

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY,
APRIL 3, 2007

+ + + + +

The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Ruthanne G. Miller, Vice-Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER Vice Chairperson
CURTIS ETHERLY, JR. Board Member
JOHN A. MANN, II Board Member
(NCPC)

ZONING COMMISSION MEMBER PRESENT:

CAROL J. MITTEN Chairperson

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
BEVERLY BAILEY Sr. Zoning Spec.
JOHN NYARKU

D.C. OFFICE OF THE ATTORNEY GENERAL:

SHERRY GLAZER

This transcript constitutes the minutes from the Public Meeting held on April 3, 2007.

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1 P-R-O-C-E-E-D-I-N-G-S

2 10:13 a.m.

3 VICE CHAIR MILLER: Good morning.

4 This meeting will, please, come to order.
5 This is the April 3, 2007 Public Meeting of
6 the Board of Zoning Adjustment of the District
7 of Columbia. My name is Ruthanne Miller. I'm
8 the Vice Chair of the BZA. As the Chair of
9 the BZA's term has expired, I will be chairing
10 over this meeting today and we'll be having
11 elections soon to elect a new chair and vice
12 chair.

13 With me to day is Mr. Etherly,
14 also mayoral appointee, and Carol Mitten to my
15 right from the Zoning Commission and to my
16 left is Mr. John Mann from NCPC, Clifford Moy
17 from the Office of Zoning, Sherry Glazer from
18 OAG, John Nyarku and Beverly Bailey from the
19 Office of Zoning.

20 Copies of today's hearing meeting
21 agenda are available to you and are located to
22 my left in the wall bin near the door. We do

1 not take any public testimony at our meetings
2 unless the Board asks someone to come forward.
3 Please, be advised that this proceeding is
4 being recorded by a Court Reporter and is also
5 webcast live.

6 Accordingly, we must ask you to
7 refrain from any disruptive noises or actions
8 in the hearing room. Please, turn off all
9 beepers and cell phones.

10 Does the staff have any
11 preliminary matters?

12 MR. MOY: No, Madam Chair.

13 VICE CHAIR MILLER: Okay. Then
14 let's proceed with the agenda.

15 MR. MOY: The first case for
16 decision making is Application No. 17575 of
17 4620 Iowa Avenue Cooperative Association,
18 pursuant to 11 DCMR 3103.2, for a variance
19 from the minimum lot area requirements under
20 subsection 401.3, and a variance from the off-
21 street parking requirements under subsection
22 2101.1, to add a residential apartment unit to

1 the first floor of an existing apartment
2 building in the R-4 District at premises 4620
3 Iowa Avenue, N.W., that's in Square 2814, Lot
4 800.

5 On March 13, 2007, the Board
6 completed public testimony, closed the record
7 and scheduled its decision on April the 3rd.
8 The Board requested a post-hearing document
9 from the applicant and that was filed in your
10 case folders from the applicant and is
11 identified as Exhibit 24. Staff will end here
12 by saying that the Board is to act on the
13 merits of the application for the variance
14 relief.

15 VICE CHAIR MILLER: Thank you, Mr.
16 Moy. I would like to note that I did not
17 participate in this case, in hearing the case,
18 so I won't be participating in the decision
19 making and so I'm going to defer to my other
20 Board Members to proceed on this.

21 MS. MITTEN: Okay. I'll start
22 off. Maybe I'll just start off with a motion

1 for approval of Case No. 17575 for the two
2 variances that Mr. Moy outlined. This
3 particular case is the conversion of former
4 parking space on the first floor of the
5 building that is known as the Iowa Cooperative
6 to a new apartment. This space has not been
7 used for, I don't know that it was ever
8 actually ever used for, parking, but it
9 certainly hasn't been used for decades for the
10 prescribed use.

11 And actually, what we found in the
12 testimony that while there will be the
13 elimination of the interior parking space,
14 there will actually be a greater yield of on-
15 street parking by the elimination of the curb
16 cuts that currently lead to the space. The
17 unusual condition really stems from the -- the
18 unique condition stems from the combination of
19 the fact that we have an existing building and
20 we have a longstanding derelict use that I
21 think can be -- if we strictly apply the
22 Zoning Regulations, they will retain in

1 perpetuity under-functioning space, under-
2 utilized space that could be better served by
3 conversion to an apartment.

4 And I think that the conversion is
5 entirely consistent with the zoning, the R-4
6 Zoning of the property in light of the fact
7 that the balance of the cooperative is an
8 apartment building in R-4 and this is just one
9 additional unit. And I think because the
10 applicant has agreed to the two conditions,
11 that we had discussed, which is that they
12 would remove the curb cuts, once the space is
13 converted, so that the area that used to
14 provide access to the parking will now be used
15 for on-street parking and they will store
16 their trash bins inside the building until
17 they are given a public space approval to
18 locate the trash bins outside.

19 I think with those two conditions
20 that this application can be approved.

21 BOARD MEMBER MANN: And that was
22 your motion. Is that correct?

1 MS. MITTEN: That was my long
2 motion.

3 BOARD MEMBER MANN: I'll second
4 that.

5 MS. MITTEN: Thank you.

6 BOARD MEMBER ETHERLY: I'll agree
7 wholeheartedly with the discussion that has
8 already been laid out. I should say the
9 deliberation with regard to this particular
10 case. Just perhaps from a process standpoint,
11 would it be part of your motion, from my
12 colleague Mrs. Mitten, that the two conditions
13 that are noted at Exhibit 24 would be added to
14 our final decision as conditions?

15 MS. MITTEN: Absolutely.

16 BOARD MEMBER ETHERLY: Excellent.

17 MS. MITTEN: I neglected to make
18 that clear. So thank you for the
19 clarification.

20 BOARD MEMBER ETHERLY: No problem
21 at all. Excellent.

22 MS. MITTEN: Madam Chair, did you

1 want me to call for the vote or did you want
2 to do that?

3 VICE CHAIR MILLER: Oh, I'm
4 totally not participating in this.

5 MS. MITTEN: Okay.

6 VICE CHAIR MILLER: So feel free.

7 MS. MITTEN: Okay. Well, then is
8 there any further discussion? Mr. Mann?

9 BOARD MEMBER MANN: I just wanted
10 to point out a couple of things regarding the
11 ANC's position on this. The ANC did not take
12 a position on this. And I would also point
13 out that the Office of Planning recommended
14 approval of this.

15 MS. MITTEN: Thank you. Any
16 further discussion? We have a motion to
17 approve the application in Case No. 17575 and
18 I would ask for all those in favor, please,
19 say I.

20 ALL: Aye.

21 MS. MITTEN: Those opposed,
22 please, say no. Mr. Moy?

1 MR. MOY: Yes, the vote is 3-0-2.
2 This is on the motion of Carol Mitten to
3 approve the application, seconded by Mr. Mann,
4 also in support of the motion is Mr. Etherly.
5 And again, the vote is 3-0-2, two Board
6 Members not participating, not voting.

7 MS. MITTEN: Thank you.

8 MR. MOY: The next case for
9 decision making -- oh, one other thing before
10 we leave this case. Would the Board care for
11 a summary order or a full order?

12 MS. MITTEN: I think a summary
13 order would be fine in this case. Thank you.

14 MR. MOY: All right. Thank you.
15 All right. The next case for decision making
16 then is Application No. 17578 of Hartford
17 Street, LLC, pursuant to 11 DCMR 3104.1, for
18 a special exception to construct a new
19 residential development consisting of 16 row
20 dwellings under section 353 and 410, in the R-
21 5-A District at premises 2700 Hartford Street,
22 S.E., and that's in Square 5727, Lots 149-154.

1 Staff notes that the application
2 has been amended to include variance relief
3 from section 2117.8(d) to permit access to the
4 required parking spaces. And I have just
5 noted the change of row dwelling units from 18
6 to 16.

7 On March 13, 2007, the Board
8 completed public testimony, closed the record
9 and scheduled its decision on April 3, 2007.
10 The Board requested a number of post-hearing
11 documents. I would first like to lead off by
12 saying that the Board received documents from
13 both Department of Transportation and ANC-8B.
14 These were filed after the March 13th hearing.
15 They are identified as Exhibit 26 and Exhibit
16 27, respectively.

17 The applicant has filed per the
18 Board's request, and that was dated -- their
19 document dated March 20th. The office
20 received it March 22nd. That is identified as
21 Exhibit 29. Staff adds that in the
22 applicant's filing, the applicant also

1 included some narrative to respond to comments
2 made by witnesses at the public hearing.

3 The supplemental submission by the
4 applicant are the drawings that were
5 presented, that was part of their presentation
6 at the Public Hearing and that's in your
7 document exhibited as 31.

8 Finally, we also have letters of
9 concern from individuals in opposition to the
10 application that were allowed into the record.
11 The first one is from Mary Campbell, Exhibit
12 No. 28. The second is from Barbara Gibson-
13 Jackson and that filing is identified as
14 Exhibit 30.

15 Finally, the staff -- the Board
16 should act on the merits of the application
17 for special exception relief.

18 MS. MITTEN: Madam Chair, if you
19 would like me to manage this?

20 VICE CHAIR MILLER: Yes, I would
21 like to make a statement again.

22 MS. MITTEN: Sure.

1 VICE CHAIR MILLER: That I didn't
2 participate in this case either and I will be
3 deferring to my Board Members. Thank you.

4 MS. MITTEN: Thank you. I think
5 I'll start off the discussion in this case by
6 moving approval of the application in Case No.
7 17578 for special exception approval for the
8 16 unit development of row dwellings. I
9 believe the applicant without belaboring the
10 discussion or the discussion from the hearing
11 meets the special exception criteria.

12 And we have the support of the
13 Department of Transportation and the Office of
14 Planning and the ANC. And the only testimony
15 that we received in opposition related more to
16 the nature of the quality of the prior
17 development that was done by some of the same
18 individuals, a different partnership, and we
19 have a response from the applicant.

20 And while I can certainly see why
21 the neighbors identify very strongly with, I
22 guess, the principal spokesperson, which is

1 Mr. Mitchell, the, I guess, Knox Hill Village
2 Limited Partnership, which become insolvent
3 was the prior developer, has been
4 reconstituted as a new entity and it is really
5 not an issue for the Board, because it's not
6 a land use issue, but we have to satisfy
7 ourselves that DHCD, who is providing
8 financing for the project, has satisfied
9 themselves that these folks have the capacity
10 to bring this development to fruition.

11 BOARD MEMBER ETHERLY: I'll second
12 that motion.

13 MS. MITTEN: Thank you, Mr.
14 Etherly. Any further discussion? Any
15 discussion? Then we have a motion and a
16 second to approve Case No. 17578 and I would
17 ask all those in favor, please, say aye.

18 ALL: Aye.

19 MS. MITTEN: Those opposed,
20 please, say no. Mr. Moy?

21 MR. MOY: Yes, staff would record
22 the vote as 3-0-2, this is on the motion of

1 Carol Mitten to approve the application,
2 seconded by Mr. Etherly, also in support of
3 the application Mr. Mann. And we have two
4 Board Members not participating and not
5 voting.

6 MS. MITTEN: Thank you, Mr. Moy.

7 BOARD MEMBER ETHERLY: Mr. Moy?

8 MR. MOY: Yes, sir?

9 BOARD MEMBER ETHERLY: If I could,
10 I neglected to ask was there necessary action
11 needed with regard to acceptance of the ANC
12 report and the DDOT submittal? I have no
13 objections on either of those in particular,
14 but I just wanted to inquire.

15 MR. MOY: That's a good eye, sir.
16 I think to be on the safe side, staff would
17 recommend that the Board do that.

18 BOARD MEMBER ETHERLY: And I would
19 have no objection to waiving our rules and
20 accepting both the ANC report and the DDOT
21 report. My colleagues will recall that as Mr.
22 Moy mentioned in his summary of new

1 submittals, there were two documents that were
2 submitted by homeowners as Mrs. Mitten alluded
3 to from a neighboring development that had
4 some commonality in terms of some of the
5 earlier principles and what have you.

6 I would have no objection to
7 waiving our rules and accepting those as well.

8 MS. MITTEN: Okay. Is there any
9 objection? Mr. Mann?

10 BOARD MEMBER MANN: No objection.

11 MS. MITTEN: And I have no
12 objection. Great. Thanks, Mr. Etherly. And
13 I think we can have a summary order in this
14 case as well. Thank you, Mr. Moy.

15 MR. MOY: Thank you.

16 MS. MITTEN: Mrs. Miller, back to
17 you.

18 VICE CHAIR MILLER: Okay. Thank
19 you. And I think we're back to Mr. Moy for
20 the next case.

21 MR. MOY: The next and final case
22 for decision for the Public Meeting is Appeal

1 No. 17444-A, as in alpha, of Kuri Brothers,
2 Inc., pursuant to 11 DCMR 3100 and 3101 from
3 the administrative decision of the Zoning
4 Administrator, Department of Consumer and
5 Regulatory Affairs, DCRA, to revoke
6 Certificate of Occupancy Permit Nos., and I'm
7 going to read the original advertisement,
8 33951 and 33951, huh, for an automobile
9 service center and vehicle fueling by Notice
10 of Revocation, dated August 4, 2005.

