GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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, of the revocation of a certificate of occupancy (#B00181657) for occupancy that does not conform to the use permitted, "automobile service center", in a C-3-A District at premises 4221 Connecticut Avenue, N.W. (Square 2051, Lot 5).

Hearing Dates: April 8, and May 13, 2003
Decision Date: July 1, 2003

ORDER

Appellant, Kuri Brothers, Inc. ("Kuri Brothers" or "Appellant"), filed this appeal, accompanied by a "Petition for Appeal", on September 11, 2002, with the D.C. Board of Zoning Adjustment ("Board"). Appellant contests the revocation of its Certificate of Occupancy ("C of O") for premises located at 4221 Connecticut Avenue, N.W., Washington, D.C. 20008, in Square 2051, Lot 5, in the C-3-A Zoning District [Exhibit 1]. For the reasons stated below, the appeal is denied.

PRELIMINARY AND PROCEDURAL MATTERS:

By letter dated June 27, 2002 and personally served, the Department of Consumer and Regulatory Affairs ("DCRA") provided Appellant with a Notice of Intent to Revoke Certificate of Occupancy # B00181657 ("Notice to Revoke"). Appellant did not respond to the Notice to Revoke within the fifteen days DCRA indicated in the notice. DCRA then notified Appellant's counsel that Appellant was "deemed to have admitted the validity of the charges" set forth in the Notice to Revoke and revoked the C of O on August 19, 2002.

Appellant's 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, 2002, 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

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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.

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

ANC 3F submitted a Resolution, approved at a duly-noticed meeting, and with a quorum present, opposing the Appeal [Exhibit 18]. Charles E. Smith Residential also submitted a letter in opposition to the appeal [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, finding that the reasons for the rescheduling of the hearing were persuasive.

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 41]. The Board took these motions under advisement, pending filing of proposed findings of fact and conclusions of law and the rendering of its final decision.

Appellant submitted Appellant's Responses to Exhibits, which listed objections to exhibits being submitted by ANC 3F. To the extent that this submission was intended as a motion to the Board to strike such exhibits from the record it was denied.

On January 28, 2003, the day of the scheduled hearing for this case, only preliminary issues were addressed. The hearings for this case took place on April 8, and May 13, 2003.

Appellant chose to present no formal argument prior to or during the hearings for this case, even after asking that the initial hearing date be postponed. Instead, Appellant asked to be allowed to submit his argument in the context of proposed findings of fact and conclusions of law. Although the Board is not required under its regulations to accept such a submission, the Board chose to allow Appellant an opportunity to spell out any legal arguments he might have, based on the evidence submitted, and thereby present an argument in this case. Many of the arguments listed in Appellant's Petition for Appeal were never presented by Appellant and therefore were not adequately substantiated and thus were not considered. Those that were presented by the Appellant and considered by the Board are addressed below.

At the conclusion of the May 13, 2003, 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 by the parties. While the Appellant's submission more closely resembled a legal brief, it was accepted into the record and considered by the Board in reaching this decision

At its regularly-scheduled meeting on July 1, 2003, the Board denied the Appeal.

FINDINGS OF FACT:

1. Appellant was issued a certificate of occupancy for an "automobile service center" on August 12, 1998 at 4221 Connecticut Avenue, N.W. ("subject property").

2. Automobile service center is not a defined term in the Zoning Regulations.

3. Appellee, DCRA, issued a notice of intent to revoke Appellant's certificate of occupancy for the subject property on June 27, 2002.

4. Appellee issued a final notice of revocation of the certificate of occupancy for the subject property on August 19, 2002.

5. Appellant appealed the DCRA Director's decision to revoke his certificate of occupancy on September 11, 2002.

6. Appellant was advised during the Board's preliminary discussions regarding this case that DCRA's decision to revoke the Appellant's certificate of occupancy was taken pursuant to 12A DCMR § 118.4.

7. Pursuant to 12A DCMR § 118.4.1, a certificate of occupancy may be revoked, "after notice, if the actual occupancy does not conform with that permitted".

