithstanding its determination to the contrary at the January 28, 2003 hearing, this tribunal does not have the authority to hear a *de novo* appeal; (ii) upon review of the record before the Office of Adjudication, it is evident that Judge Little violated Appellant's due process rights by denying Appellant a hearing on the Notice of Intent to Revoke; (iii) assuming, arguendo, that this Board *does* have the authority to hear a *de novo* appeal, the burden would be upon the D.C.R.A. to demonstrate that the revocation of Appellant's Certificate of Occupancy was proper; (iv) the D.C.R.A. is unable to demonstrate that the revocation of Appellant's Certificate Of

Occupancy was proper; and (v) notwithstanding each of the foregoing, the D.C.R.A. is otherwise precluded from revoking Appellant's Certificate of Occupancy on the grounds of laches.

A. This Tribunal Does Not Have The Jurisdiction To Hear A De Novo Appeal

1. During the January 28, 2003 hearing, the Board determined that, in adjudicating the instant appeal, it was not limited to the record established before the Office of Adjudication, and that it had the authority to decide this matter de novo (i.e., to conduct a full evidentiary hearing on this matter). Appellant respectfully submits that the Board erred in conducting a de novo hearing in this appeal for the reasons discussed below.

2. In its "Final Notice" of August 19, 2002 purporting to revoke Appellants' Certificate of Occupancy, the D.C.R.A., through Administrator J. Gregory Love, stated that "*Pursuant to D.C. Code, 2001 ed. §6-641.09 and Title 11 D.C.M.R. §3203.08(a)*, this is official notice to you that the Department of Consumer and Regulatory Affairs, Building and Land Regulation Administration hereby revokes your Certificate of Occupancy effective immediately." (emphasis added).

3. A review of the District of Columbia Municipal Regulations (the "regulations") reveals that Title 11 D.C.M.R. §3203.08(a) does not even exist; accordingly, the ***only*** valid statutory basis upon which the DCRA could have revoked Appellant's Certificate of Occupancy is D.C. Code §6-641.09.

4. D.C. Code §6-641.09 relates to building permits and certificates of occupancy, and states, in pertinent part:

> In the event that said regulations [adopted under this sub-chapter] provide for the issuance of certificates of occupancy or other form of permit to use, it shall be unlawful to use any building, structure, or land until such certificate or permit be first obtained...It shall be unlawful to erect, construct, reconstruct, convert or alter any building or structure or part thereof within the District of Columbia in violation of the provisions of said sections or of any of the provisions of the regulations adopted under said sections...The owner or person in charge of or maintaining any such

> building or land...in violation of said sections or of any regulations adopted under said sections, shall upon conviction for such violation...be punished by a fine of not more than $100 per day for each and every day such violation shall continue. The Corporation Counsel of the District of Columbia or any neighboring property owner or occupant who would be specially damaged by any such violation may, in addition to all other remedies provided by law, institute injunction, mandamus or other appropriate action or proceeding...Civil fines, penalties and fees may be imposed as alternative sanctions for any infraction of the provisions of this subchapter...***Adjudication of any infraction of this chapter shall be pursuant to Chapter 18 of Title 2*** [of the D.C. Code].

(emphasis added).

Thus, §6-641.09 clearly incorporates by reference the administrative procedures set forth in Chapter 18 of Title 2 of the D.C. Code.

6. Chapter 18 of Title 2 discusses administrative adjudication of civil infractions and, more specifically, §2-1803 et seq. pertains to appellate review of civil infractions.[3] Of particular relevance to the instant case is §2-1803.01 and § 2-1803.03. Section 2-1803.01, entitled "jurisdiction to hear appeal" states, in pertinent part, that "appeals involving infractions of Chapter 6 of Title 6 [of the D.C. Code],[4] or the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment." Section 2-1803.03, entitled "scope of review" states, in pertinent part, that "The reviewing agency shall make a determination of each appeal **on the basis of the record established before the administrative law judge or attorney examiner.**" (emphasis added).

7. Since (i) the D.C.R.A.'s own "Final Notice" of August 19, 2002 indicated that

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[3] As discussed more fully below, D.C. Ann. Code., §2-1801.02 (the "definition" section of Chapter 18 of Title 2) defines "infraction" as "any act or failure to act for which a civil sanction may be imposed under the provisions of this chapter, and with respect to which either the Corporation Counsel or the United States Attorney for the District of Columbia is authorized to commence a criminal proceeding in the Superior Court of the District of Columbia, or for which another civil sanction may be imposed under any District laws or regulations."

[4] As discussed in greater detail infra, Chapter 6 of Title 6 of the D.C. Code pertains to "Zoning and the Height of Buildings"

Appellant's Certificate of Occupancy was being revoked pursuant to §6-641.09; (ii) §6-641.09 clearly that "Adjudication of any infraction of this chapter shall be pursuant to Chapter 18 of Title 2 [of the D.C. Code]"; and (iii) § 2-1803.03 of the D.C. Code states that "The reviewing agency shall make a determination of each appeal **on the basis of the record established before the administrative law judge or attorney examiner**" (emphasis added), this Board clearly erred by conducting a de novo hearing in this case, thereby going ***beyond*** the record established before the Office of Adjudication.

8. Notwithstanding the D.C.R.A.'s express assertion in its "Final Notice" of August 19, 2002 that §6-641.09 governed this case, during the January 28, 2003 Hearing, this Board determined that D.C. Code §6-641.07(g), rather than §6-641.09, applied to this matter. According to this Board, §6-641.09 was not relevant because this case does not involve an appeal of a "civil infraction" (i.e., a case where a specific monetary penalty is levied against the respondent).[5]

9. Section 6-641.07(g) pertains to the power and jurisdiction of this Board, and states, in pertinent part:

> (g) Upon appeals the Board of Adjustment shall have the following powers:
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> (1) 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 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 and subchpater V of this chapter...
>
> (4) In exercising the above-mentioned powers, the Board of Adjustment may, in conformity with the provisions of this subchapter and subchapter V of this chapter, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from.....

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[5] In making this determination, this Board curiously failed to even *suggest* any substantive or procedural difference between cases involving the imposition of a monetary penalty and cases involving the revocation of a certificate of occupancy that would justify applying two completely different adjudicatory procedures to these two types of cases.

10. A review of the foregoing statutory provisions reveals that this Board's determination that it had the authority to conduct a *de novo* hearing in this case is based upon two fundamentally flawed assumptions. Firstly, this Board erred by concluding that §6-641.07(g) expressly (or even implicitly) authorizes it to conduct a *de novo* hearing on an appeal pertaining to the revocation of a certificate of occupancy. Secondly, this Board erred by concluding that §6-641.09 (which, as noted above, incorporates by reference § 2-1803.03's admonition that in an administrative appeal, the appellate body is limited to the record established before the D.C.R.A.) is only applicable to appeals where a specific monetary penalty is assessed against the appellant.

11. Firstly, §6-641.07(g) describes the appellate powers of this Board in the "traditional" terms of an appellate body (e.g., this Board's authority to "reverse", "affirm" or "modify" Orders of the Office of Adjudication); this statute does ***not*** state, or even imply, that this Board has the authority to conduct a *de novo* hearing (or even entertain new evidence) on appeal. Thus, any determination by the Board that §6-641.07(g) expressly or implicitly permits it to conduct a *de novo* hearing on an appeal of a revocation of a certificate of occupancy is clearly erroneous and a manifest error of law - in fact, there is no statutory provision which permits this Board to conduct a *de novo* appellate hearing.

12. Conversely, this Board's determination that the scope of §6-641.09 is limited to situations where a monetary penalty is assessed against the respondent is likewise flawed. As noted above, this statute unambiguously states that "Adjudication of ***any infraction of this chapter*** (i.e., Chapter 6 of Title 6 of the D.C. Code) shall be pursuant to Chapter 18 of Title 2 [of the D.C. Code]". Chapter 6 of Title 6 of the D.C. Code, entitled "Zoning and Height of Buildings", includes §6-641.07(g), the ***very*** statute which gives this Board its authority to adjudicate appeals in zoning-related cases (i.e., including appeals involving the assessment of a monetary penalty and appeals involving the revocation of

a certificate of occupancy). If §6-641.09 applies to all cases arising under Chapter 6 of Title 6 of the D.C. Code, including all ***appeals*** arising under §6-641.07(g) (including the instant appeal), it follows, ipso facto, that the limitations of Chapter 18 of Title 2 (including the limitation that all administrative appeals must be based **solely** on the record established before the Office of Adjudication) apply to this case.[6]

13. This Board's determination that §6-641.09 only applies to instances where a monetary penalty is assessed against the appellant likewise ignores the meaning of the term "infraction" , as defined in the D.C. Code. As noted above, the term "infraction" is defined in §2-1801.02 of the D.C. Code as, inter alia, "any act or failure to act for which a civil sanction may be imposed under the provisions of this chapter, and with respect to which...the Corporation Counsel...is authorized to commence a criminal proceeding...or for which another civil sanction may be imposed." (emphasis added). Neither the D.C.R.A., nor this Board, has identified any definition of the term "civil sanction" (in the D.C. Code or elsewhere) which would suggest that this term only refers or applies to monetary penalties. As such, there is no support for this Board's tacit assumption that the term "infraction" (as used in §6-641.09) applies only to monetary penalties, and not to non-monetary penalties (such as the revocation of a certificate of occupancy).