11 The subject property is located in
12 the C-3-A District at premises 4221 and 4225
13 Connecticut Avenue, N.W., Square 2051, Lot 5.

14 Staff notes for the Board that the
15 action before the Board is to the address 4225
16 Connecticut Avenue.

17 At the Board's Public Hearing on
18 4225 Connecticut Avenue, which was November
19 28, 2006, the Board requested the following
20 post-hearing documents from all parties:
21 First, proposed findings of fact and
22 conclusions of law and, second, a brief on the

1 applicability of the Court of Appeals'
2 decision, February 2, 2006, on this instant
3 appeal.

4 These filings were filed from the
5 appellant and the appellee. From the
6 appellant, their draft findings of fact and
7 conclusions of law is identified as Exhibit
8 38. The memorandum is identified as Exhibit
9 37. Yesterday, Monday, April the 2nd, the
10 appellant also filed a supplemental, which is
11 a list of exhibits, and that is identified as
12 Exhibit 41 in your case folders.

13 The appellee, DCRA, similarly has
14 filed findings of fact and conclusions of law
15 identified in your case folder as Exhibit 40.
16 And their memorandum on the applicability of
17 the court's decision is identified as Exhibit
18 39.

19 I think with that, Madam Chair,
20 the staff is going to conclude its briefing.

21 VICE CHAIR MILLER: Thank you very
22 much. This case has a long history and I want

1 to try to recap a little bit of the history,
2 particularly related to even this Certificate
3 of Occupancy and also related to the address
4 that it's next to. I think part of what we
5 tried to do was sort out the issues in this
6 case.

7 And so what I would like to do is
8 just start a little bit with the history and
9 the issues as I see them and then we can see
10 if everyone agrees and then jump in and
11 address the issues.

12 As a recap, I want to note that we
13 already made some decisions in this case. On
14 April 25, 2006, the Board denied the appeal
15 related to the Certificate of Occupancy for
16 4221 Connecticut Avenue on grounds of lack of
17 jurisdiction in light of the Court of Appeals'
18 decision with respect to that address, D.C.
19 BZA v. Kuri Brothers, 891 A.2d 241, and we
20 determined that in that case the court
21 affirmed our decision finding that they were
22 operating outside the scope of their

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1 Certificate of Occupancy and that all the
2 facts with respect to that premise had already
3 been decided.

4 On November 28, 2006, the Board
5 denied DCRA's motion for summary judgment
6 finding, at that point, that there were
7 factual issues in dispute. Therefore, we had
8 a hearing on that, on the merits of the case.
9 The Board also denied the motion to stay an
10 order to seize all business operations related
11 to light repair. I believe we found that
12 there was not a good case made for irreparable
13 harm or likelihood of success on the merits or
14 for the prongs, in general, needed for that
15 kind of action.

16 The appeal here is based on
17 whether or not the ZA erred in revoking the
18 Certificate of Occupancy for the premises
19 located at 4225 Connecticut Avenue.

20 I think the first preliminary
21 question is D.C. v. Kuri Brothers
22 controlling as a matter of law with respect to

1 4225? And I hope I don't mix up my numbers.
2 But anyway, I want to remind the Board what
3 the holding was in that case and everyone
4 should have a copy of that decision.

5 In that case, the court did affirm
6 the BZA's finding that "revocation was
7 warranted, because petitioner was operating an
8 automobile repair garage, a use outside the
9 scope of petitioner's Certificate of
10 Occupancy, and was not permitted in its Zoning
11 District without a special exception."

12 In that case, the BZA concluded
13 that the automobile service center could not
14 be construed to allow the operation of a
15 repair garage. And the question before the
16 court was also whether the Board's finding
17 that the petitioner was operating a repair
18 garage was supported by substantial evidence
19 in the record. And the court found that it
20 was. And the evidence that is cited in the
21 Court of Appeals' case includes the following:

22 Testimony from a DCRA inspector

1 that he saw automobile engine and other
2 significant repair work being done on
3 petitioner's premises on multiple occasions
4 corroborated by photographs of petitioner's
5 garage, copies of work orders, petitioner's
6 business card, advertisements and signage
7 offering a full range of auto repair services
8 (brakes, exhaust, alignment, transmission,
9 electrical, body work, engine overhauls, air
10 conditioning, heating).

11 Testimony by petitioner that there
12 were 21 service bays, that they had ASE-
13 certified technicians, that there was the
14 capability to service and repair all cars,
15 domestic and foreign. And in that case, the
16 petitioner, Kuri Brothers, presented no
17 evidence in rebuttal.

18 So the court found that there was
19 substantial evidence that Kuri Brothers was
20 operating outside its Certificate of Occupancy
21 doing work as a repair garage related to that
22 particular premises. Then there was a

1 question. I don't know, anybody have any
2 comments on that yet? Okay.

3 Then there was the question then
4 is this case barred by res judicata? I mean,
5 is this the same operation? Is this the same
6 address? We took a look at that and we
7 determined that the issues weren't the same,
8 that the address is different. I think that's
9 what we needed to try to find out at that
10 hearing was is it exactly the same issues, is
11 it the same facts and it did not appear to be.

12 The issue is different, as I
13 understand it now, and I'll try to frame how
14 I understand it as presented to us. Whether
15 the ZA erred in revoking the Certificate of
16 Occupancy on the basis that it was issued in
17 error, one, because of this Court of Appeals'
18 case and I think that we determined that that
19 wasn't sufficient in denying the motion for
20 summary judgment. There was a different
21 address. There are different issues being
22 raised and different evidence.

1 The next issue is did the ZA err
2 in creating this automobile service center
3 classification, which is not specifically set
4 forth as a matter-of-right use under the
5 Zoning Regulations? And I think that is one
6 issue that we should deliberate on.

7 Another issue that is raised is
8 whether or not the ZA subsequent to issuance
9 of a Certificate of Occupancy for an
10 automobile service center, I think for over a
11 period of time, can then revoke that category
12 as applied to this business.

13 And then third, is there evidence
14 in this case that the business is operating as
15 a repair garage, which is not a permitted use
16 in this zone, as determined by the Court of
17 Appeals upholding the BZA's decision.

18 So I would propose that we start.
19 I would propose primarily, oh, there is one
20 other issue, I guess, basically, we can touch
21 upon later, but there is a D.C. Statute that
22 was passed that goes to, and I'm really

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1 generalizing here, I would have to look in the
2 applicant's pleadings, but it goes to the
3 45th, this type of operation isn't allowed to
4 decrease its services, but we'll get to that
5 one later and whether or not the ZA can take
6 action that would be contrary to that D.C.
7 Statute.

8 Okay. I think that we should
9 start with the issue whether the ZA erred in
10 finding that, actually the ZA before him erred
11 in creating an automobile service center
12 category, which was not an appropriate use as
13 a matter-of-right in this District.

14 And I think we have to start as
15 usual with the regulations. The uses as a
16 matter-of-right are set forth in, for C-3, 741
17 of the regulations. And there is no, of
18 course, automobile service center set forth
19 here. And the testimony we heard was that the
20 ZA relied on, a previous ZA, section 741.4,
21 which reads "Other service or retail use
22 similar to that allowed in section 741.2 and

1 741.3 shall be permitted in a C-3 District
2 including assemblage and repair, clearly,
3 incidental to the conduct of a permitted
4 service or retail establishment on the
5 premises."

6 Then we have to go then and look
7 back to 741.2 and 741.3 to see if this
8 automobile service center use could be said to
9 be, I would say, clearly incidental to the
10 conduct of any of these provisions, such as,
11 see, a gasoline service station.

12 I think the first question is, you
13 know, and we may not debate this too much, but
14 I mean, one is can the ZA do that? Can they
15 look and see and make a decision that oh,
16 okay, I think it's similar, so I'm going to
17 issue this type of Certificate of Occupancy?

18 And then, two, if we say okay,
19 that's okay, then, but did he make the right
20 decision? Would we just say that oh, well,
21 maybe he can do that, but, in our view, this
22 is not assemblage and repair incidental to the

1 conduct of a permitted service or retail
2 establishment on the premises and we can look
3 at the facts in this case.

4 So I think, at this point, I would
5 open it up for discussion.

6 MS. MITTEN: Madam Chair, to your
7 first question, which is do the Zoning
8 Regulations give the Zoning Administrator the
9 authority to create these sort of almost
10 interpolating categories and creating
11 categories that are similar to permitted uses,
12 I think that it does, but it doesn't in a
13 general sense, but in a specific sense and I
14 don't think anyone disputes this.

15 I think both sides, both the
16 appellant and the appellee are in agreement
17 about this, which is that the Zoning
18 Administrator is not authorized to grant more
19 authority than is given to him through Title
20 11. So that whatever that category is, it
21 does not confer more authority than whatever
22 the similar matter-of-right use is, which I

1 think is the crux of this case, which is, as
2 I see it and I see this case somewhat
3 different, but certainly maybe not a sibling,
4 but a cousin to 4221, which is that I think
5 the reason, and this is what was articulated
6 by the Zoning Administrator in his testimony,
7 is that the error in this case is that by
8 creating a use category that is very similar
9 to an existing category, and that existing
10 category being automobile accessory sales,
11 including installations, by creating this new
12 category, the impression, the longstanding
13 impression has been created that there is
14 somehow more authority, more uses being
15 granted to this particular operator than are
16 permitted as a matter-of-right.

17 And I think just to juxtapose
18 these two cases of 4225 and 4221 together, I
19 think there is the narrow uses that are
20 permitted by, the relatively narrow uses
21 permitted, the accessory sales and
22 installations. And then there is this very,

1 I would say, heavy use, to use shorthand, of
2 repair garage.

3 And in 4221, the Board went so far
4 as to say we found that they were operating a
5 repair garage, because of the evidence in the
6 record. In this case, I think we are
7 somewhere in the grey area between finding
8 that they are actually operating a bona fide
9 repair garage and something more than is
10 permitted as a matter-of-right. And we're in
11 that grey area.

12 And the error, in my mind and this
13 was what was articulated by Mr. Crews, is that
14 this Certificate of Occupancy has given the
15 impression that the operator of the 4225 has
16 now been authorized to operate in the grey
17 area. Maybe not so far as to go to a repair
18 garage, which is what we dealt with in 4221,
19 but that they are exceeding what's allowed as
20 a matter-of-right and that's what he
21 articulated as the error, that's what I
22 believe the error to be and so I think it's

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1 not I don't think the Board has to say and I'm
2 not sure that Mr. Crews was articulating this
3 very strict sense that he is not allowed to
4 issue Certificates of Occupancy for anything
5 that isn't specifically articulated in the
6 regulations.

7 But in this case, what has been
8 created is an impression that more rights are
9 conferred on the operator than are conferred
10 by Title 11 and he is seeking to clarify that
11 by revoking the Certificate of Occupancy.

12 VICE CHAIR MILLER: Well, is your
13 point then that he erred or that the previous
14 ZA erred in making a judgment that this was a
15 similar use or didn't fall within the category
16 741.4, that it was incidental to the conduct,
17 that it didn't fall in the category of
18 assemblage and repair, clearly, incidental to
19 the conduct of a permitted service or retail
20 establishment on the premises?

21 MS. MITTEN: Yes, yes.

22 VICE CHAIR MILLER: Okay.

1 MS. MITTEN: I don't find this
2 repair to be incidental. The repair that was
3 articulated and it includes things like tune-
4 ups, spark plugs, I mean, you know, doing
5 tune-ups and I don't know about what goes on
6 with cars, especially now since I don't have
7 one any more, but, you know, all those things
8 of tending to the systems of the car and so on
9 is not incidental repair.

10 And I believe we had testimony in
11 the record that the average bill was somewhat
12 in excess of \$300, which also suggests while
13 the applicant was advancing that as well, here
14 is evidence that we're not doing heavy repair,
15 which is going more to the 4221 case, which is
16 operating a repair garage, but that is a
17 substantial amount of cost to be incurred for
18 something that would be considered to be
19 incidental.

20 VICE CHAIR MILLER: Do we have a
21 definition of incidental?

22 MS. MITTEN: I doubt it. I mean,

1 we certainly don't in Title 11 and we would
2 have to go to the Webster's Dictionary that
3 there is, you know, a citation in Title 11 and
4 section 199 that tells us where to go for
5 terms that are not defined in Title 11. So we
6 would have to look in that dictionary, if we
7 wanted a definition.

8 VICE CHAIR MILLER: Okay. Because
9 I have a few problems with this part. And one
10 is the court case in which DCRA argued that
11 they operated beyond the scope of an
12 automobile service center. So, to me, that,
13 number one, seems to validate that category of
14 an automobile service center. And then to go
15 back later and say sorry, that's not a
16 legitimate category, to me, seems -- I don't
17 know what the legal term is, but I'm not sure
18 that you can make that about-face.

19 And I think that there is also the
20 issue of when you have this category that was
21 created and in operation use relied upon by
22 business for many, many years then to just

1 turn around and say oh, sorry, it's not a
2 recognized use any more. I don't know that
3 the Government should be able to do that.

4 I think that we can look at this
5 de novo in a sense or like the other case, but
6 the question is is it really operating as a
7 repair garage? In that case, it would be
8 outside the scope just like the other address,
9 operations were outside the scope. Do Board
10 Members have comments?