8. The subject property is zoned C-3-A.

9. In the C-3-A zone, a repair garage is only permitted by special exception pursuant to 11 DCMR § 743.1.

10. "Automobile accessories sales, including installations" is a permitted use in a C-3-A district.

11. In 11 DCMR § 199.1, a "garage, repair" 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."

12. DCRA and ANC 3F submitted photographs of Appellant's underground space. Those photographs showed automobiles, lifts, other equipment, automotive parts, and vehicles [Exhibits 21 and 35].

13. DCRA and ANC 3F summarized and submitted copies of Appellant's own advertising of services offered at "Van Ness Auto Care", which offered the following: 21 service bays, foreign & domestic car specialist, and diagnostic, tune-up, brake, exhaust, alignment, transmission, and electrical services.

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

15. DCRA Inspector Anthony Hooks, who testified at the hearing, has the following responsibilities at DCRA: inspection of auto repair garages and monitoring of required licensing for repair garage operations.

16. In the months preceding the date the Notice to Revoke was issued, Inspector Hooks witnessed several vehicles being repaired and saw cars hoisted up on lifts and employees engaged in automobile engine repairs. The Board found Inspector Hooks' testimony with respect to these activities to be credible.

17. Inspector Hooks' photographs taken during his inspection also show that automobile repair activities are taking place on Appellant's property [Exhibit 25].

18. Inspector Hooks submitted into the record Repair Work Orders supplied to him by Chris Kuri, one of Appellant's principals, for repair work ordered by customers during one of days that Inspector Hooks visited the subject property [Exhibit 37].

19. DCRA Inspector Vacylla Williams testified to inspecting the subject property on June 5, 2002 with Inspector Hooks and to witnessing automotive repairs being conducted. The Board found Ms. Williams' testimony to be credible.

20. The notice of intent to revoke the Appellant's C of O details automobile repair and maintenance activities, as witnessed by three different inspectors on four different occasions.

21. Appellant submitted documents [Exhibit 40] that contained the following relevant information:

May 4, 1983 C of O and Application for 4221 Connecticut Avenue, N.W.
Owner: Connecticut Avenue Datsun, Inc.
USE: Automobile Sales and Service
Prior use indicated on application: Automobile Sales and Service
Purpose of application: Ownership Change

October 10, 1986 Application for 4221 Connecticut Avenue, N.W.
Owner: Connecticut Avenue Nissan, Inc.
USE: Motor Vehicle Dealer
Prior use indicated: Motor Vehicle Dealer
Purpose of application: Ownership Change

April 24, 1998 C of O and Application for 4221 Connecticut Avenue, N.W.
Owner: Koo L. Yuen
USE: Automobile Service Center
Use applied for, as stated on application: (Automobile Service Center) Automobile Sales, Automobile Accessory Sales Including Installation
Prior use indicated: Automobile Service Center
Purpose of application: Partial Occupancy - Basement

August 12, 1998 C of O and Application for 4221 Connecticut Avenue N.W., Basement
Owner: Kuri Brothers, Inc.
USE: Automobile Service Center
Use applied for, as stated on application: (Auto Repair)/Office Automobile Service Center
Prior use indicated: Auto Repair
Purpose of application: Ownership Change

22. Appellant also presented C of Os and applications for C of Os for locations other than the subject property. Appellant made no showing that these documents are material to this case. The Board therefore finds these documents irrelevant to this Appeal.

23. As demonstrated by ANC 3F Commissioner Karen Perry in her submission and accompanying documentation [Exhibit 34], DCRA has taken enforcement action

against owners of the subject property due to its use as a repair garage as early as 1989, and continuing thereafter.

24. A May 20, 1992 decision by DCRA Administrative Law Judge Rohulahim Quander found that a repair garage was being operated at the subject property.

25. In 1940, the Board granted a variance to Flood Motor Company to expand its existing repair garage. The approval was "subject to the condition that all repairing shall be incidental to the sale of new cars only" (Exhibit 34, Transcript of October 9, 1940, hearing at page 30).

