STATEMENT REGARDING

APPLICATION NO. 17281

POWER FUEL & TRANSPORT LLC

Tuesday, February 8, 2005

Good morning, Mr. Chairman and Members:

I am John Ray, and I am an attorney with the firm of Manatt Phelps & Phillips. We represent the DAG Petroleum company, which is owned by Mr. Joe Mamo. DAG owns a Shell service station at 4700 South Capitol Street SE, and also owns 15 other Shell stations in the District of Columbia and others in Maryland.

Mr. Mamo is in the gas-station business and supports development of more gas stations because the city needs more. What we oppose is the double standard that has infected the gas-station review process at the Department of Consumer and Regulatory Affairs.

We believe the regulations governing business permits and zoning ought to be applied fairly and equally across the board. We are troubled by considerable evidence that this has not been the rule at DCRA. Mr. Mamo and other gasoline service station owners in the city have been held to the strict standards of the business permit requirements and zoning regulations – while Power Fuel has been excused from many of the rigors of compliance.

On September 28, 2004, we filed a complaint with DCRA's General Counsel, providing information that four Power Fuel stations in C-2-A and C-3-A zone districts have been constructed and placed in operation without going to the BZA to seek special exceptions as required by the Zoning Regulations.

The fifth station on our complaint list is Power Fuel's South Capitol Street station which is the subject of Application No. 17281. In June 2004, DCRA issued a building permit allowing Power Fuel to install "new pumps and tanks at gas station per plans" at the address of 4675 South Capitol Street SW, Lot 1 of

BZA
Case No. 17281
Exhibit No. 34
Board of Zoning Adjustment
District of Columbia
CASE NO. 17281
EXHIBIT NO. 34

Square 6274. Lot 1 – the 4675 address – is occupied by a Bank of America branch, not a gas station. (The building permit was included in the Power Fuel application documents and is marked as Exhibit No. 10 in your case file.)

There has not been a gas station on Lot 1, at the 4675 address, since at least March 2, 1987, when a Certificate of Occupancy was issued to American Security Corporation for use of the 4675 location for retail banking. On December 8, 1993, another Certificate of Occupancy was issued for use of the 4675 location as a branch of Nations Bank, which subsequently became the Bank of America branch operating there today.

Until we filed our complaint last September, it appeared that Power Fuel would also build the South Capitol Street station without BZA approval. However, on November 8, 2004, Power Fuel wrote to the DCRA Zoning Administrator, stating: "We understand that our work and re-installations activities as set forth in the above-referenced permit (referring to the June 2004 tank installation permit) shall be allowed to proceed by DC-DCRA/BLRA, and that concurrently an application to restore this prior valid use shall be filed/submitted to the District of Columbia Board of Zoning Adjustment (BZA)." [*See* Exhibit 7 of Application No. 17281]

Thus, according to the Power Fuel representative, the Zoning Administrator told him to go ahead and install tanks for a gas station at 4675 South Capitol even though there was no gas station there, and at that time, no BZA application had been filed to build a gas station there.

Finally, on December 3, 2004, Power Fuel filed the special-exception application with BZA, but characterized it as a request for the Board's "recommended outcome". [*See* Exhibit 3 of Application No. 17281] And, without waiting for the Board's decision and order, Power Fuel began work on or about January 7, 2005, to install the underground tanks.

But not on Lot 1 at 4675 South Capitol. Instead, they were installed on Lot 4, at 4665 South Capitol, and that is where Power Fuel is attempting to locate the

proposed gas station despite its application to the Board to approve a gas station at 4675 South Capitol.

The Power Fuel application states the intention to "re-establish" a gasoline station. But one cannot "re-establish" what was never there. DCRA's Certificate of Occupancy records show that a C of O for gas station use has never been issued for the 4665 address.

Perhaps that is why Power Fuel lists 4675 as the address on its application, even though a gas station has not existed even at the 4675 address for at least the past 18 years. In yet another discrepancy, DCRA issued a C of O to Power Fuel for a gas station at 4675 South Capitol on September 29, 2003, even though it was a bank -- not a gas station - on the site and in operation at that time.