14. Moreover, the penalty assessed by the D.C.R.A. against Appellant in the instant case (the revocation of Appellant's Certificate of Occupancy), clearly falls under the definition of the term "infraction", as defined in §2-1801.02 of the D.C. Code. Firstly, this penalty is the direct result of Appellant's alleged "action or failure to act". As noted above,

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[6] It is also worth noting that at the January 28, 2003 hearing, counsel for the D.C.R.A. ***concurred*** with the undersigned that the scope of this Board's authority in adjudicating the instant appeal is limited to a review of the record established before the Office of Adjudication. **See**, transcript of January 28, 2003 hearing, at page 64 LL. 12-22, page 95 LL. 5-8; page 112 LL. 19-20.

the D.C.R.A. purportedly revoked Appellant's Certificate of Occupancy due to Appellant having allegedly conducted activities at the premises which were *outside the scope* of its certificate of occupancy.[7]

15. Furthermore, the revocation of Appellant's Certificate of Occupancy likewise meets the second "prong" of §2-1801.02's definition of "infraction", since Appellant's alleged activities at the premises, which are purportedly outside the scope of the premises' Certificate of Occupancy, constitute acts "for which a civil sanction may be imposed...and with respect to which...the Corporation Counsel...is authorized to commence a criminal proceeding...or for which another civil sanction may be imposed." As noted above, §6-641.09 *itself* clearly provides that the use of a premises in a manner which is outside the scope of that premises' certificate of occupancy subjects an individual owning/operating the premises to a wide array of civil and criminal penalties and proceedings, including, but not limited to: (i) criminal conviction and a fine "of not more than $100 per day for each and every day such violation shall continue"; (ii) suits in law: (iii) suits in equity for "injunction, mandamus or other appropriate action"; and (iv) "civil fines, penalties and fees".[8] For each of the foregoing reasons, the instant appeal falls under the provisions of

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[7] **See**, for example, Notice of Intent to Revoke, which stated, inter alia, "At the time of the Certificate of Occupancy's issuance, you informed the Department that the corporation's intent was to sell small automotive parts and make installations of same. The Department created the category of 'Automobile Service Center' to facilitate your efforts. This facilitation did not include or permit any major automotive engine, body work or other automotive garage functions. ***By making major repairs and doing engine work you have operated outside the scope of this Certificate of Occupancy.***" (emphasis added). Likewise, at the January 28, 2003 hearing, counsel for the D.C.R.A. reiterated that the basis upon which the D.C.R.A. revoked Appellant's Certificate of Occupancy was for purportedly performing business activities at the premises which were outside the scope of Appellant's Certificate of Occupancy for an Automobile Service Center. **See,** January 28, 2003 Hearing Transcript, at page 139 L. 25 to page 140 L. 21.

[8] In fact, the D.C.R.A. has in the past attempted, on numerous occasions, to levy civil sanctions against Appellant (in the form of monetary penalties) for precisely the same reasons that the D.C.R.A. later revoked Appellant's Certificate of Occupancy (i.e., for conducting activities at the premises which were outside the scope of those permitted at an "automobile

§6-641.09 (including its directive that appeals are limited to the record established before the Office of Adjudication), and, as such, this Board's determination to adjudicate this case on a *de novo* basis is clearly erroneous.

1. The Record Established Before The Office Of Adjudication Did Not Support The Revocation Of Appellant's Certificate Of Occupancy. Specifically, Judge Little Violated Appellant's Due Process Rights By Denying Appellant A Hearing On The Notice Of Intent to Revoke On August 9, 2002

16. As demonstrated above, the scope of this Board's review of the D.C.R.A.'s revocation of Appellant's Certificate of Occupancy is limited to a review of the record established before the Office of Adjudication. This "record" is comprised solely of the following: (i) the June 27, 2002 Notice of Intent to Revoke; (ii) the undersigned's letter of July 22, 2002 to Judge Little requesting a hearing before the Office of Adjudication on the Notice of Intent to Revoke; (iii) the August 9, 2002 letter from Judge Little to the undersigned denying Appellant's request for a hearing on the Notice of Intent to Revoke; and (iv) the D.C.R.A.'s "Final Notice" of August 19, 2002 revoking Appellant's Certificate of Occupancy.

17. In reviewing the record before the Office of Adjudication, it is crucial that this Board be cognizant of the fact that the revocation of Appellant's Certificate of Occupancy did **not** result from the D.C.R.A. having established the truth of the infractions itemized in the Notice of Intent to Revoke. Rather, as noted in the August 19, 2002 Final Notice, the revocation of Appellant's Certificate of Occupancy stemmed from:

> your failure to request a hearing before the Department's Office of Adjudication or to otherwise respond within 15 days from the date of service, June 28, 2002, to the Department's Notice of Intent to Revoke. In the absence of such response, the charges and specifications therein noted are deemed admitted and valid.[9]

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service center").

[9] See, Final Notice of August 19, 2002, at page 1.

In other words, the revocation of Appellant's Certificate of Occupancy was **not** based upon substantive findings that Appellant had actually violated the zoning regulations, but, instead, was based entirely on a purely immaterial procedural misstep by Appellant (i.e., Appellant's alleged failure to respond to the Notice of Intent to Revoke within 15 days of its service).

18. The revocation of Appellant's Certificate of Occupancy on the ostensible basis of Appellant's alleged failure to respond to the Notice of Intent to Revoke in a timely manner was clearly erroneous for a number of reasons. Firstly, as noted above, there does not to be **any** statutory or regulatory basis for the D.C.R.A.'s unilateral determination that if a party upon whom a Notice of Intent to Revoke is served does not respond to such Notice within 15 days, it loses all of its due process rights to challenge the Notice and "the charges and specifications therein noted are deemed admitted and valid".

19. Secondly, even assuming arguendo that there *is* statutory or regulatory basis for the D.C.R.A.'s determination that a party must respond to a Notice of Intent to Revoke within 15 days of its service, Appellant's failure to respond to the Notice of Intent to Revoke until July 22, 2002 (24 days after the service of the Notice of Intent to Revoke, or nine days "late") was cured and explained by the undersigned's letter of July 22, 2002. As noted above, in this letter, the undersigned: (i) formally requested a hearing before the Office of Adjudication on the Notice of Intent to Revoke; and (ii) explained that Appellant had not requested a formal hearing earlier because Yuen was out of the country at the time the Notice of Intent to Revoke was served, and was not apprised of the Notice of Intent to Revoke until approximately July 15, 2002.

20. Nevertheless, on August 9, 2002, Judge Little unjustifiably denied Appellant's request for a hearing on the Notice of Intent to Revoke. The grounds given for Judge's Little's denial of Appellant's request for a hearing were clearly pretextual. In support of her

denial of Appellant's request for a hearing, Judge Little stated:

> With regard to requesting a hearing on the above-cited matter...the Respondent was given 15 days from the date of service to respond to the Notice of Intent to Revoke. No such response having been provided, the Respondent is "deemed to have admitted the validity of the charges" as indicated in the official notice to the Respondent by the Department of Consumer and Regulatory Affairs. Accordingly, the Office of Adjudication does not have the authority to grant a hearing without the approval of the initiating agency, DCRA. Further, the appropriate procedure would have been for Respondent (through counsel) to submit a timely motion to this administrative tribunal. *Arguendo*, even if the letter submitted were to be treated as a motion, necessarily it would be denied for lack of a *certification* of mailing to the petitioner providing the petitioner with the constitutional right of due process to receive and the opportunity to respond to your request.

(emphasis in original).

21. Each of the reasons proffered by Judge Little for denying Appellant's request for a hearing is utterly baseless. Firstly, Judge Little provided no authority (e.g., a citation to an applicable statute or regulation) for her determination that "the Office of Adjudication does not have the authority to grant a hearing without the approval of the initiating agency, DCRA". In her letter of August 9, Judge Little *implied* that the basis for this determination was because Appellant had failed to respond to the Notice of Intent to Revoke within 15 days of its service, and thus (according to Judge Little), "the Respondent is 'deemed to have admitted the validity of the charges'". Nevertheless, as previously noted, there is **no** statutory or regulatory basis for the D.C.R.A.'s self-serving determination that if a party does not respond to a Notice of Intent to Revoke within 15 days, the charges set forth in the Notice are deemed admitted. Accordingly, there is no basis for Judge Little's conclusion that "the Office of Adjudication does not have the authority to grant a hearing without the approval of...DCRA."