CONCLUSIONS OF LAW:

Pursuant to D.C. Official Code § 6-641.07 (Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 799) (2001 Ed.)), the Board is authorized to hear appeals from any person aggrieved by any "decision based in whole or in part upon any zoning regulation". The decision complained of in this case is the June 27, 2002 decision to revoke the Appellant's certificate of occupancy, pursuant to 12A DCMR § 118.4, which was followed by a final notice of revocation on August 19, 2002. A certificate of occupancy may be revoked, "after notice, if the actual occupancy does not conform with that permitted". 12A DCMR § 118.4.1. Appellant's use of the subject property as a repair garage does not conform to its certificate of occupancy for an "Automobile Service Center". Therefore, the Board finds DCRA's decision to revoke Appellant's certificate of occupancy pursuant to 12A DCMR § 118.4.1 to be proper and denies this appeal. A discussion of these conclusions follows.

1. The scope of review

Appellant has contended throughout the proceeding that the Board is precluded from holding an evidentiary hearing because DCRA has procedures providing for such a hearing when a revocation of a C of O is proposed and that this appeal is governed by the Civil Infractions Act, which limits the Board's scope of review to the record below.

As to the first contention, certainly, if a DCRA revocation hearing had occurred, the Board, as it has done before, could have limited its review to that record. *See Perkins v. District of Columbia Board of Zoning Adjustment,* 813 A.2d 206, 209 (D.C. 2002). Since no hearing was held because the Appellant failed to timely request one, the Board can develop its own record to aid decision making.

The Board's authority to hear appeals from administrative decisions is not limited by the existence of post-decision hearing procedures developed within DCRA. The District of Columbia Court of Appeals has recognized the Board's review authority in similar appeals of DCRA decisions and has further noted that it is the final responsibility of the Board, and not DCRA, to interpret the Zoning Regulations. *See Keefe Co. v. District of Columbia Board of Zoning Adjustment*, 409 A.2d 624 (D.C. 1979); *Association for the Preservation of 1700 Block of N Street, N.W. and Vicinity, et al v. District of Columbia Board of Zoning Adjustment*, 384 A.2d 668 (D.C. 1978).

In Appellant's second contention, Appellant asserts that the Board must confine itself to DCRA's record because DCRA is relying upon a section of the Zoning Act that references the Civil Infractions Act (D.C. Law 6-42; D.C. Official Code § 2-1801 *et seq.*). It is reasoned that since appeals of civil infractions are limited to the record below, this proceeding must be limited accordingly. It is true that DCRA cites D.C. Official Code 6-641.09 (§ 10 of the Zoning Act) as a basis for its action and that the section indicates that violations of the Zoning Act and its regulations may be enforced and adjudicated through the Civil Infractions Act. The problem for the Appellant (and the Board) is that DCRA cites the wrong provision.

DCRA stated in its Notice of Intent to Revoke that "[b]y making major repairs and doing engine work you have operated outside the scope of this Certificate of Occupancy". D.C. Official Code 6-641.09 does not make it unlawful to operate outside the scope of a certificate of occupancy. Rather, that section prohibits undertaking a use without one. The Zoning Regulations do the same. 11 DCMR § 3203.

Thus, since no law or regulation makes it a violation to operate outside the scope of a C of O, as opposed to engaging in a use without one, there can be no civil infraction proceeding brought for doing so. Only the BOCA Supplement specifically refers to the act of operating outside the scope of a C of O, and does so only as a ground for revocation. 12A DCMR § 118. Thus, by asserting that the appellant was operating outside of the scope of its C of O, DCRA limited its enforcement action to revocation under the BOCA Supplement. The Civil Infractions Act is not implicated here because no violation of the Zoning Act or Regulations is directly asserted.

2. Significance of DCRA's erroneous citations.

Appellant was not materially affected by the inaccurate citations. DCRA's inaccurate citations did not have any direct bearing on its course of action in revoking the Certificate of Occupancy. The notice of proposed revocation states the grounds for the action: that the repair garage use being operated at the subject property is not permitted under the existing certificate of

occupancy, as determined by the Zoning Regulations. This complies with the notice requirement of 12A DCMR § 118.4.6, which states that the "Notice of proposed revocation of the Certificate of Occupancy shall be given in writing, setting forth specifically the *grounds* for the action." (emphasis added). Also, DCRA correctly cited to the provision of the Zoning Regulations that requires that a repair garage obtain a special exception in a C-3-A district in order to obtain a C of O for that use. Moreover, Appellant's counsel was ultimately provided with the citation to the authority for DCRA's action, 12A DCMR § 118.4, prior to the hearings for this case, and claimed to have been aware of that subsection prior to the hearing. Lastly, while DCRA's errors might have initially led the Appellant to believe that this should have been treated as a Civil Infractions Act case, Appellant did treat the appeal otherwise, after stating: "[a]ssuming *arguendo* that this Board had the authority to adjudicate this appeal *de novo*. . ." [Exhibit 44 at 16].

