MARGARET GENTRY

GOVERNMENT RELATIONS & COMMUNICATIONS SERVICES

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May 24, 2005

Via Hand Delivery

Board of Zoning Adjustment
District of Columbia Office of Zoning
One Judiciary Square, Suite 210 South
441 Fourth Street N.W.
Washington, D.C. 20001

RE: BZA Application No. 17281
Power Fuel & Transport LLC

Dear Members of the Board:

I write as a private citizen to comment on the Power Fuel & Transport LLC submission dated May 3, 2005, and identified as Exhibit No. 38 in the above-listed case. As the Board may recall, I assisted John Ray of the law firm of Manatt Phelps & Phillips in preparing his BZA hearing testimony and written submissions in this case on behalf of our client at that time, DAG Petroleum Suppliers LLC. I have completed the work for which DAG Petroleum retained me, and Mr. Ray also does not presently represent DAG Petroleum. Thus, this letter is offered, not on behalf of any client, but as my personal view based upon my prior research and familiarity with the case.

Regarding Power Fuel's May 3rd submission, let me note first that when I last reviewed the case file about two weeks ago, I noted that Power Fuel had filed no record of having served ANC 8D, a party to the case, with its May 3rd submission. If Power Fuel did not, in fact, serve copies of its submission on ANC 8D, the failure to do so violates the Zoning Regulations and has deprived ANC 8D of a fair opportunity to respond.

My further comments relate to the memorandum signed by Thomas F. DeCaro, Jr., of the law firm of DeCaro & Howell (the "DeCaro memorandum") and included in Power Fuel's May 3rd submission. The DeCaro memorandum reflects a gross misunderstanding of the issues raised by the Board during the February 8th hearing on this case, as well as factual errors and lack of familiarity with the applicable Zoning Regulations.

BZA
Case No. 17281
Exhibit No. 42

1. Community Opposition.

The DeCaro memorandum states, on page 4: "The project has been uniformly approved by local citizens. The only District of Columbia opposition to the project comes from a competing gas station across the street...." This is not true. ANC 8D voted to oppose the

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17281
EXHIBIT NO. 42

application, and 8D-03 Commissioner Absalom Jordan testified in opposition at the February 8th hearing.

2. BZA Jurisdiction.

The principal argument set forth in the DeCaro memorandum is the same assertion Power Fuel witnesses presented at the hearing: that the BZA has no jurisdiction over Power Fuel's determination to open and operate a gasoline service station at 4665-4675 South Capitol Street S.W. The DeCaro memorandum makes no better argument for that position than Power Fuel witnesses did at the hearing and moreover, ignores the position affirmed by Chairperson Griffis at several points during the hearing.

Commenting on this argument at one point during the hearing, Chairperson Griffis said, "The point is that the Zoning Administrator sent you here. That's enough for us. We need to ask no more." (Transcript of the hearing of February 8, 2005, at p. 136; referenced hereinafter as *Tr.*) Referring to advice from the Board's legal counsel, Mr. Griffis also noted that in addition to the Zoning Administrator's referral, Power Fuel had self-certified the development plan as subject to BZA special-exception review. (*Tr.*, pp. 142-143) Finally, Mr. Griffis also stated, during a discussion of the Applicant's building permit: "We obviously agree with the fact that the permit is invalid unless they have a special exception and obviously they can't construct it. So to allay everyone's fears in that matter, they have taken the correct route in terms of bringing an application before the Board and that's what we do." *Tr.*, p. 231.

3. The Issue of Nonconforming Use and Discontinuance of Use.

The DeCaro memorandum further argues, as Power Fuel witnesses contended during the hearing, that a special exception is not required because a gasoline station has been in continuous use at the site, thus remains grandfathered as a C-3 nonconforming use with no BZA action required for its on-going nonconforming use. The Zoning Regulations, at 11 DCMR § 199.1, provide: "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. The nonconforming use shall be considered a conforming use, subject to the further provisions of §§ 3104.2 and 3104.3", which require BZA special-exception approval of "any extension or enlargement of that use."