22. Secondly, in her letter of August 9, 2002, Judge Little did not cite to any authority (e.g., an appropriate statute of regulation) in support of her assertion that "the appropriate procedure would have been for Respondent (through counsel) to submit a timely motion

to this administrative tribunal." Indeed, this contention by Judge Little contradicts the plain language of the Notice of Intent to Revoke, which, as noted above, merely stated that "you have the right to challenge this proposed action to revoke your certificate of occupancy...[by] request[ing] a hearing in writing...addressed to E. Savannah Little, Chief Administrative Law Judge." The Notice of Intent to Revoke does not indicate that Appellant needed to file a "Motion" in order to request such a hearing. It is self-evident that the undersigned's letter of July 22, 2002 not only contained a formal request for a hearing ("By virtue of this letter, Kuri wishes to formally request a hearing on this matter"), it **also** clearly explained the reason why Appellant failed to respond to the Notice of Intent to Revoke within the 15-day period unilaterally set by the D.C.R.A. ("Koo Yuen...was out of the country and was not apprised of this matter until approximately July 15, 2002.").

23. Finally, Judge Little's claim that the undersigned's July 22, 2002 request for a hearing was invalid "for lack of a *certification* of mailing to the petitioner" is completely disingenuous. Indeed, the most cursory glance at the undersigned's July 22, 2002 letter indicates that it was "cc'd" to D.C.R.A.'s counsel.

24. Based on the foregoing, it should be obvious that Judge Little's denial of the undersigned's request for a hearing was devoid of any cogent legal or factual basis. Moreover, this denial was manifestly unfair, in that it deprived Appellant of even the most ***basic*** due process rights with regard to the Notice of Intent to Revoke, resulting in an adjudication "by default" against Appellant.

25. The manifest unfairness of Judge Little's denial of Appellant's request for a hearing becomes even more obvious when one examines analogous District of Columbia law regarding default orders and judgments. For example, Rules 12 and 55 of the District of Columbia Superior Court provide that a default order may be entered against a defendant if he fails to respond to a civil complaint within 20 days of its service (thereby

resulting in an admission by the defendant of the facts alleged in the complaint). ***Nevertheless***, Rules 55(a) requires the trial court to vacate a default order if the defendant can demonstrate "good cause" as to why he failed to respond to a complaint within the requisite 20-day time period. The term "good cause" is given a very expansive and liberal interpretation by the District of Columbia Court of Appeals, in light of the "strong judicial policy" in the District of Columbia favoring the resolution of cases on the merits, and, therefore, the Court of Appeals has determined that even a "slight abuse of discretion" by a trial court in failing to vacate a default order is sufficient to justify a reversal of the trial court. Miranda v. Contretas, 754 A.2d 277, 279 (D.C. 2000), Hawkins v. Lynhill Condominium Unit Owners Ass'n., 513 A.2d 242, 244 (D.C. 1986); Dunn v. Profitt, 408 A.2d 991, 993 (D.C. 1979); Mewborn v. U.S. Life Credit Corp., 473 A.2d 389, 391 (D.C. 1984). Having reviewed nearly every reported case in the District of Columbia regarding default orders, the undersigned can represent to this Board that the District of Columbia Court of Appeals has never upheld a default order under facts even ***remotely*** similar to those of the instant case (i.e., where the party seeking to vacate the default indicated its intention to defend against the complaint "on the merits" only nine days after the expiration of the applicable deadline to respond to the complaint, and provided "good cause" as to why it had failed to respond to the complaint within the appropriate deadline).[10]

For each of the foregoing reasons, Judge Little's denial of the undersigned's July 22, 2002 request for a hearing was clearly erroneous and constituted an unjustified deprivation of Appellant's due process rights.

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[10] Indeed, the **only** reported case in the District of Columbia where the District of Columbia Court of Appeals upheld the trial court's refusal to vacate a default order under Rule 55 (c) appears to be Firestone v. Harris, 414 A.2d 526 (D.C. 1980). However, Firestone is not even remotely on point with the case sub judice, as it involves a party's **wilful violation** of an Court Order compelling discovery.

B. Assuming Arguendo That This Board Had The Authority To Hear A De Novo Appeal In This Matter, The Burden Of Proof Is Upon The D.C.R.A. To Demonstrate Circumstances Sufficient To Warrant The Revocation Of Appellant's Certificate Of Occupancy

26. Assuming *arguendo* that this Board had the authority to adjudicate this appeal *de novo*, the D.C.R.A. would nevertheless have the burden of proof to demonstrate that the revocation of Appellant's Certificate of Occupancy was proper (e.g., that Appellant's business activities at the premises are, as the D.C.R.A. has alleged, beyond the permissible scope of those permitted for an "Automobile Service Center").

27. Preliminarily, it should be noted that if this case had been heard by the Office of Adjudication in the first instance, the D.C.R.A. would have had the burden to demonstrate that Appellant was operating outside the scope of its Certificate of Occupancy, since it is well-established that a "certificate of occupancy enjoys a presumption of validity." **See**, for example, Burka v. Aetna Life Ins. Co., 945 F. Supp. 313, 318 (D.D.C. 1996). Therefore, a central issue in this *de novo* appeal is whether the burden of proof has "shifted" to the Appellant.

28. A "de novo" trial is defined by Black's Law Dictionary (7th Edit. West 1999) as "[a] new trial on the entire case, that is, on both questions of fact and issues of law – **as if there had been no trial in the first instance.**" (emphasis added). Courts in both the District of Columbia and Maryland have consistently held that, when a previously-adjudicated case is re-heard before an "appellate" body *de novo*, the burden of proof lies with the same party as in the lower tribunal, and the appellate body is not to accord deferential treatment (e.g., abuse of discretion, manifest error, clearly erroneous, etc.) to the decision of the lower tribunal to which it is typically entitled. **See**, for example, Chase v. State Farm Fire & Cas. Co., 780 A.2d 1123, 1127 (D.C. 2000); Jarrett v. Woodward

Bros., Inc., 751 A.2d 972, 977 (D.C. 2000) (When conducting a *de novo* review of a trial court's decision to grant summary judgment, the appellate court is to "apply the same standard as the trial court" and, thus, "the moving party has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law."). **See also,** Boehm v. Anne Arundel County, Md., 459 A.2d 590, 596-599 (Md. App. 1983) (A landowner sought a variance for a non-conforming use for his landfill. The Anne Arundel County zoning office (the "zoning office") granted the variance. Neighboring landowners appealed the decision of the zoning office to the Anne Arundel Board of Appeals (the "Board") for *de novo* review. The Board reversed the decision of the zoning office and the landowner appealed the Board's decision to the Maryland Court of Special Appeals, contending, among other things, that the Board failed to give "great deference" to the decision of the zoning office. In rejecting the landowner's argument, the Court of Special Appeals concluded that "The hearing before the Board is completely *de novo.* The Board **is in no manner bound** by the decision of the Zoning Office." (emphasis added). The Court of Special Appeals further noted that "a *de novo* hearing is an entirely new hearing at which time all aspects of the case should be heard anew ***as if no decision had been previously rendered.***") (emphasis added); Pollard's Towing, Inc. v. Berman's Body Frame & Mechanical, Inc., 768 A.2d 131, 136-137 (Md. App. 2001) (The Maryland Court of Special Appeals, in affirming the denial of the Baltimore County Board of Appeals (the "Board") of a towing license to the appellant, determined that the Board, by reviewing *de novo* the prior decision of the Department of Permits (the "Department") to grant a towing permit, "was exercising what amount[s] to original jurisdiction" and that "the 'de novo hearing is for all intents and purposes the first hearing of the case'". Since the Board was acting in a *de novo* capacity, the burden of proof remained upon the permit applicant to demonstrate entitlement to a towing permit, notwithstanding the Department's prior

decision in his favor.)[11]

29. Courts in other jurisdictions have similarly held that an administrative "appellate" body, hearing a *de novo* appeal, is to adjudicate the case using the same burden of proof as the lower tribunal. For example, Stahl v. Cooper Tire & Rubber Co., 1995 Ohio App. Lexis 1523 (Third App. Dis. 1995) involved a worker's compensation claim brought by an employee (Stahl) alleging that he had sustained an on-the-job injury. The Toledo Regional Board of Review (the "Board") found that Stahl had sustained a compensable injury. The employer appealed the Board's decision to the Hancock County Court (the "trial court") for *de novo* review, and the trial court thereupon determined that Stahl's injury was not compensable. Stahl appealed the trial court's decision to the Ohio Court of Appeals, contending that the trial court erred by permitting the employer to re-litigate the issue of whether Stahl had sustained an on-the-job injury. Stahl argued that when the employer initially filed its appeal, the only asserted basis for the appeal was whether Stahl's on the job injury *resulted in a herniated disk* - not whether the injury had actually occurred in the course of Stahl's employment. Thus, Stahl argued that the trial court was bound by the Board's prior determination that Stahl had sustained a compensable injury, and that the employer and trial court were foreclosed from re-litigating this issue.