3. The Burden of Proof

Appellant has asserted that the Board erroneously applied the burden of proof in this case. The Board, however, finds that the person alleging "that there is an error in any ... decision", D.C. Official Code § 6-641.07 (g)(1), must prove the error alleged. For the purposes of this appeal, the Appellant must show that the notice of revocation fails to demonstrate that a ground for revocation exists. If the notice is facially sufficient, the Appellant may nevertheless show that (1) the facts relied upon by the government were in error; (2) that the government misapplied those facts to the law; or 3) that there is a defense to the charge, such as laches or estoppel. Appellant, here, did not meet its burden of proof in any respect.

4. The Appellant did not meet its burden of proof

The notice, although not a model of clarity, does state enough facts to demonstrate that the Appellant was operating outside the scope of the certificate of occupancy. Notwithstanding DCRA's troubling admission that it "created the category of 'automobile service center' to facilitate the Appellant's efforts", the Board concludes that DCRA did not intend to sanction a use that required a special exception within the zone district, such as a repair garage. Thus, if the notice of revocation showed that the Appellant was operating a repair garage, it follows that they were operating outside the scope of their C of O.

Section 199.1 of the Zoning Regulations define 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.

The definition is not limited to the categories listed, as suggested by Appellant. The Board therefore must simply determine, from the evidence submitted, whether automobiles are being maintained or repaired at the subject property.

The Board concludes that the facts stated in the notice sufficiently proved that a "repair garage" was the use being undertaken by Appellant. Whatever ambiguity might have existed in the notice, it was dispelled through the testimony of the government's and Intervenor's witnesses. All the activities listed in the Findings of Fact fall under the category of maintenance or repair. The advertisements and pictures submitted into the record also indicate that maintenance and repair activities were central to the Appellant's business.

Because the certificate of occupancy cannot be construed to have lawfully allowed this use and Appellant made no argument that such was the case, the Board concludes that the Appellant was operating outside its scope.

Appellant points to the fact that DCRA did not present any witness qualified to determine whether the activities of the Appellant fit within the category of repair garage. However, the Board, as the body charged with interpreting the Zoning Regulations, is more than able to make such a determination. In fact, it made the same determination with respect to this very property on March 30, 1998 (BZA No. 93-0006-CI).

In sum, Appellant was operating a repair garage in the C-3-A district under a certificate of occupancy that did not allow such a use. Appellant's certificate of occupancy was therefore validly revoked, pursuant to 12A DCMR § 118.4.2, because the actual use, repair garage, did not conform to whatever it was that was permitted (if anything) under his certificate of occupancy.

Estoppel and Laches

Appellant's defense, stated in his Proposed Findings of Fact and Conclusions of Law, is that DCRA's revocation of the Certificate of Occupancy was barred by the doctrines of estoppel and laches. The Board finds the Appellant's claims to be without merit.

"[T]he doctrine of equitable estoppel has traditionally not been favored when sought to be applied against a government entity. . . it is accepted that in certain circumstances an estoppel may be raised to prevent enforcement of municipal zoning ordinances." *Saah v. District of Columbia Board of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981); *see Wieck v. District of Columbia Board of Zoning Adjustment*, D.C.App., 383 A.2d 7, 11 (1978). The elements that must be shown in order to raise an estoppel against enforcement of a zoning regulation are: (1) that a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine. *Wieck v. District of Columbia Board of Zoning Adjustment,* 383 A.2d 7, 11 (D.C. 1978).