11 MS. MITTEN: I think the one point
12 that I just want to clarify, if I didn't say
13 this clearly, is that whatever the use
14 category is, so in this case the use category
15 on the Certificate of Occupancy is either
16 automotive or automobile service center, it
17 doesn't matter what you call it. The Zoning
18 Administrator only has the authority to confer
19 rights that are matter-of-right in the
20 regulation.

21 So to say that it's not fair for
22 DCRA to say well, they are taking away rights

1 that the applicant has had for a long time,
2 the rights have always been the same rights.
3 And the rights are those rights that are
4 available to them through a Certificate of
5 Occupancy that lists a matter-of-right use on
6 it.

7 So my view is that the impression,
8 because we have these two very similar things,
9 we have automobile accessory sales, including
10 installations, which is pretty clear, and then
11 we create this new category on automotive
12 service center. There is a suggestion that
13 there is some difference. And if there is a
14 difference, that difference is part of the
15 grey area that I was suggesting earlier, which
16 is rights not authorized by Title 11. And
17 that's why the ZA is seeking to revoke it
18 here.

19 So to me, there is no about-face.
20 The only about-face is a semantic about-face.
21 It's not -- whatever the rights are, the
22 rights are. In this case, and I think I might

1 have said it at one point, I don't understand
2 why rather than appealing this revocation, the
3 applicant or the appellant does not simply go
4 down to DCRA and make application for the
5 matter-of-right use, which they say they are
6 not exceeding matter-of-right. So why don't
7 they apply for a matter-of-right use?

8 That's the disconnect for me. If
9 there is more rights being conferred by this
10 use category, they are rights that DCRA did
11 not have the authority to confer to the
12 operator in the first place.

13 VICE CHAIR MILLER: Well, then I
14 think that you may be saying that DCRA didn't
15 have the right to refer that type of usage,
16 because it erred in its judgment previously,
17 that the types of repairs that we're going to
18 be looking at, that were presented in this
19 case, are incidental. And so I think it does
20 raise the question. This type of language in
21 the regulations and in our regulations,
22 obviously, need a lot of improvement and there

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1 is a grey area.

2 There is a grey area and the grey
3 area here, as I see it, is related to repairs
4 which are not identified as repairs for a
5 repair garage, which is defined as follows in
6 11 DCMR 199.1, garage repair, "A building or
7 other structure or part of a building or
8 structure with facilities for the repair of
9 motor vehicles including body and fender
10 repair, painting, rebuilding, reconditioning,
11 upholstering, equipping or other motor vehicle
12 maintenance or repair."

13 So in this case, we have repairs
14 that don't fall in this category. It's a grey
15 area.

16 MS. MITTEN: I agree.

17 VICE CHAIR MILLER: Okay. So and
18 I don't believe that it was incorrect for the
19 ZA to try to create a use for that grey area,
20 according to 741.4, because in some provisions
21 in our regulations, we don't let the ZA do
22 that. Some of them say, some regulations

1 allow for the ZA to find a similar use and
2 issue a Certificate of Occupancy and other
3 regulations don't provide that.

4 Like we have that in the Shagman
5 case. Okay.

6 MS. MITTEN: I think the
7 difference here is, and I do think there is a
8 philosophical difference now with Mr. Crews as
9 the ZA, which is you have, let's say, you
10 know, what I have been trying to describe it's
11 almost like a continuum and you have part of
12 the continuum is clearly defined, which is the
13 automobile accessory sales, including
14 installations.

15 Then you have a continuum, part of
16 the continuum then when you depart from what
17 is clearly permitted as a matter-of-right.
18 Then you go into a grey area that is not
19 clearly defined and then at some point on the
20 continuum when things become clear enough
21 again, they are clearly in the category of
22 repair garage.

1 And so is it inappropriate for a
2 Zoning Administrator to try and -- I mean,
3 it's his job to make interpretations in the
4 grey area, but there is a bright line when you
5 exit the uses that are clearly defined as
6 automobile accessory sales, including
7 installations and that's the bright line,
8 that's where the ZA's authority ends.

9 And I think Mr. Crews has a very
10 strong appreciation of that fact. I think in
11 the past, Zoning Administrators thought that
12 the grey area was fully open to their
13 interpretation, rather than their being a
14 bright line at some point and everything past
15 the line is special exception territory, in
16 this particular case. And I think that's why
17 this case is difficult, but that's the way I
18 see it.

19 Once you depart, there is a grey
20 area. I agree with you wholeheartedly. But
21 once you depart from what is strictly
22 permitted as a matter-of-right, you are in

1 special exception territory, even if you
2 haven't quite gotten all the way down the
3 continuum of use to repair garage.

4 VICE CHAIR MILLER: Okay. The
5 regulation reads "Incidental to the conduct of
6 a permitted service or retail establishment on
7 the premises." I mean, this case is a little
8 bit grey in that there is a gas station on the
9 premises and as I understand it, gas stations
10 aren't necessarily matter-of-right here, but
11 that this was a permitted service, because it
12 was grandfathered in before the regulations.

13 So we have a permitted service,
14 which is a gas station, which is listed in
15 741.2(c). Okay. And so if you look up the
16 definition of gasoline service station at 11
17 DCMR 199.1, it says "An area of land,
18 including any structure on any area, used for
19 the retail sale of motor fuel and lubricants
20 and incidental services, such as lubrication
21 and hand-washing of motor vehicles and the
22 sale installation or minor repair of tires,

1 batteries or other automobile accessories.
2 The term gasoline station shall not include an
3 automobile laundry or a repair garage."

4 We get back to this repair garage.
5 So when I looked at the types of repairs that
6 the applicant in this case said that they were
7 doing and some of them are set out on page 4
8 of their proposed findings of facts and
9 conclusions of law at Exhibit 38, and they
10 talk about oil changes and tune-ups and air
11 conditioning fluids and tires and emission
12 tests, alignment, I think we have to decide,
13 well, I think the ZA had to decide and we have
14 to decide also, can we say that that's
15 incidental to the conduct of the permitted
16 service of the gas station?

17 And to me, they look similar to
18 those kind of services. So I don't see why --
19 I mean, you know, we should discuss this and
20 really get into the type of repairs. But I
21 don't see what that certainly wasn't within
22 the purview of the Zoning Administrator to

1 create that kind of category. I don't think
2 he was so off the wall here.

3 MS. MITTEN: The only thing I
4 guess I just want to fall back on is he is not
5 expressly prohibited from creating the
6 category. The problem in this case is, in my
7 mind, that it has created the impression that
8 more rights are conferred on the applicant or
9 on the operator in this case than are provided
10 for in Title 11.

11 And I know, I go to the accessory
12 sales and you go to 741.4, I think, is the
13 section where there are these incidental uses.
14 Again, I don't -- or the incidental repairs.
15 I don't find it incidental. So to me, if you
16 want to say that that's part of where the
17 bright line gets drawn, I still think they
18 have exceeded what's permitted as a matter-of-
19 right under Title 11. And I think, you know,
20 part of what bears consideration here is to
21 think about why are some uses permitted as a
22 matter-of-right and others are permitted by

1 special exception?

2 And it's because the special
3 exception is intended, in this case, to
4 address the potential for adverse impacts.
5 And so in weighing whether or not a use is
6 incidental, in this case the repair use is
7 incidental, I think part of the calculation is
8 is there actual or a likelihood that adverse
9 impacts are created by the use.

10 And in this particular instance, I
11 think that, you know, it's very difficult to
12 say well, where does incidental leave off and
13 something more intense come into place? But
14 I think the preponderance of what we have in
15 the record suggests that this is not
16 incidental. And that there certainly is the
17 potential, if not the reality, of adverse
18 impacts, because of the nature of what is
19 being done there.

20 VICE CHAIR MILLER: Could you tell
21 me what regulation you are looking at when you
22 are talking about the special exception

1 provision that would apply?

2 MS. MITTEN: It's just whatever --
3 the normal special exception standard.

4 VICE CHAIR MILLER: You just mean
5 3104?

6 MS. MITTEN: Yes.

7 VICE CHAIR MILLER: Because often
8 we have specifics.

9 MS. MITTEN: Right, but there
10 aren't any in this particular case. It's just
11 -- if I could have, can you hand me the regs?
12 That one. Okay. You got one.

13 VICE CHAIR MILLER: Okay. I have
14 two points and then maybe others want to say
15 something. Because one is we're going to have
16 to get into these repairs, because I mean,
17 basically, I see two provisions addressing
18 repairs. The garage repair, which is clearly
19 prohibited and then the gasoline service
20 stations, which lists types of repairs that
21 are allowed for a gasoline service station.

22 And then my next question is

1 though, because that's going to be the crux of
2 our debate, I think, factually, but adverse
3 impacts, I don't recall hearing about it in
4 this case. I do recall I sat on the other
5 case and I recall hearing definitely testimony
6 of evidence of adverse impacts related to
7 fumes and all this kind of stuff. And related
8 to the types of repairs, which were
9 characterized as repairs related to -- were in
10 the definition of garage repair in that other
11 case.

12 And I didn't hear that in this
13 case and I think that, you know, maybe it's
14 there and I didn't hear it. But I think we
15 have to look at the evidence in this case and
16 figure out which category do they fall in.
17 And if they fall in repair garage, then it's
18 already been decided that repair garage, and
19 it says it even right here, but by the court,
20 by us, the repair garage is not allowed in
21 this zone. So that's determined by the type
22 of work they do. So we'll have to look at

1 that. Did you hear adverse impacts in
2 particular in this case?

3 MS. MITTEN: I didn't.

4 VICE CHAIR MILLER: Okay.

5 MS. MITTEN: I did not. And what I
6 was trying to express is that in doing his
7 calculation about where is the line, because
8 he has to -- the Zoning Administrator has to
9 figure out where the bright line is now, we
10 do. It's the question of, I think, one of the
11 factors is in terms of crossing the line from
12 incidental to something more intense is are
13 you creating a likelihood of adverse impacts?
14 And that's one of the factors.

15 But I agree with you in this case,
16 I did not hear evidence about adverse impacts.
17 I just wanted to finish answering the question
18 you asked me earlier, which is the special
19 exception standard for this. If it were a
20 repair garage, because, to me, anything that
21 exceeds the bright line of what is permitted
22 as a matter of right, would toss it in to a

1 special exception category whether it was
2 explicitly a repair garage in the level of
3 intensity or not, still would be a special
4 exception, that's 743.1, which just says that
5 such uses are permitted as a special exception
6 under section 3104 and subject to the
7 provisions of 706, which is a gasoline service
8 station and Chapter 23, which also relates to
9 gasoline service stations.

10 So it's gasoline service station,
11 repair garage or mechanical parking garage
12 that are permitted by special exception. So
13 a repair garage would be under 3104.

14 VICE CHAIR MILLER: But this was
15 grandfathered in, so they don't have to get a
16 special exception.

17 MS. MITTEN: Not as a gasoline
18 service station. The point I'm making is,
19 maybe I didn't make this clear, as it relates
20 to the use of this property, 4225,
21 notwithstanding the gas station operation, but
22 this repair facility or whatever you want to

1 call it, this automotive service facility that
2 if you exceed what is permitted as a matter-
3 of-right, the next category that you go into
4 would be repair garage, that's permitted by
5 special exception.

6 VICE CHAIR MILLER: Right.

7 MS. MITTEN: That's under 743.1,
8 that invokes 3104 and nothing else.

9 VICE CHAIR MILLER: Well, I agree.

10 MS. MITTEN: Oh, okay.

11 VICE CHAIR MILLER: And it lists
12 gas station here, too.

13 MS. MITTEN: Okay.

14 VICE CHAIR MILLER: So I mean, I
15 think the complication comes in here because
16 it was grandfathered in, number one, so it
17 didn't have to come for a special exception.

18 MS. MITTEN: Not for a gas
19 station.

20 VICE CHAIR MILLER: No. And then
21 we get to the ZA's interpretation that, the
22 previous ZA's interpretation, it was

1 incidental to the conduct of a permitted
2 service or retail establishment on the
3 premises.

4 MS. MITTEN: Right.

5 VICE CHAIR MILLER: I think, at
6 this point, rather than going around on this
7 too much more, we need to, unless the other
8 Board Members want to say something, look at
9 the evidence and decide whether this operation
10 is a repair garage or incidental to the gas
11 station under that provision, 741.4.

12 MS. MITTEN: If I could just
13 clarify one thing?

14 VICE CHAIR MILLER: You disagree?

15 MS. MITTEN: And I would love to
16 hear from --

17 VICE CHAIR MILLER: Okay.

18 MS. MITTEN: -- our colleagues.
19 It's not is this an incidental use or is it a
20 repair garage. If it's not incidental, there
21 is a whole level of intensity prior to calling
22 it a repair garage that, in my mind, exceeds

1 matter-of-right and that's a point that you
2 may disagree with, but it's one that I don't
3 want to be lost by framing the debate
4 narrowly. So I just --

5 VICE CHAIR MILLER: Okay.

6 MS. MITTEN: Thank you.

7 VICE CHAIR MILLER: No, let's just
8 look at this one more time then. Just so
9 we're looking at the right language though.
10 I understand what you are saying. If it's not
11 -- you would say it didn't fall within or that
12 the ZA didn't interpret the previous ZA didn't
13 make the right judgment that it was
14 incidental? Oh, no, even if we say they --
15 wait, now I'm confused.