The Ohio Court of Appeals affirmed the trial court's ruling, concluding, inter alia, that upon *de novo* review, the trial court was permitted to re-litigate all issues pertinent to Stahl's worker's compensation claim. In reaching this conclusion, the Court of Appeals determined that whenever a reviewing tribunal adjudicates a *de novo* "appeal", it is obligated to use the same burden of proof as the lower tribunal. Thus, notwithstanding the Board's determination that Stahl had sustained a compensable injury, on *de novo* appeal

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[11] **See** further, in this regard, Hardy v. State of Maryland, 369 A.2d 1043, 1047 (Md. 1977) ("This Court has consistently treated *de novo* appeals as wholly original proceedings, that is, as if no judgment had been rendered in the lower court.")

to the trial court, the burden remained on *Stahl* to demonstrate that his injury occurred in the course of his employment:

> Appellant contends that because appellee never appealed the allowance of his lumbar strain injury...the issue of whether the injury occurred...is *res judicata* because that issue "had been finally adjudicated at the administrative level without appeal"...Appellant states that the only relevant issue before the trial court was whether or not the claimant had a herniated disk...and if such a condition existed, was it caused by the industrial accident...It is a well settled rule of law that an appeal to the trial court from an order of the Industrial Commission of Ohio...is a *de novo* review...Thus, a trial court hears evidence anew on a claimant's right to participate in the fund...in effect, [the claimant] ***must reestablish his worker's compensation claim to the satisfaction of the common pleas court even though the claimant has previously satisfied a similar burden at the administrative level.*** Thus, it is clear that if either the claimant or the employer...appeals an order of the Industrial Commission...the claimant is required to establish...that the injury of which he complains was "received in the course of, and arising out of, the injured employee's employment."..Thus each and every element of appellant's right to participate in the fund must have been demonstrated in the trial court.

Id., at pages *3-6 (emphasis added).

30. A similar conclusion was reached by the Supreme Court of Arizona in Campbell v. White, 479 P.2d 685 (Az. 1971), which involved the suspension by the Arizona Superintendent of Motor Vehicles (the "superintendent") of a driver's license held by Frank White ("White"), on the grounds that White had failed to submit to a chemical breathalyzer test. The Maricopa County Superior Court (the "trial court") reversed the suspension of White's license, and the superintendent appealed the case to the Arizona Supreme Court.

The Supreme Court reversed the decision of the trial court and remanded the case to the trial court for a trial *de novo*. In the course of remanding the case, the Supreme Court determined that in a *de novo* appeal, the burden was identical to the burden before the lower tribunal; i.e., the burden remained on the state in all cases:

> [I]t is well established in this jurisdiction that in a trial *de novo* the burden remains the same whether it is in relation to an appeal from the justice court or an appeal from an administrative agency...The burden of proof at the trial *de novo* is upon the state.

Id., at 684.

31. Finally, Harrison Clinic Hospital v. Tex. State Bd. of Health, 400 S.W.2d. 480 (Tex. App. 1966) involved the cancellation by the Texas State Board of Health (the "Board") of a hospital license held by Harrison Clinic Hospital ("Harrison"). Harrison appealed the cancellation of its license to the District Court of Tarrant County, Texas (the "trial court"), requesting a *de novo* hearing. The trial court denied Harrison's request, further determined that the burden of proof was on Harrison to demonstrate that the Board's decision was not based upon substantial evidence and affirmed the Board's decision. Thereupon, Harrison appealed the trial court's decision to the Texas Court of Appeals.

The principal issue on appeal was whether the trial court had applied the proper standard of proof in adjudicating Harrison's appeal. The Texas Court of Appeals concluded that the trial court had erred by placing the burden of proof on Harrison to demonstrate that the Board's decision was not based upon substantial evidence, and remanded the case to the trial court with the instruction to hear the case *de novo* with the burden ***upon the Board*** to demonstrate by a preponderance of the evidence that its revocation of Harrison's license was proper:

> One basic question is presented by this appeal and that is whether the case should have been tried *de novo* or under the substantial evidence rule. If it should have been tried *de novo* then admittedly appellant would be entitled to trial by jury and the burden of proof would be placed upon the appellees.

Id., at page 840.

Later in its decision, the Texas Court of Appeals reiterated:

> [I]n a de novo appeal the court tries the issues anew. ***The burden of proof in sustaining the order is upon the administrative agency.*** Whether by the court or a jury, fact questions are resolved by a preponderance of the evidence.

Id., at page 842. (emphasis added).

32. Based upon each of the foregoing authorities, it is evident that even if this Board does have the authority to adjudicate this case *de novo*, the burden of proof ***remains*** on

the D.C.R.A. to demonstrate that Appellant has operated outside the scope of its Certificate of Occupancy.[12] As demonstrated below, the D.C.R.A. is unable to meet this burden as a matter of law.

2. The D.C.R.A. Has Failed To Meet Its Burden To Demonstrate Circumstances Warranting The Revocation Of Appellant's Certificate Of Occupancy

a. The D.C.R.A. Has Not Demonstrated That Appellant Has Engaged In Activities At The Premises Which Are Beyond The Scope Of Those Permitted At An "Automobile Service Center"

33. As noted above, the D.C.R.A revoked Appellant's Certificate of Occupancy on the purported basis that Appellant supposedly engaged in activities at the premises which were beyond the scope of Appellant's Certificate of Occupancy for an "Automobile Service Center".[13] The June 27, 2002 Notice of Intent to Revoke states:

> At the time of the Certificate of Occupancy's issuance, you informed the Department that the corporation's intent was to sell small automotive parts and make installations of same. The Department created the category of 'Automobile Service Center' to facilitate your efforts. This facilitation did not include or permit any major automotive engine, body work or other automotive garage functions. ***By making major repairs and doing engine work you have operated outside the scope of this Certificate of Occupancy.***[14]

34. In light of the foregoing, it is obviously conceded that Appellant may operate an Automobile Service Center at the premises. Therefore, in order to meet its burden in this

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[12] The general principle, that it is the D.C.R.A.'s burden on a *de novo* appeal to overcome the presumption of validity which is accorded to a certificate of occupancy, is particularly pertinent in the instant case, where Appellant was unjustifiably and capriciously denied a hearing before the Office of Adjudication on the D.C.R.A.'s Notice of Intent to Revoke.

[13] Title 12A-118.4.1 of the regulations authorizes the D.C.R.A. to revoke a certificate of occupancy "if the actual occupancy does not conform with that permitted."

[14] Notice of Intent to Revoke, at page 1. (emphasis added). **See also**, January 28, 2003 Hearing Transcript, at page 139 L. 25 to page 140 L. 21, wherein the D.C.R.A.'s counsel reiterated that the basis upon which the D.C.R.A. revoked Appellant's Certificate of Occupancy was for purportedly performing business activities at the premises which were outside the scope of Appellant's Certificate of Occupancy for an "Automobile Service Center".

de novo appeal, the D.C.R.A. must, *at a bare minimum*, establish: (i) the nature and extent of activities which are permitted at an "Automobile Service Center"; and (ii) that the activities conducted by the Appellant at the premises were beyond the scope of those permitted at an "Automobile Service Center". The D.C.R.A. has failed on each of these counts.[15]

35. At the April 8, 2003 hearing, the D.C.R.A. proffered the testimony of two D.C.R.A. employees, Vacylla Williams and Anthony Hooks, "in support" of its contention that Appellant is acting "beyond the scope" of its Certificate of Occupancy.[16] Startlingly, each of these individuals acknowledged that they have no knowledge of, or expertise in, the interpretation, application and/or enforcement of the District of Columbia zoning statutes or regulations.[17] Indeed, Mr. Hooks ***explicitly*** testified at the April 8, 2003 hearing that he does not investigate or make any determinations regarding zoning compliance and that "as far as the zoning issues, there's nothing I can do. **I don't have anything to say about zoning.**"[18]

36. Furthermore, although at the April 8 hearing, counsel for the D.C.R.A. indicated

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[15] Chairman Griffis of the Board acknowledged this fact at the April 8 hearing, stating: "We need to understand what the scope is before we understand what's outside the scope." **See**, transcript of April 8, 2003 Hearing, at page 341 LL. 11-19.

[16] Ms. Williams testified that she is an Investigator at the D.C.R.A.'s Weights and Measures Division, whereas Mr. Hooks testified that he is an Investigator at the D.C.R.A.'s Compliance and Investigation Division. **See**, transcript of April 8, 2003 Hearing, at page 279 LL. 9-12, page 298 LL. 15-18.

[17] Ms. Williams testified that her office investigates complaints regarding licensed and unlicensed business establishments in the District of Columbia and confirmed that it was not her responsibility to review certificates of occupancy. **See**, transcript of April 8, 2003 Hearing, at page 279 LL. 15-18, page 287 LL. 12-17. Mr. Hooks similarly testified that his job principally involves investigating complaints of unlicensed auto repair establishments and determining whether business establishments are in compliance with ***licensing*** (i.e., not zoning) laws and regulations. **Id.**, at page 298 LL. 19-23, page 299 LL. 11-12, page 319 LL. 10-14, page 330 LL. 7-18.

[18] **Id.**, at page 352 L. 24 to page 353 L. 10.

that he would be offering the testimony of Tore Bello, the former Acting Zoning Administrator at the D.C.R.A who issued Appellant's Certificate of Occupancy for an "Automobile Service Center" (and thus, the individual who should be qualified to testify as to the nature and extent of activities which are permitted at an "Automobile Service Center"), the D.C.R.A., without giving any reason, never called Mr. Bello as a witness.