Thus, a gasoline service station at 4665 or 4675 South Capitol Street S.W. was a conforming use only until December 20, 1985, after which the "establish(ment)" or "enlarge(ment)" of a gasoline service station at that location became subject to BZA review. If a gasoline service station had been in operation at that address on December 20, 1985, it could

have continued existing operations as a grandfathered use, but it could not have "enlarged" its operations without BZA approval. The whole thrust of the Zoning Commission's Order enacting the nonconforming use regulations was to phase out nonconforming uses through attrition.[1]

The DeCaro memorandum argues that Power Fuel's current plans do not amount to an "enlargement" requiring special-exception approval. I disagree, but that argument is not particularly significant in terms of the application before the Board.

The more significant issue is whether the Power Fuel site was in use as a gasoline service station on December 20, 1985, when the Zoning Regulations were amended to require special-exception approval for gasoline service stations in C-3 districts, and whether it has remained in "continuous use" as a gasoline service station since then. The record shows the answer is "no" on both questions.

Section 2005.1 of the Zoning Regulations states: "Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for a period of more than three (3) years, shall be construed as *prima facie* evidence of no intention to resume active operation as a nonconforming use."

During the hearing, there were several colloquies between Power Fuel witnesses and Board members regarding the meaning of "continuous use", including the following exchange *(Tr.*, pp. 127-130) between Chairperson Griffis and Power Fuel witnesses Ted Beck and Koo Yuen:

> CHAIRPERSON GRIFFIS: Right, and if it hasn't been used in the past three years, it has discontinued its existing nonconforming use.
>
> MR. BECK: Well, in 1976, it was conforming.
>
> CHAIRPERSON GRIFFIS: But in the past three years, it hasn't been in operation.
>
> MR. BECK: But the discontinuation refers to nonconforming.
>
> .....

[1] ***See*** Zoning Commission Order No. 403, July 18, 1983. The Commission wrote: "The recognition of the concept of non-conforming uses and structures is essentially an attempt to balance the rights and interests of property owners who established uses or built buildings at a time when they were free to do so with the overall public policy perspectives of the community which suggest that ***such uses would no longer be appropriate if they were started today. . . . The general public interest in eventually affecting the withering away of non-conforming uses should be the major policy control. . . .*** *Emphasis added.*

> MR. YUEN: The way we read the nonconforming would be something like a grandfather which like an R-4 used to be a gas station there before zoning, however, that use is continuous until somebody either stops using it or it burns down or whatever the case may be. And therefore forever will be gone. But our case here before the Board is that we maintain that the use has been established and we're not enlarging it. We're not doing any changes other than—
>
> CHAIRPERSON GRIFFIS: What does it mean to be established?
>
> MR. YUEN: I beg your pardon?
>
> CHAIRPERSON GRIFFIS: What does it mean? You said the use has been established.
>
> MR. YUEN: We have been asked by the Zoning Administrator to come to this because of—
>
> CHAIRPERSON GRIFFIS: I know, but you say that they use has been established. What do you mean by it's been established. It's been in operation or—
>
> MR. YUEN: It's been established continuously from the record which is 1958, 1976 and before 1985 and—
>
> .....
>
> CHAIRPERSON GRIFFIS: .....That existing condition does carry through all the way up to the date that that operation stops, meaning it no longer is in operation. You can't go in there and buy gas. That day starts a clock. That clock ran and if three years pass, that existing now nonconforming use is discontinued. It is no longer an existing nonconforming use. It's a nonconforming use under special exception.

In hearing testimony and in the DeCaro memorandum, Power Fuel attempts to sell the fiction that a facility can be in "continuous use" even when it is not in operation and, in fact, does not exist. But Chairperson Griffis' statement – "You can't go in and buy gas there" – succinctly penetrates the fiction and recognizes longstanding BZA case law that a business entity cannot claim a grandfathered "nonconforming use" if it discontinues operations for more than three years (except when government action has impeded the entity's access to the site, which is not the case here).

Although asserting "continuous use," Power Fuel representatives have not claimed – either in hearing testimony or in their May 3rd submission – that a gasoline service station has

been in continuous ***operation*** at the South Capitol Street site since December 20, 1985. Nor have they rebutted the statements by opposing witnesses at the hearing that there has been no gas station in operation at that site for at least the past 18 years. And, as the Chairperson pointed out and as the BZA has held in previous cases, "use" necessarily implies on-going active ***operation***.