Furthermore, reliance by the party must be justified. *Nathanson v. District of Columbia Board of Zoning Adjustment*, 289 A.2d 881, 884 (D.C. 1972).

"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). 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 737, 741 (D.C. 1979).

Appellant does not establish that any reliance on the actions of the D.C. government would have led him to make expensive improvements in good faith, nor has Appellant shown that any enforcement action was unreasonably delayed.

Appellant, in support of his estoppel claim, points to a 1940 BZA variance approval, issued to Flood Motor Company, to permit the extension of an automobile repair shop and automobile sales and service agency. Appellant points to this evidence, introduced by ANC 3F, in an attempt to establish 1) that a repair garage was functioning on the subject property for 63 years, and 2) a repair garage was approved as a variance and therefore such approval continues to run with the land. As to the first assertion, the record does not indicate that this use was continuing. Appellant submits documentation related to four C of O's for the subject property. The first C of O, in 1983, is for "Automobile Sales and Service". Whenever it was that repair garage use was discontinued, it is clear from the record that it was no longer continuing under the 1983 C of O and was abandoned by virtue of a change in use. And in 1986, a C of O was issued for "Motor Vehicle Dealer," a use even further removed from a repair garage. As to the second contention, the use approved by the BZA in 1940 for Flood Motor Company was "subject to the condition that all repairing shall be incidental to the sale of new cars only" (Transcript of October 9, 1940, hearing at page 30). When the sale of new cars was discontinued at the subject property, the repairs were no longer incidental to the sale of new cars and, therefore, were not permitted under the variance granted. Moreover, the variance was for an *extension* of the repair shop and automobile sales use already in existence. The principal use, therefore, once abandoned, as was indicated by the circumstances discussed above, cannot be resurrected under a variance for a mere extension of that use alone.

More recent events also do not establish a claim for estoppel. The record shows that in 1998, Mr. Koo Yuen applied for a C of O for the subject property. The use applied for

and approved was Automobile Service Center. Nothing in the application or C of O issued indicates that Mr. Yuen was permitted to use the property for automobile maintenance or repairs. In fact, the application itself stated that it was for "(Automobile Service Center) Automobile Sales, Automobile Accessory Sales Including Installation", which does not rationally permit the type of high impact commercial activity associated with automobile maintenance or repair.

As for the C of O at issue in this case, not only was it for Automobile Service Center, not repair garage, it was a mere change of ownership application. The underlying use remained "Automobile Service Center". While the application included the words repair garage in parentheses, and the prior use indicated was "Repair Garage", this was not the use that was stated on the C of O.

Appellant's estoppel claim therefore fails because there was no indication that the government allowed, either actively or passively, a repair garage to operate at the subject property, and therefore any reliance on the government could not be said to have been in good faith.

Turning to Appellant's laches claim, ANC 3F Commissioner Karen Perry points out in her submission and accompanying documentation that DCRA has taken enforcement action against owners of the subject property for use as a repair garage as early as 1990, and continuing thereafter. At least one DCRA Administrative Law Judge's decision (OAD 90-1683-E) reveals that DCRA considered that a repair garage as a principal business at the subject location was not permissible without a special exception or variance approval. This decision was affirmed by the Board, who agreed with the ALJ that the Appellant was operating a repair garage in violation of his C of O. Based on the above, Appellant cannot establish that the government enforcement action in this case was delayed. Appellant's laches claim therefore fails.

Based on the above, it is hereby:

ORDERED that the Appeal is **DENIED**. The motions of the Intervenor, DCRA, and ANC 3F are therefore **GRANTED**, in part, and **DENIED**, in part.

VOTE: 5-0-0 (Geoffrey H. Griffis, Carol J. Mitten, Curtis L. Etherly, Jr., Ruthanne G. Miller, and David A. Zaidain to deny)

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[1] Also, as was pointed out at the hearing, a private party is entitled to bring an enforcement action pursuant to D.C. Official Code § 6-641.09 may do so in reliance on a Board Order.

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

Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____

JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: SEP - 8 2003

UNDER 11 DCMR 3103.1, NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT. CB/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16947

As Director of the Office of Zoning, I hereby certify and attest that on SEP - 8 2003 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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Director, Office of Zoning

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