In a report to the Board on this case, the District Department of Transportation expressed concerns about the same matters I have described. The D-DOT report states:

"DDOT staff conducted a site visit and observed a number of items that raise concern. The project address listed on the application is 4675 South Capitol Street, SW, however that address is for a Bank of America branch; the existing retail store on the site that would presumably operate the gas service station has an address of 4665 South Capitol Street, SW.

"Construction activity was ongoing at the location of the gas islands and was ordered stopped by a DCRA inspector, for the third time. The site was partially razed as the asphalt was removed to install the gas service islands and gas storage tanks."

The report goes on to address parking and transportation matters, then re-asserts the concern over continuing construction. D-DOT writes: "DDOT is concerned that the applicant continues construction activity on site without BZA approval or proper construction permits, and has been reluctant to coordinate with OP and DDOT staff. . . ."

Compare D-DOT's concerns with the Zoning Administrator's statement in a letter I received from him yesterday. The Zoning Administrator acknowledged that the proposed gas station is actually being constructed at 4665 South Capitol while the permit for the tanks was for 4675 South Capitol. He acknowledged that the gas station application is now before BZA, and he acknowledged that a Stop Work Order was in effect at the site at the time he "inherited" my complaint from his predecessor.

He wrote: "It was my determination that there existed no valid basis for continuing the SWO (Stop Work Order), since no evidence existed that the scope of work permitted under the building permit was being exceeded. . . . Please be advised that this office has a written commitment from the owner of subject property that construction would be limited to underground tank installation, backfilling and paving to grade only, pending the outcome of the application before the BZA."

But D-DOT, based on a site visit, described the removal of asphalt, the installation of the gas service islands, and continuing "construction activity" without proper permits.

From this record, and the fact that Power Fuel has built or renovated and enlarged at least four stations in C-2 and C-3 zone districts with no BZA approval, one cannot avoid the conclusion that DCRA enforces the regulations in a loose and lackadaisical manner when it comes to Power Fuel.

But with DAG and other gasoline service station owners, DCRA's approach is stringent and strictly by the book.

For instance, in 1999, when DAG sought DCRA permits to re-establish the service station at 3101-3103 Rhode Island Avenue NE, we were advised that a BZA special exception would be necessary even though Mr. Mamo was renovating an existing gas-station structure with no change in the building footprint. We were told that the addition of a canopy and the expansion of the number of pump outlets constituted an "enlargement" requiring BZA review.

Other recent BZA cases show that other owners also were referred for BZA review for modest changes in existing gas-station operations. A few examples:

- BZA Order 16369, October 7, 1998 (Shell Oil Company addition of a canopy at an existing service station at 1830 Rhode Island Avenue NE);
- BZA Order 16455, July 21, 1999 (Amoco Oil Company renovation of an existing service station at 3426 Georgia Avenue NW), and
- BZA Order 16399, November 4, 1998 (Merit Oil addition of a canopy and office storage kiosk at an existing service station at 1739 New Jersey Avenue NW).

DCRA did not tell Mr. Mamo in 1999 that he could go ahead an install his underground tanks and build his gasoline service islands while waiting for the BZA to provide its "recommended outcome." It was certainly never suggested that the BZA action was just a recommendation.

I doubt seriously that the Shell, Amoco, and Merit applicants in the cases listed above were told they could proceed with construction work in advance of BZA decisions and orders.

More recently, Mr. Mamo sought a permit to extend a canopy cover over the new Shell Hydrogen pump at his Benning Road station. This station was chosen by Shell for its first-in-the-nation hydrogen fueling demonstration project to educate the public about hydrogen as a safe, clean alternative to foreign oil. DCRA denied his permit application, and referred him to BZA for special-exception review on grounds that the canopy extension represents an "enlargement" of the service station.

Mr. Chairman and Members, I believe the facts and circumstances surrounding this application and DCRA actions regarding other Power Fuel stations raise serious questions regarding DCRA's equal enforcement of the regulations and fair treatment of all applicants.

If DCRA has a new policy that no longer stringently applies the requirement to seek BZA special exceptions for gas station enlargements of

almost every nature, the new policy should be publicly announced and applied to all, rather than being applied on a case-by-case basis. On the other hand, if DCRA's policy is to enforce the rules strictly as they are written, such a policy should apply to Power Fuel as well as to all others.

For these reasons, we believe Power Fuel's Application No. 17281 is not sufficiently true, accurate, and complete to merit consideration and action by the Board.

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