37. Given their complete unfamiliarity with the District of Columbia zoning statutes and regulations, it is not surprising that neither Ms. Williams nor Mr. Hooks could adequately testify as to the activities that are permitted at an "Automobile Service Center", **let alone** whether the activities undertaken by Appellant at the premises exceeded the scope of those activities permitted at an "Automobile Service Center". Ms. Williams did not provide any testimony whatsoever on this issue. Moreover, as demonstrated below, Mr. Hooks' testimony on this issue is completely muddled and internally inconsistent.

38. When first asked whether he had any understanding as to which types of activities are permitted at an Automobile Service Center, Hooks testified that a "service center...is what Ms. Mitten stated...changing light bulbs, windshield wipers and things like that."[19] Nevertheless, Hooks (despite repeated questioning by counsel on this issue) failed to identify any independent legal or factual basis for this assertion (i.e., a basis apart from "what Ms. Mitten stated"), other than asserting that his conclusion was derived "just from me doing this every day.[20]

39. When asked by Appellant's counsel to clarify whether any *repairs* are permitted at an Automobile Service Center, Hooks first testified that "from what I was told and what I read no ***major*** auto repairs are to be done underneath [sic.] an Automobile Service

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[19] **See**, transcript of April 8, 2003 Hearing, at page 333 LL. 10-13.

[20] **Id.**, at page 345 LL. 15-16..

Center".[21] Yet Hooks could provide no statutory and/or regulatory basis for this contention (e.g., "what he read"), and otherwise failed to identify any method whatsoever of distinguishing between "major" auto repairs and "minor" auto repairs (in order to thereby define the scope of repairs permitted at an Automobile Service Center).

40. When asked once again to clarify which types of "minor repairs" are permitted at an Automobile Service Center, Hooks proffered the entirely circular argument that "minor repairs" are those repairs which are permitted at an Automobile Service Center, whereas "major repairs" are those repairs which are permitted at a repair garage.[22] Nonetheless, Hooks remained unable to distinguish, with any degree of specificity, between "major" and "minor" repairs.

41. When next questioned by the Intervenor's counsel as to whether the items identified in Appellant's repair receipts[23] ("test cooling system for overheating, top off fluids, summer checks, check odometer, oil filter lube, check failed D.C. inspection, check transmission service, change transmission kit and fluids, oil filter, top off fluids, inspection, check oil lights, summer checkup special, check replacing timing belt timing belt tensioner, check straight and left headlight assembly and oil filter lube and inspection") were "major" or "minor" repairs, Hooks testified, in completely self-serving and unsubstantiated fashion, that these items constituted "major repairs".[24] Not only did Hooks fail to provide **any** legal or factual support for this conclusory testimony, Hooks' claim that the items identified in Appellant's June 5 repair receipts constituted "major repairs" completely defies common sense, and thereby undermines the veracity of Hooks' testimony in its entirety. Indeed, it

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[21] **See**, transcript of April 8, 2003 Hearing, at page 340 LL. 2-4. (emphasis added).

[22] **Id.**, at page 345 LL. 2-7.

[23] The D.C.R.A. admitted into evidence Appellant's repair receipts from June 5, 2002.

[24] Transcript of April 8 Hearing, at page 351 LL. 5-18

is obvious that most (if not all) of the items reflected on Appellant's receipts relate to the ***inspection*** of various automotive components (e.g., ***test*** cooling system for overheating, ***check*** odometer, ***check*** transmission service, ***check*** oil lights, ***check*** replacing timing belt timing belt tensioner, ***check*** straight and left headlight assembly), and **not** the ***repair***, **either major or minor**, of such components. It is difficult to discern how Hooks could claim "with a straight face" that the routine inspection of various automotive components constitutes "major repairs". It is obvious that, in his zeal to assist the D.C.R.A. in revoking Appellant's Certificate of Occupancy, Hooks (who, as noted above, has no knowledge of, or expertise in, zoning matters) would characterize any activity undertaken by Appellant at the premises as a "major repair", whether or not Hooks had any legal or factual rationale for this conclusion.

42. Finally, to confuse matters even further, at the conclusion of his testimony regarding "Automobile Service Centers", Hooks testified that an Automobile Service Center is required to hold an automobile repair license.[25] This assertion seems to undermine Hooks' earlier testimony that only ***minor*** repairs are permitted at an Automobile Service Center and begs the rhetorical question: If, as Hooks claims, only ***minor*** repairs are permitted at an Automobile Service Center, why would every Automobile Service Center require an automobile repair license (a license which authorizes its holder to engage in **all** types of repairs, both "major" and "minor") ?

43. Given Mr. Hooks' muddled, self-serving, unsubstantiated and inconsistent testimony, it is clear that, with all due respect to Mr. Hooks, he simply had no idea whatsoever as to which types of repair activities are permitted and prohibited at an "Automobile Service Center". Accordingly, Hooks' testimony fails to establish that

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[25] **Id.**, at page 358 LL. 7-12.

Appellant has engaged in activities at the premises which are beyond the scope of Appellant's Certificate Of Occupancy.

b. The D.C.R.A. Has Not Demonstrated That Appellant Is Operating A Repair Garage At The Premises

44. Given the D.C.R.A.'s obvious inability to establish that Appellant has engaged in activities at the premises which were beyond the scope of its Certificate of Occupancy, the D.C.R.A may attempt to argue, in the alternative, that it is entitled to revoke Appellant's Certificate of Occupancy on the alleged grounds that Appellant is unlawfully operating a "repair garage" at the premises.[26] As will be discussed infra, the D.C.R.A. failed to adduce material evidence at the April 8 and May 13 hearings sufficient to demonstrate that the premises constitutes a "repair garage".

45. The term "repair garage" is defined in Title 11-199.1 of the 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 and repair.

46. At the April 8 and May 13 hearings, the D.C.R.A. failed to adduce any testimony whatsoever interpreting the scope of Title 11-199.1. As noted above, although the D.C.R.A. stated at the April 8 hearing that it intended to call Mr. Bello, the former Acting Zoning Administrator at the D.C.R.A (and thus an individual who one could surmise would be qualified to interpret the scope of Title 11-199.1), the D.C.R.A. never called Mr. Bello as a witness in this case. Instead, the D.C.R.A. sought to rely upon the testimony of Ms. Williams and Mr. Hooks (individuals who have no knowledge of, or familiarity with, the zoning laws and regulations) in order to ostensibly demonstrate that Appellant is operating a "repair garage" at the premises. The D.C.R.A. fell woefully short of making such a

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[26] Under Title 11-743.1 of the regulations, a "repair garage" is only permitted in a C-3 zone "if approved by the Board of Zoning Adjustment". Appellant concedes that it has not sought the permission of this Board to operate a repair garage at the premises.

showing.

47. As noted supra, the Notice of Intent to Revoke recounts a litany of "repair" activities which were supposedly observed by numerous D.C.R.A. officials during several visits to the premises:

> ***SPECIFICATION A***: On or about April 27, 1999, DCRA Zoning Inspector Yvonne Rockett conducted an inspection of the Respondent's business and personally observed Respondent's employees repairing automotive head lights and engaging in under the hood automotive mechanical repairs.
>
> ***SPECIFICATION B***: On or about January 3, 2002, DCRA Investigator Anthony Hooks conducted an investigation of the Respondent's business and personally observed Respondent's employees performing automotive engine repairs.
>
> ***SPECIFICATION C***: On or about May 12, 2002, DCRA Investigator Anthony Hooks conducted an investigation of the Respondent's business and personally observed Respondent's employees performing automotive engine repairs.
>
> ***SPECIFICATION D***: On or about June 5, 2002, DCRA Investigators Anthony Hooks and Vacylla Williams conducted an investigation of the Respondent's business and personally observed that the premises were open for business and that there were eight vehicles in various states of auto repair. The Investigators also observed the Respondent's employees accepting automotive repair receipts and vehicles for repair.[27]

Although these "personal observations" may *seem,* at first blush, to be persuasive, at the April 8 and May 13 hearings, the D.C.R.A. was unable to provide any credible evidence to corroborate these "personal observations".

48. At the April 8 hearing, Ms. Williams testified that on June 5, 2002, she accompanied Mr. Hooks to the premises and observed "auto repair activity".[28] However, when further questioned regarding the *nature* of the "auto repair activity" that she supposedly observed, Ms. Williams could only state that "We saw several cars up on lifts, some of which fluids were [sic.] being changed", and later testified that this was her only

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[27] **See**, Notice of Intent to Revoke Certificate of Occupancy, at page 2.

[28] **See**, April 8 hearing transcript, at page 279 L. 25 to page 280 L. 6.

observation.[29] Notably, Ms. Williams did **not** testify that she observed "eight vehicles in various states of auto repair" (as alleged in the Notice of Intent to Revoke) **nor** did she testify that she observed **any** of the "repair garage" activities identified in Title 11-199.1 (i.e., "body and fender repair, painting, rebuilding, reconditioning, upholstering, equipping, etc.").[30] For each of these reasons, Ms. Williams' testimony cannot possibly support the contention that Appellant is operating a "repair garage" at the premises.

49. Mr. Hooks' testimony at the April 8 hearing likewise fails to support the contention that Appellant is operating a repair garage at the premises. Mr. Hooks began by testifying regarding observations he made at the premises in 1999 (i.e., over four years ago). Even assuming the accuracy and veracity of these observations, the D.C.R.A. cannot possibly demonstrate how these observations made over four years ago are indicative of the activities ***currently*** occurring at the premises.

