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DC OFFICE OF ZONING
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Board of Zoning Adjustments
District of Columbia Office of Zoning
Suite 210 South
441 - 4th St. NW
Washington, DC 20001

Advisory Neighborhood Commission 8D
4601 Martin Luther King Ave. SE
Washington, DC 20032

Re: BZA Application No. 17281
Power Fuel Transport LLC

To the Board of Zoning Adjustments:

This is a response to the submission of May 16, 2005 by the Advisory Neighborhood Commission 8D regarding the above-referenced submission.

Alleged Failure to Notify Commission. The submission to the BZA contained 20 copies. It was the understanding Power Fuel Transport LLC that BZA would provide the appropriate copies. It is clear that the Commission obtained a copy of the Power Fuel submission in time to prepare a detailed response, and so even if there were an issue regarding notification, it caused no one any prejudice.

Issuance of Building Permit. The Commission seems to object that DCRA never provided the Commission with a copy of the application paperwork in connection with issuance of the building permit. First of all, the permit process was reviewed by Lennox Douglas and approved by him four months ago. The Commission was well aware, whether or not it may have received any paperwork, of the status of the redevelopment of the site.

BZA
Case No. 17281
Exhibit No. 41

Board of Zoning Adjustment
District of Columbia
CASE NO. 17281
EXHIBIT NO. 41

While it may be of concern internally that one branch of the District government may have failed to provide documentation to another branch, this should not affect the substantive rights of Power Fuel. Power Fuel acted in good faith, provided all documentation when requested in this case, and was cooperative at considerable expense in reconfiguring the site to accommodate suggestions made by various departments of the District Government.

A letter submitted by Lennox Douglas on January 15, 2005 indicates that the Commission was, in fact, give notice. There is no basis to prejudice the existing permit or BZA process on account of an allegation that the Commission did not receive a notice.

Moreover, David Clark, Director of the Department of Consumer and Regulatory Affairs, has opined that the DCRA failure to provide permitting information to the ANC is permissible where DCRA determines that the failure to issue a permit has no significant impact on neighborhood planning and development. There is no basis for this determination of no-impact by the DCRA should have any bearing on Power Fuels' permit in this case.

In any event, it is clear that the Commission has had considerable input into the process, and that the process was not affected by an internal failure to deliver copies. Power Fuels should not be prejudiced by such a failure under the circumstances.

Shell Oil Application. The Commission states in its letter that "[c]hanges in the law and zoning regulations have occurred since the processing of the Shell permits or application which warrants a different standard in their case." The Power Fuel Memorandum discusses the applicable standard of review at length and clearly demonstrates that it is legally appropriate to grant any required BZA approval for the project, especially after Power Fuel agreed to substantial expensive revisions to its original scope of work.

The Commission does not reference any relevant changes to laws or regulations between the Shell project and the instant project which would have any bearing whatsoever on the approval of the Power Fuel project.

The most significant relevance of the Shell use of the site is that it demonstrates that the site as a whole was continuously used as a retail gasoline service station. The cases cited by Power Fuel clearly demonstrate that an extended use such as Shell's use means that Power Fuel's use of the site for the same purpose, even if the site was temporarily closed, is a permissible use.

Your attention is also directed to the letter submitted by Mr. Toye Bello dated February 1, 2005. On page 1 paragraph 4, and page 2 paragraph 1 line 6 of the letter, Mr.

Bello states: "It was my determination that there existed no valid bases for the continuing the SWO [stop work order], since no evidence existed that the scope of work permitted under the building permit was being exceeded. Further, I found no substantive basis upon which a case for revocation could have been moved." Also page 2 paragraph 2 of the February 1, 2005 letter from Toye Bello Zoning Administrator. Had there been any objection based on the changed in the law, Mr. Bello would not have agreed to allow the permitted work to proceed.

From this Bello correspondence, it is clear that the issues involved in the issuance of the permit were carefully considered and resolved already in Power Fuel's favor.

Alleged Discontinuance of Service. The regulations and cases cited in the Memorandum submitted by Power Fuel clearly demonstrate that the alleged discontinuance of service has no bearing on the approval of the BZA.

First, the discontinuance of use regulations, §2005.1, apply only to discontinuance involving a nonconforming use. The Commission in citing that regulation overlooks the fact that the service station use at the site proposed by Power Fuel is fully conforming. The Regulations define nonconforming use as follows:

> . . . .any use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective, that does not conform to the use provisions for the district in which the use is located. A use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use. That nonconforming use shall be considered a conforming use.

The site is "located" in a C-3-A zone, and so the use of the site was never nonconforming, because the use of the site at all times as a gasoline service station fully conforms to the C-3-A use as detailed in the Power Fuels Memorandum. Moreover, §2003.4 provides that when an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming use or less restrictive use. Although use of the site as a service station was always a conforming use back into the 1950's and before, even if at some point the use had been changed in the last 55+ years from a nonconforming use, the Power Fuel use would still be considered to be a conforming use as of now because any approval of a nonconforming use converts the use into an otherwise conforming use under the regulations.

Under the circumstances, even if the closure of the site is equivalent to a discontinuance of use, the Power Fuels use of the site is fully permissible without any further BZA approval.