16 MS. MITTEN: No, I agree.

17 VICE CHAIR MILLER: Okay.

18 MS. MITTEN: You are saying they
19 invoked 741.4.

20 VICE CHAIR MILLER: Right.

21 MS. MITTEN: Which is --

22 VICE CHAIR MILLER: Assemblage and

1 repair clearly incidental to the conduct.

2 MS. MITTEN: Correct.

3 VICE CHAIR MILLER: Okay.

4 MS. MITTEN: And I'm saying that
5 this exceeds that and so they erred. If they
6 relied, if prior ZAs relied on 741.4, then I
7 think that they were in error and I side with
8 the current ZA on that point.

9 VICE CHAIR MILLER: Right. Okay.
10 You think that they are an error because you
11 can't categorize those type of repair as
12 incidental?

13 MS. MITTEN: I assume you are
14 saying it's incidental to a gasoline service
15 station.

16 VICE CHAIR MILLER: That's the way
17 I look at it.

18 MS. MITTEN: Okay.

19 VICE CHAIR MILLER: Everybody
20 looks at it differently, but, yes.

21 MS. MITTEN: Well, the only thing,
22 I mean, the only evidence we have in the

1 record about the nature of it is -- I think
2 there are two things. One is the amount that
3 people pay, the average bill is clearly more
4 than the average person pays for gas,
5 notwithstanding how expensive gas has become.
6 I mean, I don't know how much it costs to fill
7 an SUV, but I think \$300 as an average repair
8 bill well exceeds the average transaction to
9 buy a tank of gasoline. So in that sense, to
10 me, it's not incidental.

11 VICE CHAIR MILLER: It's kind of
12 like what do you compare it to? Do you
13 compare it to the average repair bill for a
14 repair garage, right? That's what they were
15 comparing it to.

16 MS. MITTEN: That's the
17 distinction I was trying to make is it's not
18 that it's either incidental or --

19 VICE CHAIR MILLER: Oh, I see what
20 you are saying.

21 MS. MITTEN: -- a repair garage.
22 It could be anything --

1 VICE CHAIR MILLER: In between.

2 MS. MITTEN: -- in between.

3 VICE CHAIR MILLER: All right.

4 MS. MITTEN: Exactly.

5 VICE CHAIR MILLER: Fine.

6 MS. MITTEN: Okay.

7 VICE CHAIR MILLER: And if it's in
8 between, you say that the ZA would have
9 exceeded his authority in creating this use
10 for that?

11 MS. MITTEN: Exactly.

12 VICE CHAIR MILLER: Okay.

13 MS. MITTEN: That is exactly my
14 point.

15 VICE CHAIR MILLER: Okay. So what
16 I'm anticipating is that we look at the
17 repairs, because our decision has to be based
18 on substantial evidence in the record, and
19 decide whether they look, if we can, I don't
20 know, are they incidental? Are they a repair
21 garage or look at the whole --

22 MS. MITTEN: I mean, I don't know

1 that you have to --

2 VICE CHAIR MILLER: You don't have
3 to go through every single little piece of
4 evidence.

5 MS. MITTEN: No, but I don't know
6 that you have to look beyond -- to me, it's a
7 very compelling thing to know how much the
8 average repair is. It's not like somebody oh,
9 you know, I'm going to get a tank of gas and
10 while I'm here, I'm going to have somebody
11 change my wiper blades or give me a tune-up or
12 something like that. People clearly have an
13 agenda, because it's like there's something
14 wrong with my car, whether I need gas or not,
15 I'm going to make a trip to Van Ness Auto Care
16 and get that taken care of. And that is, to
17 me, clearly not incidental to buying gasoline.

18 VICE CHAIR MILLER: Okay. Yes, I
19 got that. Okay. I mean, not that we are
20 experts in car repairs. I think that there
21 wasn't -- and you all can correct me if I'm
22 wrong, I don't think that there is a factual

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1 dispute with respect to the type of work that
2 is being done there. And if you look at page
3 4 of the appellant's proposed findings of fact
4 and conclusion of law, I think that's a good
5 place to start as to what type of repair work
6 they are doing and not doing.

7 BOARD MEMBER ETHERLY: If I could,
8 Madam Vice Chair?

9 VICE CHAIR MILLER: Oh, please.

10 BOARD MEMBER ETHERLY: Just to
11 kind of -- I think the discussion that we have
12 had up to this point has been very, very
13 helpful, because it is an incredibly
14 complicated web of legal argumentation that
15 we're dealing with. So I don't want my
16 colleagues to take the silence of other
17 Members to perhaps be numbness at this point.

18 I think the discussion was very
19 helpful, because, for me, the question is how
20 do you get to deciding whether this is
21 incidental or a repair garage? And I think
22 much of the conversation that we have had up

1 to this point really has been about how you
2 kind of walk through the door to get to that
3 point.

4 And perhaps as we begin to move a
5 little deeper into the discussion, I will want
6 to get some clarification on the questions
7 that we feel are absolutely necessary to
8 resolving the appeal. The appellant's brief
9 gets into a little bit of that, those nuances
10 of how you frame the question that's at issue,
11 but I think ultimately once you get through
12 the door, you still have to deal with where we
13 are right now, which is, is it incidental? Is
14 it some other work?

15 And I think you are absolutely
16 right, Madam Vice Chair, as you look at page
17 4 and as my colleagues will recall a lot of
18 the discussion during our hearings went to
19 issues of major versus minor repair. And as
20 is noted in the proposed findings of fact and
21 conclusions of law at page 4, the appellant
22 argues and argued, as I recall, in our hearing

1 that the work here is definitely minor. It
2 would term as minor mechanical work, oil
3 changes, exhaust and brakes, tune-ups, air
4 conditioning, fluids, tires, emission tests,
5 electrical repairs and heating.

6 I engaged in a back and forth
7 discussion that is outlined in part on --
8 beginning on or about page 358 of the
9 transcript from what was our Tuesday, November
10 28th Public Hearing, and that is included at
11 the rear of the appellant's proposed findings
12 of fact and conclusions of law where I tried
13 to walk specifically through some of what I
14 felt were major repairs and whether or not the
15 appellant's facilities were set up.

16 My colleagues will note that the
17 appellee continues to argue in its findings
18 that, number one, its facilities are not
19 constructed to handle major repair, facilities
20 in terms of the types of lifts and service
21 bays that are employed on-site, facilities in
22 terms of the types of training and

1 certifications that its employees possess with
2 regard to the kind of work that they may be
3 qualified to undertake.

4 In the proposed findings of fact
5 and conclusions of law, there is also, as my
6 colleagues will recall, a documentation
7 submitted by some of the suppliers of the
8 appellant, in particular, Olympic Auto Parts
9 which notes in its Wednesday, October 25, 2006
10 letter that the parts it supplies to Van Ness
11 are parts that are consistent, and I'm
12 paraphrasing, but Olympic Auto Parts
13 characterizes as light repair items.

14 So to a point, there are certain
15 evidentiary items in the record that would
16 seem to suggest that this is minor repair. I
17 think it doesn't necessarily slam dunk or
18 resolve definitively the issue of what is or
19 is not incidental to the conduct of a
20 permitted service or retail establishment.

21 One of the issues that is perhaps
22 somewhat still unresolved for me and it was

1 part of the back and forth in the transcript
2 at page 364, 365 et seq is the issue I had
3 asked of what was the average length of stay
4 for vehicles on-site. As Mrs. Mitten was just
5 beginning to ask to the layperson perhaps the
6 issue of incidental comes to well, what is the
7 primary purpose or reason for the trip.

8 And I think part of what we're all
9 struggling with is Zoning Regs that were
10 written at a time when the business model was
11 probably a very different one from what we
12 have today. Now, to an extent, our Zoning
13 Regs allow for a lot of those variations
14 today, i.e., convenience stores that are on
15 service, gasoline service station sites or
16 other types of attendant services.

17 We have dealt with in recent
18 memory cases that involve food establishments,
19 small food establishments and gasoline retail
20 services, clearly, that's not what we have
21 here, but what was of interest to me as I
22 tried to grapple with this issue of what is

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1 incidental to the idea of a gasoline station
2 and Mrs. Mitten, her comment struck a tone
3 with me again in terms of what do you -- what
4 should you reasonably expect to be able to
5 accomplish pursuant to purchasing a tank of
6 gas?

7 As is indicated on page 8 of the
8 appellant's proposed findings of fact and
9 conclusions of law, actually it's beginning at
10 page -- actually it is page 8. It is under
11 community impact and I'm not talking about
12 community impact, but just at the top of page
13 8, Item No. 2 under community impact, the
14 appellant writes "The business is based on the
15 model of the customer dropping off a car in
16 the morning on the way to work and picking up
17 the car by the end of the day. When there are
18 too many cars to be worked on simultaneously,
19 the excess cars are parked in the neighboring
20 underground garage and not on the neighborhood
21 streets."

22 That to me evidences something

1 that is not what I would think to be
2 incidental to the idea of a gasoline service
3 station trip. I tend to think of a gasoline
4 service station trip, and I'm simply using a
5 layperson's approach to it, is I need to stop
6 here, pick up a tank of gas, perhaps if you
7 top off my wiper fluid, back in the days when
8 we had these service station guys and maybe
9 they would wipe your windshield or top your
10 fluid off, maybe check your oil and then you
11 are on your way.

12 But the expectation that a car is
13 going to be left for some length of time or
14 perhaps even stored on-site suggests to me a
15 somewhat deeper, more invasive type of
16 procedure. Not necessarily still raising the
17 issue of minor and major. Obviously, we had
18 a lot of discussion about what is minor versus
19 what is major repair. I'm not necessarily
20 reaching that here, because again I think you
21 get out of the scope of incidental when you
22 begin to leave your vehicle and have to come

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1 back at some point.

2 So perhaps just as we start to get
3 into that question, I'll highlight that.
4 Again, in terms of the facilities, I am well-
5 counseled by the appellant's argument that
6 there are two lifts, two service bays, one
7 flat bay, none of those bays would suggest the
8 ability for heavy work. And as I recall from
9 the hearing, heavy work, replacement of engine
10 blocks, getting into the guts of the car,
11 dealing with large scale vehicles.

12 But as you begin to leave vehicles
13 on-site for work, to me, that begins to move
14 out of the scope of incidental to a gasoline
15 service station and more into the orbit of a
16 repair garage. So let's just kind of take
17 that as perhaps my little starting salvo into
18 sorting out that particular question of what
19 is incidental.

20 MS. MITTEN: If I may, I'm glad
21 that you identified that as another way of
22 determining incidental. What I think and I

1 think you are right to, if this was
2 intentional or not, take us away from us as
3 lay people trying to say that the continuum of
4 intensity is light or heavy repair. The
5 continuum of intensity is incidental or not.

6 And I think we have, there is,
7 ample evidence, because, you know, we can
8 debate that all day and I'm not sure we would
9 in the end have an agreement, but I think it
10 is clear that this is not incidental. This is
11 not like a convenience store, you know, buying
12 a candy bar and a pack of cigarettes while you
13 happen to be getting some gas. So I think we
14 don't need to engage in a debate about light
15 versus heavy repair, because I think we
16 already have.

17 VICE CHAIR MILLER: I don't really
18 agree with you totally and this is why,
19 because I understand what you're saying about
20 incidental for sure, but when they use the
21 words assemblage and repair, that just brings
22 to mind some of this type of, you know, repair

1 work. Not just windshield wiper change. I
2 think it's very grey. I mean, I don't think
3 the regulations are good. They are going to
4 be rewritten.

5 When you do an automotive service
6 center that is not defined, I don't think that
7 that's, you know, a great idea, because here
8 we are saying does it fit? Is this an
9 appropriate category when it's not even
10 defined and it's just left up to us to make a
11 decision. But I think we kind of have to look
12 at the type of work and see. I guess, yes, if
13 it's not -- we don't have to decide okay,
14 maybe it's not incidental, but how much
15 further away from incidental is it?

16 How close is it to repair that the
17 ZA would have erred in creating this use? Is
18 he so off the mark, because it's really so far
19 beyond incidental? Perhaps that's just
20 another way of looking at it.

21 I just want to say again the other
22 case was so clear cut, I mean, we had all this

1 heavy repair work, no information to evidence
2 to the contrary and adverse impact. What's
3 unusual in this case, and I don't really
4 totally understand it, but we have the
5 evidence that's before us is, you know, why
6 are they so different?

7 You know, aren't we talking about
8 the same premises? Why are they so different?
9 Why is the evidence so different? But I think
10 we have to look at the evidence that is before
11 us in this case.

12 MS. MITTEN: Well, you know, one
13 of the things is that, I mean, I happen to
14 have sat on the 4221 case and there was
15 discussion about how this category came to be
16 created. And I don't want to rely on the
17 evidence in another case, so I don't know how
18 to have the debate about why the category was
19 created. But I think it's clear that this --
20 I think what is clear is that this category
21 creates the impression that more rights are
22 being conferred than are permitted by the

1 regulations and that's why it's a mistake.

