CONSOLIDATED
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

SUBMITTED BY

ADVISORY NEIGHBORHOOD COMMISSION 3F AND

INTERVENOR, CHARLES E. SMITH RESIDENTIAL

BEFORE THE

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

RECEIVED
D.C. OFFICE OF ZONING
2003 JUL 10 PM 12:55

Appeal No. 16947 of Kuri Brothers, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of J. Gregory Love, Administrator, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs, for allegedly illegally revoking the issuance of a certificate of occupancy (#B00181657) for an automobile service center in the C-3-A District at premises 4221 Connecticut Avenue, N.W. (Square 2051, Lot 5).

Hearing Dates: January 28, April 8 and May 13, 2003

Decision Date: July 1, 2003

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

Appellant, Kuri Brothers, Inc. (AKuri Brothers@ or AAppellant@) filed this appeal, accompanied by a three-page "Petition for Appeal", on September 11, 2002, with the D.C. Board of Zoning Adjustment (the ABoard@). Appellant objected to revocation of their Certificate of Occupancy (AC of O@) Afor premises located at 4221 Connecticut Avenue, NW, Washington, D.C. 20008@, in Square 2051, Lot 5, in the C-3-A Zoning District [Exhibit 1].

By letter dated June 27, 2002 and personally served, Department of Consumer and Regulatory Affairs ("DCRA") provided Appellant and Koo Yuen with a Notice of Intent to Revoke Certificate of Occupancy Number B00181657 ("Notice to Revoke") Neither Appellant, nor Koo Yuen responded to the Notice to Revoke within the fifteen (15) days allowed. As a result, by letter dated August 9, 2002, DCRA notified Appellant's counsel that Appellant was "deemed to have admitted the validity of the charges" set forth in the Notice to Revoke. Respondent, DCRA revoked the C of O on August 19, 2002. By letter dated September 6, 2002 and personally served on Appellant and Koo Yuen, DCRA provided Notice to Discontinue Business Activity

BZA
Case No. 16947
Exhibit No. 49

Board of Zoning Adjustment
District of Columbia
CASE NO.16947
EXHIBIT NO.49

Immediately and Surrender Certificate of Occupancy No. B00181657 within 48 hours. At the same time, DCRA notified Appellant and Koo Yuen that Certificate of Occupancy C033951 dated May 15, 2002 for Automotive Service Center was also cancelled. This new Certificate of Occupancy was obtained based on a "change of ownership" from Certificate of Occupancy B00181657 which was revoked.

Appellant's underground premises are located within the boundaries of Advisory Neighborhood Commission ("ANC") 3F, in Single-Member District 3F02 represented by Commissioner Karen L. Perry. ANC 3F is automatically a party to this proceeding pursuant to 11 DCMR § 3106.2.

By letter dated November 12, 2003, Charles E. Smith Residential filed a request to intervene as a party in opposition to this Appeal. Charles E. Smith Residential owns the Van Ness South apartment building at 3003 Van Ness Street, N.W., immediately across a 16-foot public alley from Appellant=s premises and the Consulate Apartment building at 2950 Van Ness Street, N.W. located within 200 feet of the Appellant's premises. At the April 18, 2003 hearing, the Board granted Charles E. Smith Residential's request to intervene as a party in opposition.

Appellant's APetition for Appeal@ requested a hearing on the instant appeal, asserting, among other things, that Appellant Acontends, and will prove@ that Appellant Ahas a valid and lawfully issued Certificate of Occupancy for an >Automobile Service Center= which permits@ Appellant to perform Acertain automobile service and repair activities at its premises@; assuming arguendo that Appellant=s C of O is invalid, Asuch invalidity is due entirely to the intentional, reckless and/or negligent wrong doing of@ DCRA=s Building and Land Regulation Administration (ABLRA@) Zoning Division, which Aissued this C of O@ to Appellant knowing that Appellant Aintended to perform certain automobile service and repair activities at its premises@; that Appellant reasonably relied to its detriment upon the fact that it had been issued a C of O for an Automobile Service Center, and that Ait was therefore permitted to perform certain automobile service and repair activities at its premises@; and that Aautomobile service and repair activities similar to those performed by@ Appellant have been Aperformed openly and uninterruptedly@ on Appellant=s premises by Appellant, Aand prior owners of the premises, for over thirty-five (35) years. Appellant concluded that Athe equitable doctrines of laches and estoppel bar the DCRA from now seeking to revoke@ Appellant=s C of O [Exhibit 2].