The BZA has strictly construed the three-year discontinuance of use provision, most notably in BZA Appeal No. 16222, Order issued June 4, 1997, reversing the Acting Zoning Administrator's issuance of a Certificate of Occupancy for a retail drug store and pharmacy because of evidence that "the use at issue was clearly discontinued for more than a three-year period and that the building permit was issued in error."

BZA Appeal No. 15588, Order issued January 8, 1992, also is instructive. This order involved an ANC/Civic Association appeal of a building permit allowing renovation of an apartment house in an R-2 zone district where apartment houses are not a conforming use. ANC 5A and the Brookland Civic Association argued that the building permit was invalid because the property had not been used as an apartment house for more than three years. The BZA rejected the appeal, but only after requiring the apartment house owner and DCRA to produce Certificates of Occupancies, property tax records, and sworn affidavits and testimony from former tenants, nearby neighbors, and an architect to prove that the property had been in continuous use – *i.e.*, operation – as an apartment house.[2]

The DeCaro memorandum wrongly interprets *George Washington University v. BZA*, 429 A.2d 1342 (D.C. App. 1981) and *Wood v. D.C.*, 39 A.2d 67 (D.C. App. 1944) as supporting the Power Fuel position on discontinuance of use. In face, the Court in *George Washington University* found specific, detailed evidence that Intervenor Stanley Margolis had made on-going efforts to continue a nonconforming use of his property, and had been hampered in doing so for a brief period of 13 months due in part to a building permit issue. In fact, Mr. Margolis – unlike Power Fuel – recognized his responsibility to apply to the BZA for approval of a building enlargement.

Both *Wood* and *George Washington University* have little if any bearing on the instant case because both were issued before the discontinuance-of-use provision (11 DCMR 2005.1) was adopted in 1983. (***See*** BZA Appeal No. 15893, Appeal of Woodrow D. Malone, Order issued July 6, 1994, at pages 4-5, for a discussion of the history and intent of § 2005.1).

[2] ***See also*** BZA Application No. 17100-A of Jesus Is The Way Church, Order issued June 22, 2004.

During the hearing, the Board, through Vice Chair Ruthanne G. Miller, requested that Power Fuel submit "a chronology of use" of the site, including "when it (the gas station operation) lapsed and when the final lapse was and confirmation." *Tr.*, p. 261. In response, the DeCaro memorandum refers to various building permits and certificates of occupancies – with five highly significant omissions.

The DeCaro memorandum, at p. 2 lists a C of O issued to Paul D. Hohnson on December 7, 1976, for a gasoline service station at 4675 South Capitol Street SW, then states: "No other site history was located in the course of our search." In fact, five certificates of occupancies were issued for the 4675 South Capitol address ***after*** that time:

- B100638, to B & M Auto Sales Inc., for "Used Car Sales", issued October 11, 1979;
- B140893, to L.I.T.F.L. Inc., for "Motor Vehicle Dealer & Sales Finance", issued December 31, 1984;
- B144752, to Emauel Kaldani & Ali Mostashari, for "Motor Vehicle Dealer & Sales Finance", issued March 3, 1986;
- B148789, to American Security Corp., for "Retail Banking", issued March 2, 1987, and
- B167288, to Nations Bank (now Bank of America), for "Bank", issued December 8, 1993.

At the adjacent 4665 South Capitol address, at least three certificates of occupancies have been issued ***after*** December 7, 1976, as follows:

- B129684, to Pic N Pay Shoe Stores, for "Shoe Store-Retail", issued June 21, 1982;
- B145039, to Continental Baking Company, for "Bakery thrift shop. Commercial sales of bakery products on the premises only.", issued April 7, 1986; and
- B00182163, to Willie's Washington LLC, for "Retail Records CD and Tapes, Not Sexually Oriented", issued December 1, 1998.