2 And the appellant has the right
3 and has had the right all along to go down and
4 apply for a Certificate of Occupancy for a use
5 that is permitted as a matter-of-right,
6 whether it is automobile accessory sales,
7 including installations or service uses,
8 repair uses incidental to a gasoline service
9 station under 741.4 or apply for a special
10 exception to take away the cloud of
11 uncertainty, there is a lot of choices there,
12 but to me the one that is not appropriate to
13 stand is the use of this term, which is the
14 basis for the revocation of the Certificate of
15 Occupancy in this particular case.

16 VICE CHAIR MILLER: What the Court
17 of Appeals' case held was that term,
18 automobile service center, could not be
19 construed to allow operation of a repair
20 garage. So that's where the law is right now.
21 And what I hear you saying is we would go
22 further than that. We would then say we don't

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1 have to find that they are doing repair that
2 would be considered under the definition of
3 garage repair, we now are going to say that it
4 wasn't close enough to the matter-of-right
5 uses listed in 741 and, therefore, the
6 Certificate of Occupancy should be revoked.
7 That's a big leap.

8 MS. MITTEN: Well, I thought we --
9 I didn't know we were using 4221 as some kind
10 of -- you know, I thought -- well, it's not a
11 benchmark for this decision in any way, other
12 than to recognize the fact that the BZA
13 focused its attention on finding whether or
14 not a repair garage was operating at 4221.
15 And what I'm saying is that was the finding
16 and that was upheld by the Court of Appeals.

17 That did not then make repair
18 garage the benchmark for, you know, if it's
19 not a repair garage, then everything else is
20 a matter of use -- a matter-of-right. My view
21 is, because that suggests that the bright line
22 starts if you are not a repair garage, then

1 you are a matter-of-right.

2 My view is if you don't meet the
3 strict standards of what is matter-of-right
4 under 741, then you are a special exception.
5 And so it's, you know, a more conservative
6 reading, if you like, of the regulations, but
7 I think that's what is mandated, because the
8 ZA doesn't have the authority to grant
9 anything that's not a matter of right. So
10 that's -- you know, if you are on the end of
11 that continuum, the bright line gets drawn at
12 the conservative end, not at the liberal end,
13 because we haven't given that kind of liberty
14 to the ZA.

15 BOARD MEMBER ETHERLY: I think
16 what we definitely have right now are probably
17 kind of two different arguments that are both
18 necessary pieces of this. One is the legal
19 aspect of it to an extent, as I have kind of
20 phrased it before, the door that the Zoning
21 Administrator tried to walk through in terms
22 of characterizing what it is that we have in

1 front of us, be it a gasoline service station,
2 automobile service -- automotive service
3 center, repair garage or what have you.

4 And then there is a little bit of
5 the factual piece. So I am most certainly
6 trying to find the link and the thread that
7 kind of connects the two of these together.
8 But for the moment, I'm still, shall we say,
9 a little tenuous with that. But let me throw
10 another factual piece into the mix, which is,
11 and I think it's a very good point that is
12 raised by the appellant's argument, which
13 comes back again to this idea of what the
14 model is for a gasoline service station today.

15 The appellant goes through great
16 lengths to highlight throughout its proposed
17 findings of fact and conclusions of law that
18 its model, its business model is no different
19 from what you encountered at the vast majority
20 of other facilities currently operating and
21 doing business within the District of
22 Columbia, be it Meineke, Midas, any other

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1 number of premises.

2 I'll note and I'm struggling with
3 that, because I do find that argument to be
4 very, very compelling. Again, as we are often
5 or as we frequently say here at the Board each
6 case stands on its own and we are not
7 necessarily -- we're just looking at the
8 individual and specific facts of each case.
9 That is something that is troubling to me in
10 terms of trying to look at this result in the
11 context of what the Zoning Regulations are
12 endeavoring to do with respect to allowing
13 this kind of use as a matter of right in the
14 zoning question and then also the flexibility
15 that I think is being sought by the provision
16 at 741.4 with regard to other service or
17 retail use similar to that allowed in section
18 741.2 and 741.3.

19 So again, right now, I'm still
20 trying to find the thread between the factual
21 piece and the important legal arguments that
22 we are also identifying through Mrs. Miller's

1 -- Mrs. Mitten's comments and Mrs. Miller's
2 comments. But just from a factual standpoint,
3 I'll note, and this is perhaps simply more of
4 a devil's advocate point, that a number of the
5 repairs that have been identified by the
6 appellant as taking place at Van Ness Auto
7 Care, the appellant argues are part and parcel
8 of what you see at just about any gasoline
9 station here in the District of Columbia.

10 To an extent I understand that
11 argument and I can visualize it very easily,
12 because most gasoline stations that we
13 encounter today do at least have one garage or
14 two garage bays where there is some type of
15 potentially an overnight stay involved.
16 Again, playing devil's advocate here, my
17 earlier point was well, the fact that you have
18 on average anywhere from, based on the
19 appellant's proposed findings of fact and
20 conclusions of law, 3 and 20 cars on the
21 premises on any work day, again, according
22 from page 8 of the applicant's submittal at

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1 Exhibit No. 38 and you typically have
2 customers dropping off a car in the morning on
3 the way to work and picking up the car by the
4 end of the day.

5 I'm struggling with the fact that
6 again the Zoning Regs might contemplate an
7 incidental aspect of business for gasoline
8 service station to be the fluid top off and
9 the windshield wiper stuff, whereas, today, it
10 is more incidental to see potentially a longer
11 stop, a longer visit for your vehicle if you
12 have something else going on.

13 What I'm trying to struggle with
14 is what kind of guidance, be it a bright line,
15 be it a soft line, what kind of guidance can
16 this decision help offer to business owners
17 and operators working in the District such
18 that -- at what point does a gasoline station
19 stop becoming a gasoline station and becoming
20 a repair garage?

21 To an extent, I was beginning to
22 sniff around the idea of to an extent it's the

1 purpose for the visit. If the visit is to get
2 gas, then your incidental to me, as long as
3 you're not necessarily dropping off your car
4 and leaving it, oh, I had to fill up my gas
5 tank, but all of a sudden my car is in the
6 garage bay and I'm now getting picked up from
7 the gas station, that's something a little
8 different than just I'm going to pick up gas
9 and I'm leaving.

10 So I'm perhaps highlighting more
11 struggles and more grey areas than I am
12 clarity, at this point, but I'm just kind of
13 throwing the pasta on the wall and kind of
14 hopefully helping us see what sticks as we
15 move forward.

16 VICE CHAIR MILLER: Okay. I would
17 like to respond to that, because I think you
18 made some very good points about, you know,
19 other gas stations doing repairs, etcetera,
20 and I was thinking about that, too. We all
21 live in the city and we see different places,
22 but we don't know if they have special

1 exceptions or not or were grandfathered or
2 whatever.

3 So we're looking at this case and
4 what I'm thinking now is that it isn't such a
5 problem with this case. What's different
6 about this case, well, what's not going to
7 affect the future is that we do require
8 special exceptions now for both gas stations
9 and repair garages. This particular case is
10 one of those that was before the regulations,
11 that was grandfathered in.

12 So that issue is not there any
13 more, although it does affect well, what about
14 all the other ones that were grandfathered in
15 and I think that was raised by the appellant
16 in this proceeding. Are you going to -- are
17 you asking Mr. Crews, is he going to look up
18 the records and go after them and revoke their
19 Certificates of Occupancy, which Mr. Crews
20 didn't seem to indicate he was planning on
21 doing.

22 See, to me, it seems like there

1 should be a good reason for revoking the
2 Certificate of Occupancy. I mean, number one,
3 we can look at the evidence and decide that,
4 you know, we went way beyond, the previous ZAs
5 went way beyond, what we think was reasonable
6 in finding that it falls within 741.4.

7 I don't see that offhand, but we
8 can go through the evidence and maybe others
9 can point that out to me.

10 BOARD MEMBER ETHERLY: But at this
11 point, Madam Vice Chair, it is your sense that
12 you are finding the activity that appears to
13 be conducted on the premises to be incidental
14 to the conduct of gasoline service station, as
15 it relates to this premises and this business
16 right now? That's your sense or your leaning?

17 VICE CHAIR MILLER: That is my
18 leaning in that definition which talks about
19 assemblage and repair. You know, because I'm
20 not an expert in repairs. But I don't think
21 it is unreasonable at all for a ZA to have
22 interpreted the types of repairs that are

1 described in the findings of fact set forth by
2 the appellant as being in that category.

3 BOARD MEMBER ETHERLY: Um-hum.

4 VICE CHAIR MILLER: And then I
5 think it does raise the issue of, you know, if
6 there were like these grave adverse impacts
7 that were driving this particular proceeding
8 that we heard in the other case, that we
9 didn't hear in this case, that might be a
10 reason to say, you know, that it was wrong.
11 I'm not sure that I see the evidence that it
12 was so wrong and it's not going to affect
13 future applications, because our regulations
14 are different.

15 BOARD MEMBER ETHERLY: Well, as we
16 continue to deliberate and move forward, I'll
17 just indicate, as I queried Mrs. Miller, my
18 leaning, at this point, is to something that
19 is a little more involved and a little more
20 engaged than the activities that I would
21 normally consider to be incidental, if you
22 will, to the operation and conduct of the

1 gasoline service station.

2 I'm not so much hanging my peg on
3 the nature of the work that is being done. I
4 think the record has been fairly well-
5 established by the appellant without any
6 rebutting evidence, contrary evidence that the
7 nature of the work is definable or can be
8 characterized as "minor repair." But I don't
9 necessarily see that as being the sole hinge
10 here. I think to use an often overused phrase
11 from legal jurisprudence, generally speaking,
12 one that first year law students get also
13 tired of hearing, especially in crim law, is
14 the issue of totality of the circumstances, if
15 you will.

16 And what does continue to trouble
17 me is, okay, number one, I understand most of
18 the repairs appear to be minor in nature,
19 based on what Van Ness Auto Care purchases
20 from its suppliers, based on the repairs,
21 based on the type of facilities that are on-
22 site, no major lift equipment, no major over-

1 sized bay that allows for much deeper
2 exploration of the interior workings of
3 vehicles.

4 But what does continue to trouble
5 me is this notion of what is part of the every
6 day typical business model and that is, as I
7 have noted twice now, this notion that you
8 will have on average somewhere between 3 to 20
9 cars a day and the expectation is that
10 customers or clients are going to drop off
11 their vehicles at the premises and come back
12 and pick those vehicles up at some later time.

13 What would have been helpful to
14 me, and I'm not certain if it's just an
15 omission from my particular set of transcript
16 notes, is there was a page missing out of my
17 transcript notes, page 366, I believe it might
18 have been, and I'm looking for the note. I'll
19 have it in a moment. The reason why I
20 highlight that page is at the bottom of page
21 365, I believe it was either at the bottom of
22 365 or one of the earlier pages, I tried to

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1 get at from the appellant what was the average
2 length of stay for a vehicle.

3 Again, as you look at the issue of
4 what is incidental, I'm kind of sniffing
5 around this argument that if you're coming to
6 his location for gasoline, as your first
7 motivating factor, that's one thing. But if
8 you are coming to it with the expectation that
9 you are getting a greater degree of work done,
10 that in all likelihood is going to require you
11 to leave your vehicle for some extended period
12 of time, that begins to move again out of what
13 I believe the orbit of a gasoline service
14 station to be and what's incidental to the
15 operation of the gasoline service station and
16 it begins to move more into the direction of
17 a repair garage.

18 Of course, the Zoning Regulations
19 do not speak to any of this with regard to the
20 definition of a repair garage. It doesn't
21 speak to length of stay or anything along
22 those lines, but I'm just trying to fashion

1 some sense or some understanding of what is
2 incidental to the conduct of the gasoline
3 service station in this particular instance?

4 And so again, I still remain
5 concerned by the fact that there appears to be
6 a fairly routine and regular expectation that
7 vehicles are going to be left on site and, in
8 fact, stored for some period of time while
9 they are worked on, albeit the repairs are
10 minor in nature and not heavy, no replacement
11 of engine blocks, no wholesale reconstruction
12 of the motor and the guts of the vehicle, but
13 nevertheless the cars are being left on site
14 for some prolonged or extended period of time.

15 MS. MITTEN: If I could just offer
16 one thing. I don't know if this is going to
17 convince anybody or not, but, you know, we
18 heard testimony about the operation and that
19 Mr. Kuri originally just operated the repair
20 facility and then more recently became the
21 owner or the operator of the gasoline station.
22 And I think that alone, that there -- for a

1 long period of time maybe not permanently, but
2 there were two distinctly different
3 businesses, stand alone businesses being
4 operated suggests that, and that could be
5 operated by different people, the operation of
6 the repair facility is not incidental to the
7 gasoline station. It's totally separate. It
8 has been. It was separate for a really long
9 time.

10 So how could it be incidental if
11 it was operated by two distinctly different
12 entities, two separate business models, you
13 know, didn't even necessarily have to share
14 customers. There is no relationship between--
15 until more recently, there hasn't even been a
16 business relationship between the two. And I
17 just don't know what else. I think we need to
18 move this forward to a decision, because I
19 just think that we have sort of beat the horse
20 to death, at this point, and it's time to, you
21 know, just get off the horse.

22 VICE CHAIR MILLER: Okay. I want

1 to just bring in one other angle just before
2 we get off the horse. You know, it's always
3 that, you know, we're trying to decipher the
4 regulations that aren't perfect. Appellant
5 cites an interesting provision in the D.C.
6 Code and, of course, it comes up, it brings in
7 another definition, but I think it's worth
8 addressing and bringing into the dialogue.