In addition to the underground premises at issue in this case, Appellant has an office, next door (at ground level, at 4225 Connecticut Avenue, N.W., leased from Koo L. Yuen), which serves the underground repair facility (but is not at issue in this case) [Exhibit 34, Tab 4, first photograph].

The Board scheduled a public hearing for November 12, 2002 and September 20, 2002, and so notified Appellant [Exhibit 12], DCRA [Exhibit 13], and ANC 3F [Exhibit 14].

ANC 3F submitted a Resolution opposing the Appeal [Exhibit 18] as did Charles E. Smith Residential [Exhibit 22].

Appellant filed a request for postponement and rescheduling of the public hearing [Exhibits 15, 16, 17].

Over ANC 3F=s opposition [Exhibit 21], the BZA rescheduled the public hearing.

Public hearings were held before the Board on January 28, April 8, and May 13, 2003.

At the conclusion of the hearing, the record was closed, except the Board set June 24, 2003, as the deadline for submission of proposed Findings of Fact and Conclusions of Law from the parties.

PRESENTATION OF EVIDENCE:

Appellant presented no witnesses or written testimony.

Appellant's only evidence in this record is documentary Exhibit No. 40, filed April 22, 2003.

Respondent, DCRA presented both documentary evidence and testimony of witnesses, Inspector Anthony Hooks of DCRA's Office of Compliance, Weights and Measures, Auto Repairs Unit, who inspected the premises on several occasions (January 3, 2002, May 12, 2002 and June 5, 2002), and of DCRA's Zoning Inspector, Vacylla Williams, who accompanied Inspector Hooks on June 5, 2002.

ANC 3F presented both documentary evidence and testimony of Commissioner Karen L. Parry [Exhibit 34].

Charles E. Smith Residential, attached documents to its letter opposing the Appeal on November 12, 2002 [Exhibit 22] and filed a Prehearing Statement and Exhibits on April 1, 2003 [Exhibit __].

PENDING DISPOSITIVE MOTIONS:

DCRA and Charles E. Smith Residential made oral motions to dismiss or to affirm on the record on two occasions, April 8, 2003 and May 13, 2003.
ANC 3F presented a written motion to affirm and order Appellant to cease and desist, supported by a Memorandum of Law [Exhibit No. 41].

The Board has taken all dispositive motions under advisement, pending filing of proposed findings of fact and conclusions of law and its final decision.

FINDINGS OF FACT:

1. 4221 Connecticut Avenue, N.W. ("Subject Property") is zoned C-3-A.

2. In 11 DCMR § 199.1, a "repair garage" is defined as: "a building or other structure, or part of a building or structure, with facilities for the repair of motor vehicles, including body and fender repair, painting, rebuilding, reconditioning, upholstering, equipping, or other motor vehicle maintenance or repair."

3. In the C-3-A zone, a repair garage is only permitted by special exception pursuant to 11 DCMR § 743.1, not as a matter-of-right.

4. Over the last thirteen (13) or more years, Appellant and/or Koo Yuen have been the subject of numerous enforcement and/or civil infractions, actions by DCRA and/or the Board based on the operation of a repair garage at the Subject Property, including:

a.	DCRA v. Koo Yuen:	90-OAD-1726-E
b.	DCRA v. Koo Yuen, et al.:	92-OAD-1683-E
c.	Koo Yuen v. DCRA:	BZA No. 93-0006-CI
d.	DCRA v. Kuri Brothers:	99-OAD-1821-E
e.	Kuri Bros. v. DCRA:	BZA No. 00-0001

5. Appellant has leased underground space at the Subject Property accessible from the public alley to the east. Appellant does not occupy or make use of the ground-level or above-ground floors of that commercial building.

6. Evidence submitted by DCRA and ANC 3F described Appellant's use of the underground space leased to it. Appellant did not rebut their evidence or present any evidence of its own on this score.

7. DCRA Photographs of Appellant's underground space and activities show automobiles, lifts, other equipment, automotive parts, and vehicles [Exhibits 21 and 35].

8. DCRA and ANC 3F summarized and submitted copies of Appellant's own advertising of services offered at "Van Ness Auto Care", including the following:

- 21 service bays
- foreign & domestic car specialist
- latest diagnostic
- tune-up
- brakes
- exhaust
- alignment
- transmission
- electrical
- detailing
- towing service

9. ANC 3F also submitted photographs of Appellant's latest advertising sign (taken May 8, 2003) reading: "WE SERVICE & REPAIR ALL CARS DOMESTIC & FOREIGN".