Traffic Study. The Commission objects that the dates and times on which the traffic study were conducted are not representative of the traffic at the site. There is absolutely no expert evidence provided by the Commission or any opinion from a reputable traffic study contractor to back up this assertion, or to indicate that the extensive traffic study conducted by Power Fuel is in any way defective.

With all due respect, anyone can object to a traffic study and say that a different result would have obtained at a different time and date. Unless a specific result is supported for a different time and date, these factors should not be considered by the BZA, especially based on an unsupported comment.

Although there was no obligation on the part of Power Fuel to submit a traffic study in this case, Power Fuel responded to the request of the BZA and the Office of Planning. Power Fuel submitted an extensively documented Traffic Study to meet the requirements of the DDot concerns in there letter submitted at the January 27, 2005 hearing. Power Fuel hired a respected and experienced Traffic Study Company approved by the Transportation Office and have submitted there findings to the DDot authorities for review and approval. The letter dated May 16, 2005 from DDot has given its approval of the application. This approval letter includes the approval to the minor modifications recommended by the Traffic study. The Commission's response to the Power Fuel Traffic Study makes certain recommendations; however the DDot does not use the Commission's criteria to evaluate the traffic flow in the District of Columbia.

The Commission objects that Power Fuel does not propose to improve the street in connection with the project. This is not correct. Power Fuel stated in the January 27, 2005 hearing, as well as on several occasions to the Office of Planning that we would indeed make the street improvements. Specifically, Power Fuel committed to make any required improvements to the paved street at South Capitol Street dead ending at the southern entrance to the Lot 1 & Lot 4 to make entering and exiting as smooth as possible. Also in the Power Fuel Traffic Study there is also reference to the road improvements.

With the end results to the gasoline service station, convenience store w/ fast food, the bank and the Rite Aid we are able to bring multiple uses to the South Capitol & Southern Ave area S.W & S.E , and we can attract sales-tax paying Maryland shoppers as well. This road is one of the gateways to the District, and it is Power Fuels' goal to help bring revenue to the city in all our endeavors with the citizens.

Address References. There are several address references in the application paperwork. However, it is clear from the lot and block references in the same paperwork that the same parcel is under consideration. Some of the address references are based on the errors in the reported address on plans prepared and filed in the 1950's and 1960's. Another source of discrepancy is the possibility that upon project completion or at some

other point in the process, Power Fuel will apply for a separate address for a portion of the parcel. These issues have not been resolved yet and are not ready to be resolved. None of these issues is before the BZA in connection with this particular matter, and none of these issues impacts on the BZA approval process.

As explained in the submission of information regarding the uses of the lots they owned by the applicant, the lots involved are Lots 1 & Lots 4 6275-4665 . There can be more the one use for a site per the Zoning Regulations. Power Fuel has never submitted the wrong address for this application but has decided to use all available options to incorporate multiple uses at the site to bring more service to the community. We have agreed to speak with Mr. Lennox Douglas in reference to the addresses be 4675 A 4675 B in this matter should it be a condition of the BZA.

Citizen Approval. The District citizens have enthusiastically supported the reopening of the gasoline service station at the site.

Power Fuel submitted signed partition forms from the citizens in 8D ward as well as letters from the Councilman Barry's office in support of this project. The citizens who have contacted Power Fuel have had no communication with the ANC 8D Members in objection to the project nor have these citizens been aware of meetings or letters of fillings in reference to the application. It is not clear why the Commission would object on the basis of there being any citizen opposition to the project. The only objection presented is based on the paperwork filed by competing gas stations and their high-priced lobbyists, in attempt to keep the prices paid by citizens for gasoline artificially higher and to stifle competition. None of these objections has any bearing on the welfare of the citizens or the impact of the Power Fuel project on the locale.

At the January 27, 2005 ANC Community meeting Power Fuel noted that citizens were voting for new elected officers and the members of the community spoke very highly of the Power Fuel project. Unfortunately, the meeting became "heated" after Mr. Jordan would not take citizen comments on why they had no say in the approval of the Power Fuel project at 4675 S Capitol St SW address. The ANC board apparently had a written decision already written and addressed to the new chairman to vote in opposition of the Power Fuel project before the meeting began. There is no indication that any actual citizens had any input into this document, and it unfortunately appears clear that this document was prepared by the ANC **without the vote of the citizens**.

The only opposition at that meeting was presented by the competing Shell Station across the street from 4675 S Capitol St SW. 20 citizens at the ANC meeting agreed with the Power Fuel project, and only four opposed the project, excluding Board members. The four opponents were the competitors and this opposition did not represent legitimate citizen input.

The actual citizens have made their case in what they want approval of the project by the ANC in filings before the BZA and it should be noted that the ANC Commission should be responsive to the citizens, or at least should be required to state a reason why they make a recommendation which is contrary to the legitimate citizen input they have received.

Conclusion. There is no basis raised by the Commission why (1) the BZA has jurisdiction over this case or (2) even if the BZA does have jurisdiction, why the approval should not be granted.

With all due respect, the submission by the Commission raises objections to the application which are not supported by references to the law, which are inconsistent with the record before the BZA, and which contradict the positions of the *bona fide* citizens in attendance at the BZA hearing on the topic.

Power Fuel has made every attempt to be fully cooperative in this case and respectfully requests prompt approval of the project.

Sincerely,
DeCaro & Howell PC

By:
Thomas F. DeCaro, Jr.