9 And that is D.C. Code 36-304.01(a)
10 which defines a full-service retail service
11 station to mean "Any retail service station
12 location which provides a garage, service bay,
13 work area or similar enclosed area for
14 repairing, maintaining, servicing or otherwise
15 working on motor vehicles or any service
16 islands. Such repair maintenance and service
17 work may include, but is not limited to, the
18 installation of replacement of batteries,
19 tires, fan belts, lights, brakes, water pumps,
20 mufflers and other parts and accessories and
21 the performance of motor oil changes,
22 lubrications, wheel alignments, tune-ups, tire

1 repairs, brake adjustments and general repair
2 and maintenance work and services."

3 And then the appellant cites 36-
4 304.01(c) which says that "Any person or
5 operator of any full-service retail service
6 station on or after April 19, 1977" or "No
7 person shall substantially reduce the number
8 types, quantity or quality of the repair,
9 maintenance and other services, including the
10 retail sale of motor fuels, petroleum products
11 and automotive products previously offered.
12 Such operator shall maintain the retail
13 service station's existing garages, service
14 bays, work areas and similar areas in a fully
15 operational condition and reasonably equipped
16 to perform repair, maintenance and service
17 work on motor vehicles, including the
18 provision of a qualified individual or
19 individuals who is or are capable of
20 performing repair, maintenance and service
21 work on motor vehicles during a reasonable
22 number of hours per day and days per week."

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1 I bring this up because I just
2 think we have to think about the context in
3 which we are making this decision. I mean,
4 what is the point? What are we -- here is a
5 statute that is saying, you know, oh, don't
6 decrease these things, that these are good
7 things. We have a court case, in our previous
8 case it says clearly you can't have repair
9 garage work being operated in this zone.

10 And then we have this grey case
11 that is talking about minor repairs that are
12 not included in the as a matter-of-right
13 definition of what's allowed in this use, but
14 has been interpreted by previous Zoning
15 Administrators to be incidental to it.

16 So I think we have to think of,
17 you know, what's the point of where we are
18 going. And I understand, Ms. Mitten, that
19 your point is that some of these things it's
20 not matter-of-right, you know, they could
21 create an adverse impact on the community, so
22 they ought to get a special exception.

1 I guess my point is they have had
2 the Certificate of Occupancy for many, many
3 years. There are other establishments that
4 have the same type. It wasn't ideal, but
5 that's what it is. I think it was reasonable
6 within the definition of the regulations and
7 we don't have evidence of adverse impacts.

8 MS. MITTEN: Well, there are a lot
9 of things that just got said, but I just want
10 to say in terms of the code citation or
11 several sections of the code and Title 36 that
12 you noted, I would just want to say that,
13 first of all, to the extent that anything that
14 was being done at the premises at 4225 was not
15 authorized by the Zoning Regulations, it does
16 not become valid because of this new code
17 provision that encourages people to retain or
18 requires people to retain services that are
19 clearly part of a service station. So if it
20 wasn't authorized before, it doesn't become
21 authorized.

22 VICE CHAIR MILLER: I would agree

1 with you. I was reading it for public policy.

2 MS. MITTEN: Right.

3 VICE CHAIR MILLER: Okay.

4 MS. MITTEN: I think there is
5 probably a longer standing public policy that,
6 you know, compliance with Zoning Regulations
7 is desirable for the reason that, you know,
8 uses that have the potential for adverse
9 impacts are intended to be controlled. And,
10 you know, the reason why I think in drawing
11 the line and I mean I think the line is very
12 clear about what is incidental in this case,
13 but it's because there is a separate set of
14 impacts that result from operating a gasoline
15 service station from a repair garage or
16 something that exceeds what is a matter-of-
17 right.

18 So, you know, I keep going back to
19 the fact that we don't have to find that this
20 repair garage to find that they need to have
21 a special exception and if you -- and when
22 something is incidental, to me, it suggests

1 that it is not generating its own set of
2 issues. It's so minor as to be subsumed into
3 the other use. And this is clearly stand
4 alone and clearly generates its own traffic
5 and parking issues, it's own noise issues.
6 They are not part and parcel of the gas
7 station operation.

8 And as I said earlier, it used to
9 be separate. So I mean, I just don't find
10 that this is compelling. And, you know, I
11 have to go back to something I have said today
12 and I have said previously, in that, you know,
13 in the Zoning Administrator's testimony, he
14 reminded us of the fact that these folks were
15 advised as far -- as long ago and perhaps
16 longer ago, but certainly as long ago as the
17 year 2000 to get a special exception.

18 And, you know, they say they are
19 not doing anything that is not a matter-of-
20 right. And fine, remove whatever cloud there
21 may be and apply for a Certificate of
22 Occupancy for a matter-of-right use either as

1 automobile accessory sales or under 721.4,
2 which is a use that's incidental to a gasoline
3 service station. You know, come in and just,
4 you know, let's tell it like it is or if you
5 are actually doing something that's not
6 incidental, which is more what I think, then
7 apply for a special exception.

8 There is a presumption of
9 compatibility that, you know, a set of
10 conditions can be crafted that would make that
11 use compatible and they have never done that.
12 And, you know, I just -- it's very frustrating
13 because there is clearly an easier way to
14 resolve this matter than, you know, this sort
15 of seemingly endless string of appeals.

16 But, to me, it's very clear that
17 this use, if you choose to invoke 741.4, is
18 that the number, 741.4, that it's not
19 incidental. The average cost of a ticket, the
20 average cost of a repair ticket is not
21 incidental compared to what it costs you for
22 a tank of gas. As Mr. Etherly pointed out,

1 the nature of someone utilizing the operation
2 is not incidental.

3 You don't do it in the same -- you
4 don't utilize the operation in the same manner
5 or if you buy a tank of gas, you drive in and
6 within 30 minutes you are on your way. That's
7 not the way the repair facility operates. And
8 also, because these two operations for a long
9 period of time were stand alone operations, I
10 think that suggests that it's not part and
11 parcel of the service station business.

12 BOARD MEMBER ETHERLY: I would
13 tend to agree with Mrs. Mitten's comments.
14 I'll note just perhaps to help further orient
15 my colleagues, I am still in search of a
16 Webster's Unabridged Dictionary just to be
17 consistent. But what I do have in front of
18 me, by courtesy of someone's desk that I just
19 purloined or the book I purloined, Webster's
20 New World Dictionary defines incidental as the
21 following: "Happening as a result of or in
22 connection with something more important;

1 casual; likely to happen as a result of or
2 concomitant; secondary or minor, but usually
3 associated; something incidental," oh, that's
4 very helpful, but finally, "miscellaneous or
5 minor items or expenses."

6 So again, as I kind of struggle
7 and grapple with the issue of what is
8 incidental, and is the nature of the business
9 that's under way here, are those services that
10 could be defined as incidental? I continue to
11 grapple and, I think, side with Mrs. Mitten's
12 comments that what we are seeing here more
13 frequently than not are visits and trips that
14 are being generated for a purpose to which
15 gasoline and the securing thereof may be
16 incidental, but it is my sense that based on
17 the record, based on the testimony that we
18 have had, that the nature of the -- the
19 primary nature of the work and the primary
20 generator of the trips that are at issue here
21 with respect to the patrons of Van Ness Auto
22 Care are, in fact, repair work.

1 And I'm not getting to the major
2 and minor here. I don't think for me that is
3 the hinge here. I think what is more
4 important, what is more at issue here is what
5 is generating the trips here. The gas piece,
6 to me, based on the record doesn't seem to be
7 driving the business here. Rather, it is
8 wonderful for the business owner a strong
9 reputation, a good business model for doing
10 good work and good technicians, but
11 nevertheless those trips are being generated
12 by the desire of customers to get auto repair
13 services as opposed to gasoline-related
14 services.

15 And I think the record as was
16 reviewed by the Zoning Administrator and I
17 think the record that has been established
18 here in our hearings support that the business
19 that's underway here is not likely to happen
20 in what is a miscellaneous or minor way. It
21 is not happening as a result of or in
22 connection with something more important.

1 Here the gas is not more
2 important, it is the service that's being
3 provided to repair the vehicles. Again, I'm
4 not making the distinction between major and
5 minor here. I'm more focused on the issue of
6 what is driving and generating the trips.
7 Because I think as Mrs. Mitten was getting to,
8 the nature of a special exception inquiry is
9 when you start to talk about adverse impacts,
10 you get into issues around what types of trips
11 are being generated and why are they being
12 generated and what will happen as a result of
13 those trips.

14 And so if we were in a special
15 exception inquiry, which we are not, but if we
16 were, then getting into issues around what's
17 the average length of stay for your vehicles?
18 How many vehicles do you have on any given
19 day? Then those things like well, on average
20 it's between 3 and 10 -- 3 and I think 20,
21 according to the transcript, and those
22 vehicles are more than likely to be dropped

1 off at the beginning of the day, maybe picked
2 up.

3 Again, I couldn't recall whether
4 or not we had in the record any establishment
5 of the fact of what was the average length of
6 stay for those vehicles, but I think those
7 were the kinds of issues that a special
8 exception inquiry would get to and I think
9 they would have been proper in this particular
10 instance.

11 VICE CHAIR MILLER: I think we
12 should just really hash this all out and then
13 we can vote, because I want to respond to
14 that. I think I said this before. If we had
15 heard evidence of adverse impacts, then I
16 would say yes, this needs a special exception,
17 because look, there are adverse impacts that
18 weren't addressed. And I think it's very
19 curious that we didn't get the evidence in
20 this case, but that may say something that if
21 you don't get evidence about that, then maybe
22 this was properly determined by the ZA.

1 But I also think that as we
2 resolve this or try to resolve this, I think
3 we should try to bite the bullet somehow,
4 because, first of all, I want to give great
5 weight to the ANC and just talk about a couple
6 of things that I understand their position to
7 be.

8 One is I think that they oppose
9 the appeal, because they believed that it was
10 covered by the Court of Appeals' decision. So
11 we have already addressed that. And then the
12 ANC says they don't object to the fueling
13 station with two service bays for minor
14 repairs incidental to a gas station.

15 Okay. So they don't object to
16 that and then in the gas station definition,
17 that in and of itself talks about incidental,
18 I believe. Let me just pull that one more
19 time. Gasoline service stations, "An area of
20 land including any structures on any area used
21 for the retail sale of motor fuel and
22 lubricants and incidental service such as

1 lubrication and hand-washing of motor vehicles
2 and the sale, installation or minor repairs of
3 tires, batteries or other automobile
4 accessories."

5 Okay. It doesn't include
6 automobile or repair garage. Okay. I think
7 if we are going to be helpful here, I think we
8 have to really say, you know, okay, what do we
9 think were minor repairs or what can this
10 operation do if the Certificate of Occupancy
11 is going to be revoked, because we have minor
12 repairs being mentioned in the definition. We
13 have minor repairs not being objected to by
14 the ANC. We have repairs being described by
15 the appellant that they categorized as minor
16 repairs.

17 And we are not experts on repairs,
18 but if some Members of my Board are inclined
19 to uphold the revocation of a Certificate of
20 Occupancy, I think you need to articulate
21 which type of repairs have gone too far beyond
22 minor repairs that you would think would be

1 covered by the definition of at least service
2 station, which is a matter-of-right use.

3 MS. MITTEN: I'm not prepared to
4 do that. What I think is clear and what I
5 think the ANC is suggesting is that the word
6 incidental keeps coming up and to me I want to
7 deal with, because I think we don't have to
8 deal with every issue if we find -- if we can
9 make a decision based on one that is more
10 clear than another.

11 So to me, the clear issue, as Mr.
12 Etherly was saying, is this is not incidental.
13 Everybody is saying incidental is what the
14 ordinance says. The ANC is saying we want
15 something that is incidental. I can clearly
16 say this operation is not incidental to the
17 gasoline service station. I'm not prepared to
18 say what's a minor repair. You know, you can
19 change -- you can do a tune-up, but you can't
20 do something else, because I don't know. You
21 know, I don't know it well enough, but I don't
22 think we need to get there.

1 At the moment, it's certainly
2 beyond my skill set. But if that's what this
3 case was turning on, then I would have to dig
4 in on that issue, but that's not what it turns
5 on.

6 BOARD MEMBER MANN: One of the
7 things that I'm unclear about is when you are
8 talking about adverse impacts. Why should we
9 be considering whether or not there are
10 adverse impacts when we haven't screened this
11 yet or put it through any evaluation process
12 to determine whether or not there are adverse
13 impacts?

14 VICE CHAIR MILLER: I can respond
15 to that. Those would be signs that it may
16 have been improperly categorized by the ZA as
17 being incidental or close enough to the
18 matter-of-right use because of the adverse
19 effects that have occurred, that the special
20 exception provisions are in our regulations to
21 protect communities from adverse impacts.

22 BOARD MEMBER MANN: Except that we

1 didn't ask anybody to determine whether or not
2 there are adverse impacts. We were only asked
3 to evaluate whether or not the Zoning
4 Administrator had made a decision based on a
5 number of other criteria, but adverse impacts
6 wasn't among them.