10. Inspector Hooks of DCRA's Auto Repairs unit testified (on April 8, 2003) to having personally witnessed several vehicles under repair and seen employees engaged in (or learned from that they were engaging in) the following activities inside the underground facilities:

- automotive engine repairs
- cars hoisted up on lifts
- timing change (a "major repair" because it requires taking off the top half of the engine)
- brakes being changed
- exhaust system changes
- anti-freeze draining
- transmission on the ground

11. Inspector Hooks took photographs and submitted them in evidence [Exhibit 25].

12. Inspector Hooks also submitted Repair Work Orders supplied to him by Chris Kuri, one of Appellant's principals, for repair work ordered by customers during the previous hours of that day [Exhibit 37].

13. Inspector Hooks described his experience and responsibilities at DCRA as including:

- inspection of auto repair garage facilities
- monitoring of required licensing for repair garage operations

14. Based on his experience, Inspector Hooks distinguished between a "repair garage" on the one hand and installation of accessories or minor repairs on the other. He testified that the work he witnessed being performed at the Subject Property was repair garage activities and not minor repairs or installation of automotive accessories.

15. Zoning Inspector Vacylla Williams testified to inspecting the Subject property on June 5, 2002 with Inspector Hooks and witnessing major automotive repairs being conducted as defined by "repair garage" under 11 DCMR § 199.1. Inspector Williams testified that these repair garage activities which she described were not permitted in the C-3-A zone or authorized under the revoked C of O.

16. ANC Commissioner Karen Perry testified on April 8 and May 13, 2003 to the history of the site, including uses of the site and zoning decisions as to the site prior to Appellant's leasing of the underground facilities, including a very early gasoline service station and auto sales businesses that used the ground floor and upper levels, as well as the use of underground space for parking [Exhibit 34.

17. Appellant has presented documents concerning repair facilities at 4221 Connecticut Avenue prior to the occupancy by Appellant and Koo Yuen, immediate predecessor to Appellant, as follows [Exhibit No. 40]:

- May 4, 1983 C of O to
  Connecticut Avenue Datsun, Inc.
  To use First, Parking Levels I, II, and III
  For Automobile Sales and Service

- April 24, 1998 C of O to
  Koo L. Yuen
  For Automobile Service Center
  Not Sexually Oriented

- August 12, 1998 C of O to
  Kuri Brothers, Inc.
  For Automobile Service Center
  Not Sexually Oriented

18. ANC 3F and Charles E. Smith Residential have shown that, prior to the occupancies of Koo L. Yuen and Appellant, occupancies involved gasoline service station and automobile sales, with repairs being incidental to the other permitted uses. Moreover, prior occupants had used ground and upper-level floors of 4221 Connecticut Avenue, not just the underground premises.

19. The record shows repeated and very public efforts by DCRA, ANC 3F, and Charles E. Smith Residential to object to and prohibit Koo L. Yuen and Appellant, respectively, from auto repair use and occupancy of the underground premises, including but not limited to Civil Infraction procedures, from which both Koo L. Yuen and Appellant initiated appeals to Administrative Law Judges and the Board.

20. At all times relevant to this C of O and going back to at least 1990, Appellant and/or Koo Yuen knew that a repair garage was not a permitted use at the Subject Property.

21. Similarly, Appellant and/or Koo Yuen knew the operations being performed at the Subject Property clearly constituted a prohibited repair garage.

22. Appellant has also presented documents concerning occupancies at *other* locations, without presenting any testimony to explain the meaning or context of such documents and without making any compelling or convincing showing that these documents are material to this case. The Board finds these documents irrelevant to this Appeal.

CONCLUSIONS OF LAW:

Under the Zoning Regulations of the District of Columbia ("Zoning Regulations") governing this appeal directly to the Board from a DCRA zoning decision (as well as the Zoning Act itself), this

Board decides the appeal *de novo* on the record made before it. (This appeal is governed by the Zoning Act and not by the Civil Infractions Law.)

Appellant bears the burden of proof.

Appellant has not sustained its burden of proof.

Appellant operates (and has for years operated) a "repair garage" within the meaning of 11 DCMR § 199.1 at the Subject Property in the C-3-A Zoning District.