The record is clear that there has been no gasoline service station in operation with a valid certificate of occupancy at the 4675 South Capitol address since at least March 2, 1987, when the C of O was issued for the bank branch that has been in operation at that site ever since. It is likely that the gas-station operation was terminated even earlier, on or before October 11, 1979, when the C of O was issued for the used-car sales facility at that location.

Although Mr. Yuen obtained a C of O for gasoline service station use of the 4675 address on September 29, 2003, that does not negate the fact of ***a lapse of at least 18 years, and possibly 24 years*** in gas station use at that address. (Besides, I cannot understand how the 2003 C of O could have been issued for the "occupancy" of a structure that did not exist.) As for the 4665 address, there is no record that a C of O was ever issued for gas station use at this address.

MARGARET GENTRY
GOVERNMENT RELATIONS &
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Thus, the instant application cannot qualify as a grandfathered continuance of a nonconforming use and requires the BZA to determine whether it meets the standards for a special exception for the "establishment" of a gasoline service station at that location pursuant to §§ 743.1 and 706 and Chapter 23 of the Zoning Regulations.

The revised site plan and traffic study included in Power Fuel's May 3rd submission do not appear to address adequately the questions and concerns expressed by the Board, the Office of Planning, and the District Department of Transportation. Given these insufficiencies and the "great weight" that must be accorded to ANC 8D's opposition, I respectfully submit that the Board should deny the application.

Thank you for considering these comments.

Sincerely,

Margaret Gentry

Attachments
(Certificates of Occupancies, as listed on p. 6)

MARGARET GENTRY
GOVERNMENT RELATIONS &
COMMUNICATIONS SERVICES

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been sent by facsimile transmission on this 24th day of May, 2005, to the following:

Thomas F. DeCaro Jr.
DeCaro & Howell, P.C.
1446 Old Mill Road
Upper Marlboro, MD 20772
FAX: 301.464.4776

D.C. Office of Planning
801 North Capitol Street N.E.
Suite 4000
Washington, D.C. 20002
FAX: 202.442.7637

and by first-class mail, postage prepaid, to:

Advisory Neighborhood Commission 8D
4601 Martin Luther King Jr. Avenue SW
Washington, D.C. 20032

Margaret Gentry

Form LII-P-601
(Rev. 9/78)

CERTIFICATE OF OCCUPANCY

No. B116886

Washington, D.C., Oct. 11, 19 79

Permission is hereby granted to B & M Auto Sales; Inc.

to use the 1st & lot floor(s) of the building located on Lot 247/62 Square 6275

known as premises 4675 South Capital St. SE for the following

purpose(s): Used Car Sales

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Cer tificate must be obtained.

ZONE C-2-A

FEE $ 35.00

Chief, Permit Branch

By

DEPARTMENT OF LICENSES, INVESTIGATIONS AND INSPECTIONS GOVT. OF DIST. OF COL.

OFFICE COPY.

Form LII-P-601
(Rev. 2/82)

CERTIFICATE OF OCCUPANCY

No. B140893

Washington, D.C., December 31, 19 84

Permission is hereby granted to L.I.T.F.L., INC.

to use the _____ floor(s) of the building located on Lot 247/62 Square 6275

known as premises 4675 South Capitol St., S.W. for the following

purpose(s): Motor Vehicle Dealer & Sales Finance

Not sexually oriented.

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

DEPARTMENT OF LICENSES, INVESTIGATIONS AND INSPECTIONS GOV'T. OF DIST. OF COL.

OFFICE COPY

ZONE C/3/A FEE $ 27.00

Chief, Permit Branch

By _____
Permit Clerk

Form LI-P-601
(Rev. 2/82)

CERTIFICATE OF OCCUPANCY

No. B144752

Washington, D.C., 3/3/86, 19

Permission is hereby granted to Emauel Kaldani & Ali Mostashari

to use the 1st. floor(s) of the building located on Lot par247/62 Square

known as premises 4675 South Capt. St. S.W for the following

purpose(s): Motor Vechicle Dealer -Sales & Finance.

Not Sexually Oriented

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

ZONE C/3/A FEE $ 27.00

Chief, Permit Branch

By Albert Belanger
Permit Clerk

DEPARTMENT OF LICENSES, INVESTIGATIONS AND INSPECTIONS GOVT. OF DIST. OF COL.