50. Moreover, it should be noted that the Notice of Intent to Revoke does not allude to any visit made by Hooks to the premises in 1999. Although "Specification A" of the Notice of Intent to Revoke does reference a visit made "Zoning Inspector Yvonne Rockett" to the premises "On or about April 27, 1999", there is no indication in "Specification A" that Mr. Hooks accompanied Ms. Rockett on this visit to the premises.[31] Conversely, Hooks' testimony regarding the observations he supposedly made in 1999 did not allude to the "repair garage activities" recounted in "Specification A" (i.e., "Respondent's employees repairing automotive head lights and engaging in under the hood automotive mechanical repairs"). For each of these reasons, Hooks' testimony regarding his observations at the

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[29] **See**, April 8 hearing transcript, at page 280 LL. 7-10, page 294 LL. 10-18.

[30] Indeed, Ms. Williams testified at the April 8 hearing that she did not know how the regulations define an "auto repair business". **See**, April 8 hearing transcript, at page 292 LL. 16-19.

[31] Notably, Ms. Rockett was not called to testify at either the April 8 or the May 13 hearing.

premises in 1999 has little or no probative value.

51. Next, Mr. Hooks testified that in January, 2002, he visited the premises and supposedly observed "a numerous amount of vehicles on lifts again and having auto repairs conducted on them".[32] However, throughout the course of his testimony regarding his visit of January, 2002, Hooks completely failed to identify the *nature* of the "auto repairs" which were supposedly taking place at the premises during this visit (i.e., whether the repairs were "major" or "minor").[33] Moreover, Mr. Hooks did **not** corroborate the allegation in "Specification B" of the Notice of Intent to Revoke that on January 3, 2002 he "personally observed Respondent's employees performing automotive ***engine*** repairs", a glaring failure which undermines both Hooks' testimony and the allegations in "Specification B".

52. Next, Hooks testified regarding observations he supposedly made during a visit to the premises in May, 2002.[34] However, Mr. Hooks expressly acknowledged that during his May, 2002 inspection of the premises, he did **not** observe **any** of the "repair garage" activities identified in D.C.M.R. Title 11-199.1 (fender, body repair, upholstery, etc.).[35] Furthermore, Hooks was once again unable to corroborate the allegation in "Specification C" of the Notice of Intent to Revoke that, on May 12, 2002, he "personally observed Respondent's employees performing automotive ***engine*** repairs", thereby further

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[32] **See**, April 8 hearing transcript, at page 301 LL. 4-8.

[33] As previously discussed, Hooks himself admitted during his testimony on April 8, 2003 that under its Certificate of Occupancy for an "Automobile Service Center", Appellant had the right to conduct "minor" repairs at the premises.

[34] Among other things, Hooks testified that during this visit, he observed brakes being changed and "maybe changing a clamp on an exhaust system." **See**, April 8 Hearing Transcript, at page 304 LL. 3-15. However, Hooks was nonetheless unable to testify that changing brakes or "changing a clamp on an exhaust system" are "repair garage" activities, as defined under D.C.M.R. Title 11-199.1.

[35] **Id**., at page 328 LL. 6-13.

undermining both the entirety of Hooks' testimony, and the allegations in "Specification C".

53. Finally, although "Specification D" of the Notice of Intent to Revoke states that, on June 5, 2002, Mr. Hooks visited the premises and "personally observed...eight vehicles in various states of auto repair",[36] Mr. Hooks, during his testimony on April 8, 2003, did not even ***allude*** to any visit he made to the premises on June 5, 2002, which casts additional doubt on the accuracy and veracity of the Notice of Intent to Revoke.

54. As established above, Mr. Hooks' testimony with respect to his supposed "observations" in 1999, and in January and May, 2002, is inherently unreliable and is not probative to demonstrate that Appellant is operating a "repair garage" at the premises. As noted supra, Mr. Hooks was unable to testify that he observed **any** of the "repair garage" activities identified in Title 11-199.1 (i.e., "body and fender repair, painting, rebuilding, reconditioning, upholstering, equipping, etc.") during his numerous visits to the premises. Even more distressing is the fact that Mr. Hooks was unable to testify regarding any of the "engine repairs" identified in "Specification B" and "Specification C" of the Notice of Intent to Revoke (i.e., the very same "engine repairs" which Mr. Hooks supposedly "personally observed" and which formed the basis of the D.C.R.A.'s endeavor to revoke Appellant's Certificate of Occupancy). The only conclusion that can be drawn from the foregoing is that Mr. Hooks' testimony at the April 8 hearing is inaccurate and unreliable and/or that the Notice of Intent to Revoke is replete with knowingly false misrepresentations of fact. In any event, it is clear that the D.C.R.A. has not established that Appellant is operating a repair garage at the premises.

C. The D.C.R.A. Is Equitably Precluded From Seeking To Revoke Appellant's Certificate Of Occupancy On The Grounds Of Laches

55. Finally, even if the Appellant is deemed to be operating a "repair garage" at the

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[36] Again, Specification D does not state whether the repairs were "minor" (and, according to Hooks, permitted at an Automobile Service Center) or major.

premises, the D.C.R.A. should nonetheless be equitably barred from revoking Appellant's Certificate of Occupancy on the grounds of laches.

56. As noted in American Univ. Park Citizens Ass'n v. Burka, 400 A.2d 737, 740 (D.C. 1990):

> Laches is the principle that "equity will not aid a plaintiff whose unexcused delay...would be prejudicial to the defendant". It was developed to promote diligence and accordingly to prevent the enforcement of stale claims.

(citations omitted).

57. A successful defense of laches requires the party who asserts the defense to demonstrate: (i) an unreasonable and unexplained delay by one party; and (ii) prejudice to the other party resulting from the delay. Interdonato v. Interdonato, 521 A.2d 1124, 1137 (D.C. 1987); Simpson v. D.C. Office of Human Rights, 597 A.2d 392, 404 (D.C. 1991); Woodley Park Community Assoc. v. D.C. Bd. of Zoning Adjustment, 490 A.2d 628, 639 (D.C. 1985) (a one month delay in filing an administrative appeal is not sufficiently significant to give rise to a laches defense).

58. In cases remarkably similar to the case sub judice, the doctrine of laches has been applied to bar claims by governmental agencies for alleged violations of zoning regulations. For example, D.C. v. Cahill, 54 F.2d 453 (D.C. 1931) involved a claim for injunctive relief brought by a landowner (Cahill) against the District of Columbia government (the "government"), seeking to enjoin the government from revoking a certificate of occupancy issued to Cahill for the operation of a garage. The premises at issue had been openly and publicly used as a garage for fifteen years prior to Cahill's purchase of the premises (since 1911), even though, during this time period, the premises had never obtained the requisite certificate of occupancy for a garage. In 1926, Cahill purchased the property for the purpose of improving the building and renting the first floor as a garage. Cahill applied for and obtained a certificate of occupancy from the

government to use the premises as a garage, and, thereupon, made improvements to the property and leased the premises as a garage.

Approximately six months thereafter, the government attempted to revoke Cahill's certificate of occupancy for the premises, on the purported ground that it had been issued under a "mistake of fact". Thereupon, Cahill brought his claim for injunctive relief against the government. The trial court concluded that the government was precluded from seeking to revoke Cahill's certificate of occupancy on the grounds of laches, and the government appealed.

On appeal, the District of Columbia Court of Appeals affirmed the trial court's ruling:

> When appellee in good faith presented his application to the inspector of buildings, it became the duty of that officer to ascertain whether the facts justified the granting thereof...The inspector made an investigation and decided that the application should be granted; he accordingly issued the permit and certificates in due form to appellee and lessees...Reposing confidence in these official acts of the inspector of buildings, the appellee was induced to expend a large sum of money upon the building, and to enter into the several 5-year leases of the premises for garage purposes. Neither appellee nor the lessees would have entered into such leases except for the official permits and certificates issued as aforesaid.

Id., at page 454.

59. Likewise, in Wieck v. D.C. Bd. of Zoning Adjustment, 383 A.2d 7 (D.C. 1977), the predecessor in interest (De Rochefort) of the plaintiff (Wieck) obtained building permits for the erection of a storage shed behind her residence and for making various plumbing and electrical repairs to her residence. De Rochefort stated on her application for the plumbing and electrical repair permits that the repair work was being done to a recreation room at her home, when, in fact, the repair work actually took place at the storage shed, which, unbeknownst to the District of Columbia government, was being used for residential purposes (and did not comply with applicable zoning regulations for residential structures). Upon being apprised of De Rochefort's misrepresentation, the D.C.R.A. sent De Rochefort a letter stating that the building permits had been issued erroneously and ordered De

Rochefort to remove all plumbing and electrical fixtures from the shed and to discontinue the shed's use for human habitation. A similar letter was sent to De Rochefort three years later, but no enforcement action was ever taken against De Rochefort.