The Zoning Regulations do not provide for, recognize, or allow for "automobile service center" as a valid, stand-alone C of O category. Automotive Service Center is not synonymous with repair garage.

Pursuant to Title 11, Chapter 7 of the Zoning Regulations, Appellant may not lawfully operate a repair garage in the C-3-A Zoning District except pursuant to a Special Exception sought from and issued by the Board.

Appellant has not applied to this Board for a Special Exception pursuant to 11 DCMR § 743.1 to ask for authority to operate a repair garage at the Subject Property.

The Zoning Regulations prohibit such occupancy or operation at the Subject Property.

The Appellant, without much discussion or evidence, claimed that DCRA's revocation of the Certificate of Occupancy was barred by the doctrines of estoppel and laches. The Board finds the Appellant's claim without merit.

The elements of estoppel are: (1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon, (4) affirmative acts of the District government, (5) without notice that the improvements might violate the Zoning Regulations, and (6) equities that strongly favor the party asserting the defense. Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7, 11 (D.C. 1978).

Based on the long and well-established record of DCRA's and the Board's enforcement activities against the repair garage operations at the Subject Property involving the Appellant and its predecessor, Koo Yuen, there is no basis for an estoppel defense. The Appellant had no reasonable or justifiable basis for relying on the automobile service center C of O obtained from DCRA to authorize its repair garage operations. For at least thirteen (13) years Appellant and its predecessor were put on actual and repeated notice that the repair garage activities, which have continued uninterrupted, were in violation of the Zoning Regulations. Any reliance on the C of O by Appellant was not reasonable or in good faith.

The Appellant argues that the revocation is barred by laches. "Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." Wieck v. District

of Columbia Board of Zoning Adjustment, 383 A.2d 7, 11 (D.C. 1978), quoting 3 RATHKOPF, LAW OF ZONING AND PLANNING, at 67-1 (3d ed. 1972). "Laches is the principle that "equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." American University Park Citizens Association v. Burka, 400 A.2d at 740 (D.C. 1979), quoting Russell v. Todd, 309 U.S. 280, 287, 84 L. Ed. 754, 60 S. Ct. 527 (1940). The two elements of laches are the unreasonableness of the delay and the resulting prejudice to the party asserting the defense. See, e.g., American University Park Citizens Association v. Burka, 400 A.2d at 741. The "entire course of events," not merely the period from the zoning official's decision to the filing of an appeal, is relevant when determining the validity of a laches defense. Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d at 925, n.16.

Appellant has not established the existence of any unreasonable delay by DCRA in enforcing the prohibition against a repair garage. In fact, the opposite is true. DCRA has for at least thirteen (13) years sought to enforce the Zoning Regulations. DCRA enforcement has been consistent over time, but simply ignored or sidestepped by Appellant and its predecessor, through the semantics of changing certificates of occupancy which elevated form over the underlying substance. Appellant has not suffered any prejudice as a result of DCRA's actions. Again, enforcement has been consistent, repeated and well-established. Any prejudice sustained by Appellants is entirely self-inflicted in the face of clear notice of violation from DCRA.

This Board has authority to declare Appellant's operations and occupancies to be in violation of the Zoning Regulations and to direct Appellant to cease and desist from such violation so long as Applicant has not obtained from this Board the required special exception or variance.

This Board has authority to request the Mayor or his delegate to enforce by action in the Superior Court for the District of Columbia compliance with a Cease and Desist Order of this Board.

This Board may not, itself, seek an enforcement order in the Superior Court but parties entitled to bring an enforcement action pursuant to the D.C. Code may do so in reliance on this Order if Appellant fails to comply.

Based on the above, it is hereby:

ORDERED that the Appeal is DENIED.

208823

CERTIFICATE OF SERVICE

I hereby certify that, on June 24, 2003, a true and correct copy of the foregoing draft Consolidated Findings of Fact and Conclusions of Law, was mailed, first-class, postage prepaid, to:

Tamir Damari, Esq.
1025 Connecticut Avenue, N.W.
Suite 220
Washington, D.C. 20036

Matthew J. Green, Jr., Esq.
DCRA
Office of Compliance
941 North Capitol Street, N.E.
Suite 9400
Washington, D.C. 20002

David J. Bardin, Esq.
Advisory Neighborhood Commission 3F
4401-A Connecticut Avenue, N.W., #244
Washington, D.C. 20008-2322

208823

John Patrick Brown, Jr.