OFFICE COPY

No. B 148789

BLRA-17
(Rev. 6/86)

District of Columbia Government
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration Zoning Division
P.O. BOX 37200 — Washington, D.C. 20013-7200

CERTIFICATE OF OCCUPANCY

March 2, 1987
(date)

Permission is hereby granted to AMERICAN SECURITY CORP.
to use suite(s) N/A on the first floor(s)
of the building located on lot(s) 1 square G 274
known as premises 4675 South Capitol St. S.W. for the following
purpose(s) Retail Banking
Not sexually oriented. [su]

BZA #: EXPIRATION DATE:

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

ZONE C-3-A

FEE $27.00

Donald G. Murray, Acting Director

By _____
Designee

86—P-3601 wd112

OFFICE COPY

No. B 167288

★ ★ ★

BLRA-17
(Rev. 11/91)

District of Columbia Government
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration Zoning Division
P.O. BOX 37200 — Washington, D.C. 20013-7200

CERTIFICATE OF OCCUPANCY

120893
(date)

Permission is hereby granted to Nations Bank
to use suite(s) _____ on the First floor(s)
of the building located on lot(s) 1 square G274
known as premises 4675 South Capitol Street, S.W. for the following
purpose(s) Bank
Not Sexually Oriented [su]

BZA #: _____ EXPIRATION DATE: _____

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

ZONE C-3-A

FEE $ 27.00

Aubrey H. Edwards, Director

By: _____
Designee

OFFICE COPY

C-75742

Form LII P 601
Rev. 9 '79

CERTIFICATE OF OCCUPANCY

No. B129684

Washington, D.C., JUNE 21, 82, 19

Permission is hereby granted to Pic 'i Pay Shoe Stores

to use the FIRST floor(s) of the building located on Lot 1 Square 6274

known as premises 4665 S. Capitol St. S.W. for the following

purpose(s): SHOE STORE-RETAIL

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

DEPARTMENT OF LICENSES INVESTIGATIONS AND INSPECTIONS GOVT OF DIST OF COL

ZONE C/3/S

FEE $ 27.00

1216

By [signature] Chief, Permit Branch
Permit Clerk

OFFICE COPY

Form LII-P-601
(Rev. 2/82)

CERTIFICATE OF OCCUPANCY

No. B145039

Washington, D.C., ~~4-7~~, 19 ~~86~~

Permission is hereby granted to ~~Continental Baking Company~~ Continental/-

to use the ~~first~~ floor(s) of the building located on Lot ~~1~~ Square ~~6274~~

known as premises ~~4665 South Capitol Street, S.W.~~ for the following

purpose(s): ~~Bakery thrift shop. Commercial sales of bakery~~ products on the premises only.

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

DEPARTMENT OF LICENSES, INVESTIGATIONS AND INSPECTIONS GOVT. OF DIST. OF COL.

ZONE C3A

FEE $ ~~27.00~~

Chief, Permit Branch

By _____
Permit Clerk

OFFICE COPY

★ ★ ★

BLRA-17
(Rev. 12/95)

District of Columbia Government
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration Zoning Division
P.O. BOX 37200 — Washington, D.C. 20013-7200

B 00182163

CERTIFICATE OF OCCUPANCY

12/01/98
(date)

Permission is hereby granted to WILLIE'S WASHINGTON, LL
to use suite(s) _____ on the First floor(s)
of the building located on lot(s) 1 square 6274
known as premises 4665 South Capitol Street, S.W. for the following
purpose(s) Retail Records CD and Tapes
Not Sexually Oriented [su]

BZA #: _____ EXPIRATION DATE: _____

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, ONLY for the premises, or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW Certificate must be obtained.

ZONE

FEE $ 32.00

Hampton Gross, Director

By: _____
Designee

OFFICE COPY

Store# 0004 P.O. GOVERNMENT
Location: OFFICE OF FINANCE &
Reg# 1 12/01/98 at 13:34 Clk#
Receipt# 011769 Amount $*****32.00
CERT. OF OCCUP. PERMITS