GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENTS

KURI BROTHERS, INC.

APPELLANT

vs. **Appeal No.16947**

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DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

APPELLEE

Post Hearing Submission of Proposed Findings of Fact and Conclusions of Law

This is an appeal by Kuri Brothers, Inc. of a final decision of the Department of Consumer and Regulatory Affairs,(DCRA), issued on August 9, 2002, revoking appellant's Certificate of Occupancy to operate and "Automobile Service Center" at 4221 Connecticut Avenue, N.W.

The Board of Zoning Adjustment (Board) determined that this matter would not be conducted as an appellate review of the record below, but would be heard as a de novo evidentiary hearing. Hearings on this case were held on April 8, 2003 and May 13, 2003 with testimony and other evidence taken on the latter of these dates May 13, 2003. The hearing record was closed at the conclusion of the last public hearing on May 13, 2003.

Based upon the evidence submitted and the record of the proceedings before the BZA and below, appellee DCRA respectfully submits these proposed Findings of Fact and Conclusions of Law.

Issues

Whether Appellant was operating an automobile repair garage, at 4221 Connecticut Avenue, N.W. in a zone C-3 area without an approved Certificate of Occupancy in violation of Title 11 DCMR 3203.1?

Whether revocation of Appellant's Certificate of Occupancy should be sustained for failure of Appellant to prosecute its cause of action?

BZA
Case No. 16947
Exhibit No. 46

Board of Zoning Adjustment
District of Columbia
CASE NO.16947
EXHIBIT NO.46

Proposed Findings of Fact

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

2. On August 12, 1998, Certificate of Occupancy No. B001816757 was issued to Appellant at 4221 Connecticut Avenue, N.W. (basement level), for the purpose of operating an "Automobile Service Center".

2. The subject property located at 4221 Connecticut Avenue, N. W. Washington, D.C. is located in a C-3-A zone area, and is owned by Koo Yuen/Van Ness Incorporated. (Testimony of Investigator Anthony Hooks)

3. The Appellee issued a Notice of Intent to Revoke (Notice) Appellant's Certificate of Occupancy No. B001816757 on June 27, 2002.

4. Appellant given 15 days to respond to the Notice.

5. Appellant failed to respond timely to the Notice.

6. Appellant was determined to be in default of the Notice and served a final revocation of its Certificate of Occupancy.

7. Appellant in its untimely response caused the Chief Administrative Law Judge of Appellee Agency to issue an Order on August 9, 2002, which said among other things, "...the Respondent was given 15 days from the date of service ...Respondent is deemed to have admitted the validity of the charges, as indicated in the official Notice".

8. Appellant filed its appeal to the BZA on September11, 2002.

9. Hearing held by BZA on April 8, 2003 and May 13, 2003.

10. BZA made a determination to conduct *de novo* review.

11. Appellee called two witnesses, Investigators Anthony Hooks and Vacylla Williams and provided relevant evidence.

12. The Zoning Regulations distinguished between a repair garage and a retail use, and the sale of automobile accessories including installation. (Testimony of Investigator Anthony Hooks)

13. On , DCRA Zoning Investigator Anthony Hooks conducted an inspection of the Appellant's business on January 3, 2002, May 12, 2002, and with Investigator Vacylla Williams June 5, 2002 and personally observed Respondent's employees

working on automobiles: repairing head lights and engaging in under the hood mechanical repairs, parts on the floor and automobiles elevated on lifts. (Testimony of Investigators Anthony Hooks and Vacylla Williams)

14. Appellant's automobile repair garage is located in a Zone C-3-A area in Washington, D.C., and, Zone C-3-A does not permit the operation of an automobile repair garage. Only areas Zoned for C-M industrial will permit the operation of an automobile repair garage such as Appellants. (Testimony of Investigator Anthony Hooks)

15. Appellant is engaged in the business of offering automobile repair services. Appellant does not have a certificate of occupancy which permits the operation of an automobile garage at its current location.(Testimony of Anthony Hooks)

16. Appellant, although it filed an appeal from the decision of the Chief Administrative Law Judge to the BZA which was treated by the BZA as an action de novo.

17. Appellant failed to prosecute its cause of action, to wit: During the two days of hearings before the BZA, Appellant failed to call any witnesses or otherwise provide relevant exhibits or information to prosecute its claim.

Argument

Certificate of Occupancy

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

The current and longstanding use of the basement space at the subject property has been as an automobile repair garage. In a previous Decision and Order issued November 22, 1992, ALJ Rohulamain Quander made a finding that the lessor, Yuen/Van Ness, Inc. operated an automobile repair garage in the basement of the property without a valid Certificate of Occupancy. This decision was subsequently affirmed by the D.C. Board of Zoning Adjustment (BZA) in an opinion issued March 30, 1998. This same issue was raised again before the Honorable Lennox J. Simon who made the determination that the Appellant was in violation of 11 DCMR 3203.1.

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

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

The D.C. Zoning Regulations define a "Repair Garage" as a building or other structure, or part of a building or structure, with facilities for the repair of motor vehicles, including body and fender repair, painting, rebuilding, reconditioning, upholstering, equipping, or other motor vehicle maintenance or repair activities. Certainly work under the hood as described by Investigators Hooks and Williams and their accompanying pictures qualifies under this definition as that of a "Repair Garage".