7 VICE CHAIR MILLER: We didn't ask
8 the parties for a lot of things. I mean, they
9 present their case. So it's just one piece of
10 evidence that can just, I think, enlighten the
11 Board with respect to when it is making a
12 decision to realize the impact of it. And if
13 the impact of the decision were to have an
14 adverse impact, then it would be more logical
15 that the Zoning Commission would have intended
16 that this be a special exception and that I
17 say the ZA would have gone beyond what was
18 reasonable in creating that use.

19 MS. MITTEN: I think Mr. Mann's
20 point is just that because the absence of
21 information about adverse impacts shouldn't be
22 construed, given that it wasn't necessarily

1 directly on point with what is before us, as
2 suggesting that there are no adverse impacts.
3 I think that's his point.

4 BOARD MEMBER ETHERLY: And I tend
5 to think that clearly going forward, as I
6 think was indicated by you, Mrs. Miller, there
7 are indeed routes and Mrs. Mitten has clearly
8 emphasized it at the top of her remarks that
9 there are easier and more direct routes to go
10 for insuring that this type of operation can,
11 indeed, continue unabated in appropriate
12 locations throughout the District of Columbia
13 and that is you do your special exception.

14 I understand exactly what you are
15 talking about with regard to the larger
16 impact. There was -- and it's -- I'm amused
17 by the fact that I continue to reply on the
18 appellant's submittal, because I think it has
19 been very, very helpful in some respects
20 understanding the nature of the business, as
21 well as trying to sort out what's incidental
22 and what's not incidental.

1 At page 11 of the appellee's
2 submittal within what are the findings of
3 fact, proposed Finding of Fact No. 13, I
4 believe it is, makes a very interesting
5 statement and I have been trying all morning
6 to put that in the context of what we're
7 dealing with. And it simply reads as follows:

8 "The modern circumstances of auto
9 repair industry have markedly evolved from
10 1958 when the Zoning Regulations went into
11 effect, in that there has been an important
12 industry-wide shift away from major auto
13 repair work toward electronic and computerized
14 work. Repairs performed today emphasize
15 adjustment and fine tuning over heavy repair.

16 In 1958, automobiles did not come
17 standard with air conditioning or automatic
18 transmission, automobile reliability was
19 relatively poor, the catalytic converter had
20 not yet been invented and emission control
21 standards were non-existent and carburetors
22 were ubiquitous. The commercialization of

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1 fuel injection systems then being decades
2 away."

3 What that proposed statement
4 endeavors to get to, I think, is part of the
5 point that you are making, Mrs. Miller, and
6 that is the nature of the game, if you will,
7 in this area has changed such that perhaps
8 there needs to be a different understanding of
9 what is today incidental to visiting a gas
10 station.

11 But I believe as Mrs. Mitten has
12 indicated, it's not necessary to get to the
13 special exception inquiry here, rather what
14 I'm simply trying to work through is whether
15 the industry and the way business has been
16 conducted has changed or not. Part of the
17 special exception inquiry is to get precisely
18 at those issues of adverse impact.

19 And I think potentially if the
20 gasoline station model has moved away from
21 your quick five minute visit, topping off your
22 fluids, getting your windshield wiped and then

1 you're on your way, if the new model has
2 emerged to be more of a not only am I stopping
3 to get gas, but it is perhaps more like now
4 that I am going to make a longer service
5 visit, then that perhaps needs to be part of
6 the special exception inquiry.

7 And in that regard, the argument
8 that I think Mrs. Mitten is making that I'm
9 leaning towards making appears to work for me,
10 because when you look at some of the
11 documentation that has been provided in, I
12 believe it was, the ANC's submittal, and I
13 want to be sure that I'm referencing the
14 appropriate picture, but in the ANC's
15 submittal, and I don't have an exhibit number
16 on it, it is the submittal that has ANC-3F's
17 resolution.

18 At the top of it, as you begin to
19 look at some of the pictures that are offered
20 with regard to the operation at 4225
21 Connecticut Avenue, and in particular, as you
22 begin to see the cars that are housed on-site,

1 I think you begin to get a sense of well,
2 these are probably potentially some impacts
3 that the special exception inquiry -- if this
4 went to a special exception inquiry, would get
5 at precisely the issue of the storage of
6 vehicles, how many trips are being generated
7 by the operation, such that there are going to
8 be traffic considerations, such that there are
9 going to be emissions considerations with
10 regard to automobile fumes, exhaust fumes and
11 what have you.

12 As I begin to kind of put it in
13 that construct, the argument that this is not
14 incidental to the operation of a gasoline
15 station begins to work a little more clearly
16 for me. But I say all that to, I think, try
17 to bridge your comment, which is let's simply
18 understand how this is going to work in
19 practice and what this means for the practical
20 application, because as the appellant has
21 said, it's not just us. It's Meineke, it's
22 Jiffy Lube.

1 But when I think of a Meineke,
2 when I think of Jiffy Lube and I want to look
3 specifically for the cite in the appellant's
4 submittal, those are not gas station
5 establishments. I mean, perhaps I'm not aware
6 of a Meineke and a Jiffy Lube that has
7 installed gas pumps, but those are
8 establishments wherein my own layperson's
9 experience I go there knowing that I'm going
10 to have to leave my car for a prolonged period
11 of time.

12 And I found the reference in the
13 appellant's proposed findings of fact and
14 conclusions of law at page 13 where the
15 appellant discusses the distinction between
16 minor and major repairs. The appellant notes
17 at what is Point No. 3 "The Zoning
18 Administrator's position that 'a repair is a
19 repair' could lead to the absurd result that
20 windshield wipers could only be replaced at
21 repair garages and would also eliminate such
22 companies as Meineke, Midas and Jiffy Lube

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1 from doing business in the District of
2 Columbia."

3 But what we are not dealing with
4 here is a Meineke, Midas or Jiffy Lube
5 experience, because those are much -- arguably
6 much more intensive operations where you have
7 multiple bays, multiple vehicles coming
8 through, but my concern is that you have the
9 same thing here to an extent. There are
10 differences and I want to be very clear that
11 the appellant understand that I understand
12 that, but you also have gas pumps.

13 So to an extent, I'm trying to
14 make sure that we don't have a Meineke, a
15 Midas or a Jiffy Lube or a Van Ness Auto Care
16 piggyback on the gas pumps part of the
17 operation in order to get over. And I'm not
18 saying that's what the appellant is trying to
19 do here, but again, your point is well-taken,
20 Mrs. Miller, and that is how do you reconcile
21 what we're trying to fashion in terms of an
22 outcome in this case, such that there is

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1 appropriate guidance?

2 But I think the answer is exactly
3 what Mrs. Mitten said, you got for a special
4 exception or you seek the appropriate title
5 for your activity when you go for your C of O.

6 VICE CHAIR MILLER: Yes, I think
7 that's a point well-taken. I just want to --
8 I think this is very important to air this,
9 that's why we're taking a long time. I mean,
10 as I said before, I'm certainly aware of other
11 gas stations that seem similar, you know, that
12 also do service in residential areas and I
13 don't know what their history is.

14 And I guess I'm a little bit
15 concerned about, you know, what's fair. And
16 then another of my concerns is this automobile
17 service center. It's a very vague category.
18 You know, what does that mean? And I think
19 that that's a real part of the problem here.
20 And when we're looking to resolution of this,
21 if we were to say, I don't think we're going
22 or headed towards the direction of saying,

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1 they are operating outside the scope of their
2 automobile service center C of O, because it's
3 not even defined.

4 I think that the court found and
5 we found before that they were, because they
6 were doing repair work as defined under garage
7 repairs, repair garages. So I don't know
8 where this Board wants to go with this, but if
9 we were to determine that some of this in the
10 grey area is too far, I guess, Ms. Mitten,
11 you're saying we can't say some of it isn't.

12 I mean, like what are they allowed
13 to do? Are we not going to even go there? We
14 would just revoke the Certificate of
15 Occupancy?

16 MS. MITTEN: They are allowed to
17 do -- they are allowed to sell automobile
18 accessories and install those or do such other
19 repair work that is incidental to a gasoline
20 service station.

21 VICE CHAIR MILLER: Which is?
22 Which is what's in the definition? Which is

1 lubrication and hand-washing of motor
2 vehicles, minor repairs of tires, batteries or
3 other automobile accessories?

4 MS. MITTEN: I think that's fair
5 to say. But again, the focus is on it's not
6 for us, it's absolutely not for us to sit
7 here, because, first of all, we're not
8 required to do it, to decide this case and so
9 that's the main reason I don't want to do it.
10 But the point is the use has to be incidental.
11 Whatever they are doing has to be incidental.
12 And it's clearly not. And that's really as
13 far as we need to go --

14 VICE CHAIR MILLER: Yes, I think
15 that's --

16 MS. MITTEN: -- to decide this
17 case.

18 VICE CHAIR MILLER: -- so general
19 though. I mean, if you look at what their
20 work includes oil change, isn't that
21 incidental?

22 MS. MITTEN: Well, see, there is

1 two things here. Even -- let's just say, and
2 I'm not agreeing to this, but let's just say
3 for the sake of argument, that everything they
4 do is within the scope of what one could do as
5 an appropriate use that's related to a
6 gasoline service station. My point is they do
7 it in such volume, that's it's no longer
8 incidental.

9 I think that the average ticket
10 suggests that they are going beyond the scope
11 of what's incidental in terms of what is an
12 appropriate kind of use to be done in
13 conjunction with a gasoline service station.
14 But even setting that aside, they do it in
15 such volume that --

16 VICE CHAIR MILLER: What is the
17 volume that you are referring to?

18 MS. MITTEN: The number of cars
19 that they deal with.

20 VICE CHAIR MILLER: Well, what is
21 that?

22 MS. MITTEN: Well, it's 3 to 20

1 cars that are kept throughout the day.

2 VICE CHAIR MILLER: If it were
3 seven cars, would that be --

4 MS. MITTEN: I don't have to find
5 that. All I know is that the volume that they
6 are doing -- I don't have to establish what
7 the break point is. To me, they have clearly
8 exceeded it and that's as far as I need to go.
9 And if it would be helpful, at this point, I
10 would move to deny Appeal No. 17444-A for the
11 many reason that I have stated previously.

12 VICE CHAIR MILLER: Is there a
13 second?

14 BOARD MEMBER MANN: Second it, Ms.
15 Miller.

16 VICE CHAIR MILLER: Further
17 deliberation?

18 BOARD MEMBER MANN: Only to say
19 that I do agree that this seemed to hinge on
20 what is incidental and I agree with what Ms.
21 Mitten and Mr. Etherly seem to have also
22 concluded regarding the incidental use.

1 BOARD MEMBER ETHERLY: I think
2 where this leaves the issue of gasoline
3 stations for the moment, and again we're
4 talking about just this particular case, so I
5 don't want to perhaps be presumptuous and
6 necessarily suggest that the future of the
7 industry is at risk now or is in danger of
8 being pushed out of the District.

9 You know, having had some
10 experience in other areas of my professional
11 life, I am sensitive to the challenges of
12 doing business in the District of Columbia and
13 often times the fact that we exist in a
14 competitive environment that involves both
15 Maryland and Virginia and even for some
16 motorists Delaware and West Virginia.

17 I think the issue, however, here
18 as Mrs. Mitten has said is not necessarily to
19 parse out adverse impacts, but rather really
20 just how does one work this particular
21 operation into the context of zoning in the
22 District of Columbia? And I think the outcome

1 here simply notes that either there will be
2 greater clarity introduced to these relevant
3 paragraphs by the Zoning Commission or in
4 going for the Zoning Administrator and the
5 current operators or future operators will be
6 very, very clear on what is the nature of
7 their business operations.

8 If it's the case that the model is
9 now simply more volume of minor repairs, I
10 think that's important and properly in the
11 context of a special exception. And don't get
12 me wrong, I live on Capitol Hill. I have
13 probably at minimum three to four service --
14 gasoline service stations and, of course, this
15 is without having looked at what their zoning
16 classifications are, when their C of Os were
17 granted, but just generally speaking as a
18 layperson, I have at least three
19 establishments that are probably in some way
20 similar to Van Ness Auto Care, perhaps not in
21 size, in volume, but they have the service
22 bays that are at issue.

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1 And if it's the case that the
2 model has changed now, such that rather than
3 the quick five minute stop to get your gas,
4 top off your fluids and then leave, if that
5 model has now been supplanted by more trips,
6 albeit minor repair trips, but more trips to
7 deal with more complicated vehicles, there
8 used to be a time where perhaps a complication
9 was only in the high-end vehicles, your
10 European imports, your Japanese cars, but now
11 just about every car coming off of the
12 assembly line, be it Detroit, be it Korea, be
13 it wherever probably has some type of
14 computer-related component that, albeit is
15 minor, still requires a visit to a technician
16 of some type and our service stations are
17 moving to address that need.

18 If that is, in fact, the case,
19 then the Zoning Commission and/or the Zoning
20 Administrator will simply have to look at how
21 -- what is the best way to address that. But
22 that being said, it is perhaps my argument

1 that the best way to do that would be through
2 a special exception inquiry, because if you
3 are dealing with more trips now as part of
4 this new business model that the appellant has
5 highlighted in a number of different places in
6 their final submittal, then it is the case
7 that a special exception inquiry helps to
8 insure that community interests, community
9 concerns are being addressed with regard to
10 the issue of adverse impacts.