Three years after the second letter was sent to De Rochefort, Wieck purchased the premises. Six months thereafter, the D.C.R.A. sent Wieck an order directing Wieck to dismantle the shed. Wieck appealed the D.C.R.A.'s order to this Board, which rejected Wieck's claim that the D.C.R.A. was precluded from enforcing the zoning regulations (which otherwise would have prevented the shed's use for human habitation) on the grounds of laches. Thereupon, Wieck appealed the decision by the Board to the District of Columbia Court of Appeals.

The District of Columbia Court of Appeals reversed the Board, determining that the District was precluded from enforcing its zoning regulations on the grounds of laches:

> Laches is...the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches...It [laches] is often claimed "where the inactivity of the officials charged with the enforcement of the ordinance has misled the owner into acts in violation of the ordinance...or has misled persons into purchasing the property in ignorance of the illegality of the use of the structure"...Where a party can prove inexcusable delay which has resulted in substantial prejudice...laches may be found...Here, the first enforcement order was sent to Mrs. DeRochfort in July of 1968, the second order was sent to her in February of 1971, and the third order was sent to [Wieck] in December of 1974 – amounting to a delay of almost six and one-half years. The record does not disclose any sufficient reasons for this delay. If, at any time prior to May of 1974, when [Wieck] bought the...property, the zoning officials had followed up on the two prior enforcement orders, the petitioner might not have purchased the property, or if he had, he would not have done so in reliance on the presence of a valuable rental dwelling in the backyard...we believe [Wieck's] showing of injury – from the loss of an income-producing property, the value of which was indubitably reflected in his purchase price – to be sufficient to find substantial prejudice to him as a result of the zoning officials' inexcusable delay...Here the delay involved was six and one-half years and it was inexcusable since neither of the prior enforcement orders were actually pursued, let alone diligently pursued, and for no sufficiently demonstrated reasons. The substantial prejudice which would be imposed on [Wieck]...if enforcement were now upheld, involves the partial dismantling of a building which provides him with rental income, and for which he doubtless made a sizable capital investment...Any conceivable harm to the general public interest from not enforcing the zoning regulation in this case is not sufficient to outweigh the inequity of substantial prejudice to

> petitioner...we reverse the decision of the BZA...and hold that the District is barred from enforcing the applicable zoning regulation against petitioner due to laches.

Id., at pages 11-13. (internal quotations omitted).

60. In Goto, supra, the plaintiff, a pottery maker (Gotto), desired to build a kiln in the rear yard of her ceramics workshop. In furtherance of this endeavor, Gotto consulted with a zoning official who advised her that the construction would not require a permit if the kiln were set back from the walls of the workshop and used less gas than a typical residence. Shortly after Gotto began constructing the kiln, a neighborhood association complained about the kiln to a zoning administrator, who once again determined that the kiln did not require a building permit. Gotto completed the kiln and began operating it, and the neighborhood association ultimately appealed the zoning administrator's decision to this Board. On appeal to this Board, Gotto claimed that the neighborhood association's appeal was precluded on the grounds of laches. This Board rejected Gotto's laches argument, and Gotto appealed this Board's decision to the District of Columbia Court of Appeals, which reversed this Board's decision, concluding that the neighborhood association's appeal was, indeed, precluded on the grounds on laches:

> Laches will bar the claim of [the neighborhood association] if they delayed unreasonably in bringing their appeal to the Board, to Goto's prejudice...The critical period was from June 1975 to March 1976. [The neighborhood association was] aware of [the zoning administrator's] ruling by June 1975. The record reveals no reason why they waited until November 1975 to discuss that ruling with [the zoning administrator]. That unexcused delay of five months was compounded by an additional two months during which they requested...and received a written decision...Finally, the delay of still another two months between that letter decision and the filing of the appeal on March 4, 1976, adds to the unreasonableness of the timing of the [neighborhood association's] action. Accordingly...we cannot agree with the Board's conclusion that "the appellants have diligently objected to the kiln"...The second element of the laches equation is prejudice to Goto resulting from the delay...Goto spent approximately $2000...to build the kiln...Essentially...the neighbors stood by and watched Goto spend time and money before pressing their objections before the BZA.

Id., at pages 926-26. (internal quotations omitted).

61. Finally, American University Park Citizens Assoc. v. Burka, 400 A.2d 737 (D.C.

1978) involved a civil claim brought by a neighborhood association (the "association") against a builder (Burka), seeking to enjoin the issuance of a building permit to Burka, who had sought to construct a building for retail offices and stores. In support of their request for injunctive relief, the association argued that the proposed structure was to be built by Burka in part upon an alley which had been unlawfully closed by Burka three years earlier. The trial court held in favor of Burka on summary judgment, concluding that the claim of the association, premised upon the illegality of the alley closing, was barred on the grounds of laches.

The association appealed, and the District of Columbia Court of Appeals affirmed the trial court's ruling, determining that the association's claim was precluded on the grounds of laches:

> Laches will not provide a valid defense...unless two tests are met: the defendant has been prejudiced by the delay and that delay was unreasonable...As to prejudice, the Burkas assert that they have undertaken substantial legal and financial commitments since the alley closing in May 1973...We agree that...the Burkas would be substantially prejudiced if appellants were permitted to challenge the 1973 alley closing by a lawsuit three years later...the Burkas must also show that appellants' delay was undue...Appellants do not deny that they have been aware of the alleged irregularities in the alley closing since 1973...We conclude...that the delay between the 1973 alley closing and appellants' 1976 lawsuit severely prejudiced the Burkas, and that the delay was inexcusable.

Id., at pages 740-741, 742, 745.

62. When the foregoing authorities are viewed in light of the facts of the instant case, it is evident that even if Appellant is found to be operating a "repair garage" at the premises, the D.C.R.A. would nonetheless be equitably barred from revoking Appellant's Certificate of Occupancy on the grounds of laches. Appellant has never disputed that it engages in certain repair activities at the premises. However, as demonstrated below, the premises have been used for repair activities for **at least** the past 63 years, since 1940. If, as the D.C.R.A contends, these repair activities are contrary to the zoning regulations, the D.C.R.A. has "slept on its rights" by not even ***attempting*** to enforce these regulations

during the **50 year** period between 1940 and 1990 (the year the D.C.R.A. first began taking "enforcement action" against Mr. Yuen for allegedly violating the zoning regulations). Additionally, as further established below, the D.C.R.A. cannot reasonably claim that it was unaware of the nature of the repair activities taking place at the premises from 1940 to 1990. Having failed to take any action to curtail the repair activities at the premises for a period of 50 years, the D.C.R.A. cannot "selectively" seek to enforce the zoning regulations against Appellant.

63. In order to understand the relevancy of the laches doctrine to this case, it is important to review the history of the premises, in particular, the ***continual*** use of the premises as a repair garage from 1940 until 1990. On October 9, 1940, this Board issued an Order granting The Flood Motor Company a variance from the zoning regulations "to permit the extension of an automobile ***repair shop*** and automobile sales and service agency...at 4221 Connecticut Avenue N.W.."[37] The record with respect to the premises next indicates that in 1965, Flood Pontiac Company obtained a Certificate of Occupancy for an "Auto Sales ***and Repair Garage***" for the first floor and the basement of the premises.[38] Next, on May 4, 1983, Connecticut Avenue Datsun, Inc. obtained a Certificate of Occupancy to operate an "automobile sales and service" facility on the first floor and three subterranean levels at the premises.[39] Notwithstanding that the designation on the May 4, 1983 Certificate of Occupancy ("Automobile Sales and Service") differs from the designation on the October 13, 1965 Certificate of Occupancy ("Auto Sales and Repair Garage"), it is important to note that, in approving the 1983 Certificate of Occupancy, the

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[37] See, hearing transcript of October 9, 1940 (ANC's Exhibit 3), at page 29. (emphasis added). That the variance obtained by The Flood Motor Company permitted the *extension* of a repair shop suggests that the premises had been used as a repair garage even *prior* to 1940.

[38] **See**, October 13, 1965 Certificate of Occupancy, previously admitted by Appellant.

[39] **See**, May 4, 1983 Certificate of Occupancy, previously admitted by Appellant.

zoning examiner indicated that the use of the premises would **not** change (i.e., that the premises would continue to be used as a repair garage).[40] Thereafter, on October 28, 1986, a Certificate of Occupancy was issued to Connecticut Avenue Nissan, Inc. for a "Motor Vehicle Dealer" facility on the first floor and three subterranean levels at the premises.[41] Once again, although the designation on this Certificate of Occupancy reflects a change from "Automobile Sales and Service" to "Motor Vehicle Dealer", the zoning examiner, in approving the application for this Certificate of Occupancy, indicated that the use of the premises would **not** change (i.e., that the premises would continue to be used as a repair garage).[42] Finally, on March 22, 1989, Mr. Yuen obtained a Certificate of Occupancy for the premises permitting "Auto Sales and Sales of Accessories Including Installation".[43] Yet again, the zoning examiner approving the application for this Certificate of Occupancy indicated that the use of the premises would not change, thereby reflecting an acknowledgment by the D.C.R.A. that Mr. Yuen would *continue* to engage in the repair activities undertaken by prior owners of the premises.[44]

64. Thus, the evidence of record **conclusively** indicates that at all times between 1940 (at the very latest) and 1989 (when Mr. Yuen acquired the premises), the D.C.R.A. was aware of, **and approved**, the repair activities that were **continually** taking place at the premises. If the D.C.R.A.'s revocation of Appellant's Certificate of Occupancy were

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[40] **See**, application for May 4, 1983 Certificate of Occupancy, previously admitted by Appellant.