Discretion as to witness credibility falls within the providence of a hearing officer, ALJ. This discretion has neither been shown to have been abused or is it clearly erroneous. In no instance has the decision and order of the Chief ALJ been shown to be derived in a manner against the manifest weight of the testimony and evidence presented by the Appellee. Therefore her decision and order should be sustained.

Failure to Prosecute

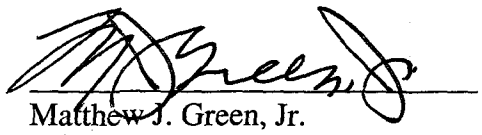
When an appellee moves for dismissal for failure of appellant to prosecute, the court looks to whether the appellant comes to court and engages in dilatory conduct and lack of good faith. All moving parties have a responsibility to move towards the disposition on the merits at a reasonable pace, and refrain from dilatory and evasive tactics .(Haneef Abdur-Rasheed vs. Bell South, Corp. et al., 1991 U.S. App. LEXIS 31304; Beaudry Motor Co. vs. Abko Properties, Inc., 780 F.2d 751, 756 (9th Cir.); Sanction can be applied to offending party that causes undue delay and who is dilatory, Matter of Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986); Bailey vs. Washington Motor Truck Transp. Employees Pension Trust, Dist. of Columbia Court of Appeals, 240 A.2d 133 (1968). Dismissal for failure to prosecute is further outlined in Taylor vs. Washington Hospital Center, 407 A.2d 585, 590-591 (D.C. 1979) when the court said that "where the case progresses to the day of trial and the plaintiff, disappointed by the rulings of the court which are adverse to her case, then refuses to go forward, a Rule 41dismissal may be appropriate." The court went on to say that "a trial judge need not look kindly upon last-minute maneuvers which wreak havoc on the court's trial calendar, and in the face of a refusal to go forward may in his discretion reject plaintiff's suggestion of dismissing without prejudice or resorting to some other milder sanction." The history of this case has been one of delay and evasion while the Appellant continued its impermissible activity. The record shows at least two ALJ Orders prior to the Order of the Chief ALJ which determined that the Appellant was operating an automotive repair garage in an area not zoned for such business activity. There have been several BZA appearances by the Appellant however they did not seek a variance or other modification in their status but just continued in their impermissible activity. Such conduct is in keeping with Link vs. Wabash R.R., 370 U.S. 626 (1962). In that case the court found counsel for plaintiff to have engaged in

dilatory conduct. In this instant matter the Appellant has not advanced its case in any way. It again has failed to provide witnesses or relevant exhibits to the Board and yet it is the moving party. As the moving party Appellant has the burden of proof. Appellant has not met this burden.

Proposed Conclusions of Law

1. Appellant bears the burden of proof.
2. Appellant has not sustained its burden of proof.
3. Appellant operates a "repair garage" within the meaning of 11 DCMR 199.1 at 4221 Connecticut Avenue, N.W. in the C-3-A Zoning District.
4. The Zoning Regulations do not provide, recognize, or allow room for "automobile service center" as a valid stand-alone certificate of occupancy category.
5. Appellant has neither applied to the Board for a Special Exception nor a Variance for authority to operate a repair garage at the premises in question.
6. The Board has authority to declare either as an appellant body or in a *de novo* hearing appellant's operations in violation of the Zoning Regulations and to direct Appellant to cease from all such violations until Appellant has applied for and been approved of its business operations at the premises. Accordingly the Board declares the operation of Appellant in violation of the Zoning Regulations and Orders a cessation of all business activities in non compliance with the Zoning Regulations. Pursuant to 11DCMR 3100 *et seq.*
7. The Board has the authority to request the Mayor or his designee to enforce compliance by Superior Court action.
8. The Board finds that the Appellant has failed to prosecute its cause of action, to wit: Appellant has failed to put on its case in chief to include testimony of any competent witness(s) or relevant evidence and is therefore ripe for a Rule 41(b) determination (dismissal) (therefore sustaining the Appellee's actions of certificate of occupancy revocation in this administrative context). Pursuant to 11DCMR 3100 *et seq.*
9. The Board finds that Appellant has violated and stands in continual violation of 11 DCMR 3203.1.
10. The Board finds that the action brought and maintained by the Appellant to be a frivolous action.
11. The Board finds that the Appellee is entitled to recover counsel fees and investigative costs from Appellant for having maintained this action.
12. The Board revokes the Certificate of Occupancy of Appellant.

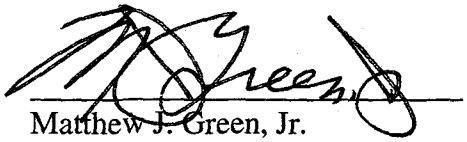
Respectfully submitted



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Certificate of Service

I hereby certify that a copy of the foregoing was caused to be faxed this 24th day of June 2003, to Tamir Damari, Esq., Counsel for Appellant, fax # 202.338.6340, J. Patrick Brown, Esq., Counsel for Intervenor fax # 202.452.1410 and David Bardin, Esq., Counsel for ANC, fax #202.857.6395.



Matthew J. Green, Jr.