11 I think as you begin to talk
12 about, and Mrs. Mitten alluded to, the average
13 of 10 to 20 vehicles that are being dropped
14 off for a prolonged period of time at a
15 facility, that requires storage space, that
16 requires space of some sort to store those
17 vehicles and that may, in fact, have adverse
18 impacts that need to be addressed within a
19 special exception context.

20 If you are talking about people
21 coming to the facility with the expectation
22 that they are going to drop off their vehicle,

1 that to me does not evoke incidental to the
2 extent that we have described it in at least
3 one dictionary definition. Again, albeit the
4 Webster's New World Dictionary, not our
5 unabridged dictionary as it is referenced in
6 the Zoning Regs, but nevertheless incidental
7 is defined as happening as a result of or in
8 connection with something more important.

9 What appears to be more important
10 at this particular site is the great, the
11 wonderful, the excellent repair work that is
12 going on. That's a wonderful thing for the
13 business owner and that is an option that we
14 want our residents to be able to access, but
15 if that is indeed the case, I think you are
16 talking about a different type of visit that
17 could, in a special exception context, have
18 some valid issues attendant to it in terms of
19 the volume of cars, the traffic that's evoked
20 as people are bringing their cars for their
21 stay.

22 So I think the motion is, indeed,

1 a proper one. I think the record supports it.
2 Is it perhaps as clean and as tight as we
3 would like it to be in a perfect world?
4 Absolutely not. So I definitely understand
5 the concerns that have been raised by my
6 colleague, Mrs. Miller. It's an area that is
7 ripe for some clarification, but I think the
8 outcome as it is potentially contained in the
9 motion that is before the Board, I think,
10 addresses most of the key issues.

11 And I think we have walked
12 through, as Mrs. Miller said, painful, but
13 absolutely necessary detail with regard to
14 trying to parse out what is happening at this
15 particular site and what was before the Zoning
16 Administrator. Thank you, Madam Vice Chair.

17 MS. MITTEN: If I could just to
18 follow-up on one of the points that Mr.
19 Etherly made, which is that this is an area
20 that's ripe for clarification. In that way,
21 it reminds me of the regulations for fast food
22 restaurants, because restaurants are permitted

1 in C-2-A. Fast food restaurants require a
2 special exception.

3 And up to this point, we have had
4 this sort of, what do I want to call it,
5 detailed analysis that one must do to
6 determine whether or not a restaurant is a
7 fast food restaurant and it involves all kinds
8 of measurements and stuff like that, which is
9 sort of the direction, you know, you're
10 wanting more clarity. So that's what the fast
11 food regulations were about.

12 And those arose because there was
13 a lack of clarity about what is a fast food
14 restaurant. And to the extent -- clearly,
15 there needs to be clarification here, to the
16 extent that there needs to be that level of
17 clarification that will become known depending
18 on the volume of cases that are generated.
19 And that's something that I'm sure would be
20 undertaken in the rewrite of the Zoning
21 Regulations.

22 But even those very specific rules

1 are being rewritten for fast food restaurants.
2 So, you know, it's something -- this hasn't
3 evolved at all. These uses have not evolved
4 at all since 1958. The automobiles clearly
5 have. So I don't think that what -- I think
6 the reason why I was in favor of sticking to
7 it and only going so far as we need to go in
8 this case is because the Zoning Commission is
9 aware that it's an issue and we're sort of
10 poised to deal with this longstanding list of
11 problematic sections of the Zoning Ordinance
12 as we prepare to undertake the rewrite of
13 Title 11.

14 BOARD MEMBER ETHERLY: And again,
15 I'll note that the issue of major versus minor
16 repair, you know, isn't the linchpin for me
17 here. You will recall that I referenced back
18 to the note that the appellant made in their
19 proposed findings of fact and conclusions of
20 law about the reference to Jiffy Lube,
21 Meineke, Midas, etcetera, and how the work
22 that's being performed at Van Ness Auto Care

1 and here I'm reading verbatim from the
2 submittal "Is the same type as that performed
3 at neighboring stations and includes scheduled
4 annual maintenance work, warranty work and the
5 same variety and type of work performed by
6 Jiffy Lube, Meineke, Midas, etcetera."

7 And that was at page 4 of the
8 appellant's submittal. It references an
9 exchange that occurred between Mr. Kuri and
10 myself at page 346 of the transcript where in
11 response to a question that I asked about the
12 type of work and I'll read from the
13 transcript:

14 "Board Member Etherly: And as far
15 as you have said with regard to heavy vehicle
16 type work, large trucks, SUVs or anything like
17 that, I mean --

18 Mr. Kuri: The only thing we do
19 is, you know, if there is somebody from out of
20 town that has a flat on their, you know,
21 Winnebago, I guess, we'll help them with the
22 tire to get them out of town, but that's it."

1 The transcript continues and Mr.
2 Kuri, and I'm reading further down:

3 "Mr. Kuri: Any type of, you know,
4 body work, any major body work, you know,
5 anything like that, we wouldn't take care of."

6 And let me pause here in my
7 reading of the transcript. I understand that
8 that point has been made very clearly. But
9 the transcript continues and this is Mr. Kuri.

10 "Mr. Kuri: You know, we basically
11 -- you know, we're doing the service, you
12 know, things you get done on your car once a
13 year or something like that. Just keeping it,
14 you know, warranty. The same warranty as the
15 dealership would. You know, Meineke, Jiffy
16 Lube, Midas kind of thing."

17 The reason why I highlight that is
18 coming back to the issue of what a Meineke or
19 a Jiffy Lube or Midas type of facility
20 involves or calls into question, I believe.
21 These are facilities that encourage volume,
22 that encourage a very quick and fast

1 turnaround, but it's something to me that is
2 quite different from what a gasoline service
3 station model is.

4 We have talked about the service
5 bays, what types of lifts are on-hand at Van
6 Ness Auto Care and I understand that the
7 facility itself does not look like a Meineke,
8 a Jiffy Lube or a Midas kind of thing, but if
9 that is the business model that is somewhat
10 akin to what is happening at Van Ness Auto
11 Care, I am definitely comforted that it is
12 more appropriate for that type of operation to
13 be subject to a special exception inquiry.

14 Because, in my experience, your
15 typical Jiffy Lube operation is one that,
16 again, tremendous amount of volume. On a good
17 day, perhaps like the one that we have,
18 especially if it's a holiday, you're going to
19 have a large, large number of vehicles
20 funneling through, getting all the fluids
21 changed and then moving on.

22 If that type of thing were to

1 happen into some of these border zones, if you
2 will, in our Zoning Regs, whether it's the C-
3 2-As or what have you, I think you begin to
4 evoke some of the concerns about adverse
5 impacts that a special exception would enable
6 you to get at.

7 So just to kind of round out my
8 thinking and my deliberation on the issue, I
9 wanted to highlight that point. Thank you
10 again, Madam Vice Chair.

11 VICE CHAIR MILLER: Thank you. I
12 think I said a lot earlier. I just want to
13 just recap a couple of things. And that is I
14 agree with my Board Members there is a grey
15 area here and I think that a special exception
16 is appropriate for this type of repair work
17 that falls in the grey area. But where I
18 differ is how you deal with the business
19 that's been operating under a Certificate of
20 Occupancy that several ZAs have created and
21 condoned.

22 Why you should then revoke it,

1 what would be the grounds? And, you know, I
2 think either we missed it or DCRA and the ANC
3 were just, you know, through their whole case
4 in the first time around, because the first
5 time around I saw all these adverse impacts
6 and, to me, that is a real clear sign that
7 something has to be done and something is
8 wrong here. And I just didn't see that in the
9 evidence in this case.

10 So without that adverse impact
11 component, I then am thinking about well,
12 what's fair? How do you deal with businesses
13 that have gotten Certificate of Occupancies
14 like this or in other cases where they have
15 been -- where the ZA has designed a use, I
16 mean, a category where he has been or she has
17 been authorized to do so and then a new ZA
18 comes along and has a different view, do you
19 just revoke the Certificate of Occupancy?

20 And I'm troubled by that and I'm
21 also troubled by the fact that I think it's a
22 little bit vague here that we can't identify,

1 you know, where the line is or anything and,
2 therefore, can't really identify what's wrong
3 with that definition, except that it's vague.
4 And it should be corrected in the new
5 regulations.

6 And I'm also troubled that, you
7 know, this is a definition that we supported
8 last time around and supported in the Court of
9 Appeals' decision. And so then just to say it
10 isn't valid any more is a problem for me. So
11 that's why I am going to vote against it. But
12 it may be that the circumstances in this case
13 really do warrant it, that there may be
14 adverse impacts on the neighbors that didn't
15 come through in the evidence and if that's the
16 case, then a special exception proceeding
17 would be a good thing. But I didn't see the
18 evidence here and that's why I can't vote that
19 way.

20 Any other comments?

21 MS. MITTEN: I just want to make
22 one follow-up comment on your concerns, not

1 that I intend to persuade you, but just to
2 have this in the record, which is the emphasis
3 in the 4221 case was different, which is the
4 emphasis was towards establishing that there
5 was a repair garage operating at 4221 and that
6 in so doing, that the applicant was operating
7 outside of their Certificate of Occupancy.

8 We did not endorse the use
9 category that had been created. That was not
10 what was before us, because we were
11 emphasizing repair garage, which is clearly
12 not permitted as a matter-of-right in the C-3-
13 A Zone. And so that was why that was
14 emphasized. And because that was the
15 emphasis, the operation outside the
16 certificate or outside of the, yes, scope of
17 the Certificate of Occupancy, which one could
18 read (i.e., what is permitted as a matter-of-
19 right?), we got a lot of testimony about
20 adverse impacts, because that was the focus.

21 The focus here as has been
22 emphasized over and over again is not whether

1 they are operating outside of the scope of the
2 Certificate of Occupancy, but they appealed a
3 revocation of a Certificate of Occupancy for
4 the automobile service center based on the
5 ZA's finding that there was an error. And so
6 that's why we have different emphasis in the
7 two cases and a different fact pattern in the
8 two cases. I just wanted to round that out.

9 VICE CHAIR MILLER: Okay. But
10 you're saying it wasn't endorsed, but it
11 wasn't questioned either. Isn't that correct?

12 MS. MITTEN: We didn't make a
13 finding about it. The Board did not make a
14 finding about it.

15 VICE CHAIR MILLER: Okay. And I
16 don't want to belabor it, but I just want to
17 make a full record, because, you know, I'm
18 looking at the Court of Appeals' decision in
19 this.

20 MS. MITTEN: Yes, what page are
21 you on?

22 VICE CHAIR MILLER: The slip

1 opinion, page 7. Do you have that Westlaw
2 Slip Opinion? Otherwise, it's paragraph 8.

3 MS. MITTEN: Hold up what you are
4 looking at. Is it this?

5 VICE CHAIR MILLER: Yes.

6 MS. MITTEN: Okay. And then --

7 VICE CHAIR MILLER: Oh, no, page
8 7. All the pages are -- there are different
9 pages on here. One says page 8 of 9. Right
10 below it, it says page 7. And then there is
11 a paragraph 8.

12 MS. MITTEN: There is a paragraph.
13 Go ahead. I'll try and find you.

14 VICE CHAIR MILLER: Okay. It's
15 just the line says "Although the term
16 automobile service center is not defined in
17 the Zoning Regulations and it's precise scope
18 may be subject to some uncertainty, the BZA
19 concluded that it was not intended and could
20 not be construed to allow operation of a
21 repair garage."

22 MS. MITTEN: That's right. But we

1 didn't endorse the use of that terminology.
2 And the reason it clearly couldn't be
3 construed to allow the operation of a repair
4 garage is because a repair garage is by
5 definition not permitted as a matter-of-right.

6 VICE CHAIR MILLER: Okay. Yes, I
7 don't think we endorsed it either.

8 MS. MITTEN: Okay.

9 VICE CHAIR MILLER: We didn't
10 question it either.

11 MS. MITTEN: Okay.

12 VICE CHAIR MILLER: Yes, okay.
13 Any other comments? Okay. Then all those in
14 favor of the motion, say aye.

15 MS. MITTEN: Aye.

16 BOARD MEMBER ETHERLY: Aye.

17 BOARD MEMBER MANN: Aye.

18 VICE CHAIR MILLER: All those
19 opposed? Opposed. All those abstaining?

20 MR. MOY: Madam Chair, before the
21 staff gets to the final vote, staff would like
22 to just very quickly clarify a typo in the

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1 reading of the advertisement that the C of O
2 is No. 33914 as relates to 4225 Connecticut
3 Avenue.

4 So with that, the vote is 3-1-1 on
5 the motion of Carol Mitten to deny the Appeal
6 of 17444-A, seconded by Mr. Etherly, in
7 support of the motion Mr. Mann. Ms. Miller
8 opposed and a Board Member not present, not
9 voting.

10 VICE CHAIR MILLER: Thank you.
11 And does that conclude the agenda for our
12 Public Meeting, Mr. Moy?

13 MR. MOY: Yes, ma'am.

14 VICE CHAIR MILLER: Thank you.
15 This meeting is adjourned.

16 (Whereupon, the Public Meeting was
17 concluded at 12:27 p.m.)

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