[41] **See**, October 28, 1986 Certificate of Occupancy, previously admitted by Appellant.

[42] **See**, application for October 28, 1986 Certificate of Occupancy, previously admitted by Appellant.

[43] **See**, March 22, 1989 Certificate of Occupancy, previously admitted by Appellant.

[44] **See**, application for March 22, 1989 Certificate of Occupancy, previously admitted by Appellant.

allowed to stand, Appellant would be significantly and irrevocably prejudiced, since Appellant: (i) has invested a substantial sum of money into the premises; (ii) has entered into a long term lease with Yuen to rent the premises; (iii) has spent years developing client good-will and creating a profitable asset; and (iv) has foregone other business opportunities in reliance on its ability to operate its business at the premises, consistent with the activities of prior business-owners at the premises during the previous 60 years.

65. Conversely, the D.C.R.A. has not proffered a ***scintilla*** of evidence to show that the repair activities undertaken by Mr. Yuen and Appellant at the premises are more extensive than those previously undertaken by The Flood Motor Company, Flood Pontiac, Connecticut Avenue Datsun and/or Connecticut Avenue Nissan. Nor has the D.C.R.A. established that the zoning regulations pertaining to "repair garages" in C-3-A zones have become more restrictive between 1940 and the present. Therefore, if, as the D.C.R.A. alleges, Appellant's use of the premises violates the zoning regulations, it follows, ipso facto, that ***all of the prior*** owners/operators of the premises have likewise violated the zoning regulations dating back to 1940. Yet, over the course of fifty years, the D.C.R.A. took no enforcement action against these prior owners.

66. Based on the foregoing, it is evident that the instant case is squarely "on point" with Cahill, Burka, Gotto, and Weick, supra. In each of the aforementioned cases, the party seeking to enforce the zoning regulations delayed, without just cause, for various lengths of time (ranging from nine months to eleven years) before "selectively" attempting to enforce the zoning regulations against a particular land-owner. During these periods of delay, the landowners in these cases made capital investments into their properties, entered into long-term leases and otherwise made valuable improvements to these properties. The case sub judice presents an even more striking instance of laches, since the District of Columbia delayed for **at least fifty years** (between 1940 and 1990) before

suddenly deciding to curtail the supposed "repair garage" activities at the premises once Mr. Yuen acquired the premises. The D.C.R.A. has presented no explanation whatsoever for this fifty year delay. Additionally, whereas in Cahill, Burka, Gotto, and Weick, supra, there was no question whatsoever that the party asserting the doctrine of laches was in violation of the zoning regulations, in the instant matter (as demonstrated above), the D.C.R.A.'s "case" against Appellant for allegedly violating the zoning regulations is flimsy, at best.

67. In response to the foregoing argument, it is anticipated that the D.C.R.A. and/or the ANC may contend that the doctrine of laches does not apply to the case sub judice, because the repair activities allegedly undertaken at the premises by Yuen and Appellant differ (i.e., are more extensive or more "major") from the repair activities of prior owners. At the May 13 hearing, the ANC highlighted the fact that, in its October 9, 1940 Order granting The Flood Motor Company a variance from the zoning regulations "to permit the extension of an automobile repair shop and automobile sales and service agency", this Board made its Order "subject to the condition that all repairing shall be incidental to the sale of new cars only".[45] Thus, the D.C.R.A./ANC may argue that the repair activities of prior owners at the premises were different from the repair activities of Appellant/Yuen, in the sense that they were "minor", or strictly limited to the repair of new automobiles. Any such contention by the D.C.R.A. or ANC would be unavailing for several reasons.

68. Firstly, the term "incidental", as used in this Board's Order of October 9, 1940, is completely ambiguous and provides little guidance regarding this Board's intent in granting the October 9, 1940 variance. The ANC would have this Board believe that the Board's prior directive that "all repairing shall be incidental to the sale of new cars only", clearly memorializes a determination by this Board that The Flood Motor Company could

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[45] **See**, transcript of October 9, 1940 Hearing (ANC's Exhibit 3), at page 30.

only repair new vehicles at the premises. This assumption by the ANC is utterly speculative, and, more importantly, it defies logic. The ANC cannot explain any substantive difference (from a legal or a zoning perspective) between the repair of a "new" automobile and the repair of a used or an "old" automobile. If, as the ANC and the D.C.R.A. have alleged, the critical distinction to be made in this case is between "major" repairs and "minor" repairs, whether these repairs are made to "new" or "old" automobiles should be utterly immaterial.[46]

69. In response to any possible contention by the D.C.R.A./ANC that the October 9, 1940 Order was intended to restrict repair activities at the premises to "minor" repairs, it should be noted that the plain language of this Order did not limit, in any respect, the nature and/or extent of repair activities that were permissible at the premises. In other words, notwithstanding Hooks' unsubstantiated assertion that "minor repairs" are permitted at the premises, whereas "major repairs" are not,[47] the October 9, 1940 Order did not make any distinction whatsoever between "major" and "minor" repairs, and did not otherwise prohibit **any** types of repairs from being undertaken at the premises. Furthermore, any express or implicit contention by the D.C.R.A. that owners of the premises prior to Mr. Yuen only engaged in "minor" repairs (whatever that means) defies logic. If, as the D.C.R.A. has suggested, each of the owners prior to Mr. Yuen only engaged in "minor" repairs (e.g., the installation of windshield wipers, etc.), there would have been no reason for Connecticut Avenue Datsun and Connecticut Avenue Nissan to obtain certificates of occupancy which encompassed **three subterranean levels** at the premises. The fact that

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[46] Similarly, the ANC cannot explain what constitutes a "new vehicle" (e.g., a vehicle with less than 1,000 miles ? 5,000 miles ? 10,000 miles ?, etc.).

[47] It should be reiterated that Hooks was unable to proffer any cogent testimony to explain the difference between "major" and "minor" repairs.

these operators obtained certificates of occupancy for three underground levels strongly suggests that these entities were engaging in repair activities at the premises which were **far** more extensive than merely installing windshield wipers (i.e., repair activities consistent with the premises ***continual*** use as a repair garage, as reflected in the Certificates of Occupancy for the premises).[48]

70. Finally, it should be noted that by permitting The Flood Motor Company "the extension of an automobile ***repair shop***", this Board authorized The Flood Motor Company to engage in **any and all** repair activities at the premises (including, but not limited to, those "repair garage" activities that would otherwise be prohibited by D.C.M.R. Title 11-199.1). Since it is "black letter law" that a zoning variance runs with the land[49], and because the variance granted to The Flood Motor Company authorized The Flood Motor Company to undertake all types of repair activities at the premises, without limitation, it can be reasonably assered that Appellant need not even rely upon a laches argument, since it is at least arguable that the variance granted to The Flood Motor Company likewise permits Appellant to operate a "repair garage" at the premises as a matter of law. Nevertheless, at a bare minimum, since it is evident that the repair activities undertaken by Appellant at the premises have not been shown to be more extensive than the repair activities undertaken by The Flood Motor Company and subsequent owners/operators of the premises for the past **sixty-three** years, even assuming arguendo that these activities undertaken by Appellant are beyond the permitted scope (either because the variance

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[48] In this regard, it is important to note that during the May 13 hearing, the ANC's representative Karen Perry testified that prior to Mr. Yuen's acquisition of the premises, she had only visited the premises once. **See**, May 13, 2003 Hearing Transcript, at page 279 L. 4 to page 280 L. 22. Thus, neither the ANC nor the D.C.R.A. was able to establish that the use of the premises by prior owners differed in any respect from Appellant's use of the premises.

[49] See, for example, North Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Board, 666 A.2d 63, n. 7 (1995); French, supra, at 1029, Speyer, supra, at n. 9 (1991)

granted to The Flood Motor Company did not apply to subsequent owners of the premises, or for some other reason), the D.C.R.A. has clearly "slept on its rights" by failing to even ***attempt*** to curtail these allegedly unlawful repair activities over the course of five decades, until such time as Mr. Yuen acquired the premises. Thus, for this reason, and each of the other reasons set forth above, the D.C.R.A. is precluded from revoking Appellant's Certificate Of Occupancy on the grounds of laches.

III. CONCLUSION

For each of the foregoing reasons, Appellant respectfully requests that the D.C.R.A.'s "Final Notice" of August 19, 2002, revoking Appellant's Certificate of Occupancy, be reversed.

Respectfully submitted,

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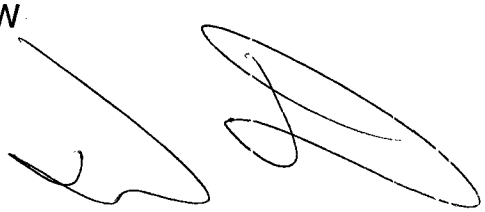
CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2003, a copy of the foregoing document was sent via U.S. Mail, postage prepaid to the following:

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