

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 13180, of the Penn-Branch Citizens Association, et al., pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decisions of the Zoning Administrator of November 13, 1979 and December 5, 1979 to the effect that the proposed use of the subject premises as a fast-food/carry out outlet is a permitted use in a C-1 District at the premises 3250 Pennsylvania Avenue, S.E. (Square 5539, Lot 830) and at the premises 3244 Pennsylvania Avenue, S.E., (Square 5539, Lot 202). respectively.

HEARING DATE: February 20, 1980
DECISION DATE: April 2, 1980

FINDINGS OF FACT:

1. The subject properties are located on Pennsylvania Avenue, S.E., between Branch Avenue and O Street. They are known as 3250 Pennsylvania Avenue and 3244 Pennsylvania Avenue, S.E. respectively. The properties are located in a C-1 District. The properties are adjacent to each other and each extends a depth of approximately 210 feet from Pennsylvania Avenue.

2. By lease dated October 16, 1978, the lessor, Fay H. Burka, leased to the lessee, Burger King Corporation, the subject property. By lease dated November 7, 1978 Burger King Corporation subleased part of the subject property known as 3244 Pennsylvania Avenue to MSM Enterprises, Inc., hereinafter referred to as Church's Fried Chicken.

3. On November 15, 1979, the Zoning Administrator issued a building permit to Fay H. Burka to construct a restaurant known as Burger King at the premises 3250 Pennsylvania Avenue, S.E. On December 5, 1979, the Zoning Administrator approved the plans for zoning purposes for MSM Enterprises, Inc., to construct a restaurant known as Church's Fried Chicken at the premises 3244 Pennsylvania Avenue, S.E. The building permit has not been issued pending review of the plans by other city Departments.

4. On January 9, 1980, the appellant filed an appeal with the BZA from the decision of the Zoning Administrator in approving the applications for zoning purposes.

5. The Board at the public hearing of February 20, 1980, granted Burger King Corp., and MSM Enterprises, Inc., permission to intervene in the appeal and admitted Southeast Neighbors, Inc. and Advisory Neighborhood Commission - 7B as additional appellants.

6. The grounds for the appeal were stated as follows:

- a. The District of Columbia Department of Licenses and Inspections, the District of Columbia Zoning Administrator and each approving agency failed to give notice of the building permit applications to the affected Advisory Neighborhood Commission, as required by the District of Columbia Self-Government Act, (P.L. 98, 87 Stat. 824, Section 738(d), and the Advisory Neighborhood Commissions Act of 1975, (D.C. Law 1-21, as amended, Section 13).
- b. Fast food/carry out facilities are prohibited in the subject area by the zoning map and zoning regulations (Sub-section 5101.1 and Paragraph 5101.33 Q).
- c. The District of Columbia Zoning Administrator overstepped his authority by approving the applications for building permits at the subject sites in clear violation of the permitted uses for C-1 Districts.

7. The appellant argued as to grounds (a) of the appeal that the District of Columbia Self-Government Act and the Advisory Neighborhood Commissions Act of 1975 require District agencies to give notice to an affected ANC before issuing licenses or permits of significance to neighborhood planning and development within it's neighborhood council area, to allow the ANC to review the matter, and submit comments and recommendations to the Government agency involved. In the subject appeal, at least eight District of Columbia Government agencies reviewed the applications for building permits and at no time during the course of approvals was ANC-7B advised.

8. The appellant argued as to grounds (b) of the appeal that the subject area, according to the District of Columbia zoning map is within a "C-1" District. According to Sub-section 5101.1 of the regulations, "the C-1 District is designed to provide convenient retail and personal service establishments for the day-to-day needs of a small tributary area, with a minimum impact upon surrounding residential development." The appellants further cited Sub-paragraph 5101.33 Q, which permits as a matter-of-right "lunch counter, lunch room, cafe or restaurant, but not including a drive-in type restaurant."

In the subject appeal the plans as reviewed by the Zoning Administrator for both Burger King and Church's Fried Chicken provided drive-in windows and driveways leading directly to the windows. The appellant further argued that the two subject fast food/carry out facilities planned for the subject area are "drive-in type restaurants." While the District of Columbia Zoning Regulations do not define the terms lunch counter, lunchroom, cafe, restaurant or drive-in type restaurant, the term "restaurant" is defined in Section 25-103(r) of the District of Columbia Code:

The word restaurant means. . .a place where meals are served, such space being provided with such adequate kitchen and dining-room equipment and capacity, and having employed therein such number and kinds of employees for preparing, cooking, and serving meals. . .

Definitions of the terms "lunch counter," "lunch room," "cafe" and "restaurant" can be found in Webster's New Collegiate Dictionary, Third Edition. Lunch counter means "a long counter at which lunches are sold or luncheonette," and luncheonette means "(a) place where light lunches are sold to be eaten on the premises." Lunchroom means "(a) place where lunches supplied on the premises may be brought from home or eaten." A cafe is defined as a "restaurant" and a restaurant is defined as "a cafe is defined as a "restaurant" and a restaurant is defined as "a public eating place."

The key and common feature in each of the definitions is the necessity of the facility to serve meals to be eaten on the premises. This capacity is clearly different from and distinguishable from a "drive-in" type facility. The clear import of a drive-in type establishment is that the patrons are transient, while the lunch counter, lunchroom, cafe or restaurant is aimed at patrons who wish to consume their meals on the premises. Thus, the plain meaning of the terms would disallow inclusion as a matter-of-right of fast food/carry out facilities in a C-1 District.

9. The appellant argued as to grounds (c) of the appeal that the function of the Zoning Administrator is to review proposed construction plans submitted in connection with applications for building permits. If, and only if, those plans conform to the zoning map and Zoning Regulations, the Zoning Administrator may approve. The Zoning Administrator must, however, withhold his approval if the plans fail to conform. The plans at issue here do not conform and the Zoning Administrator acted ultra vires in approving them.

10. The Zoning Administrator testified that as to the use of the buildings they are restaurants and are permitted in a C-1 District for the following reasons. In 1958 the Zoning Commission, when adopting the new regulations, spelled out under Section 5101.33(Q) that restaurants were a permitted use in the C-1 District. On July 11, 1961, under Zoning Commission Case No. 61-25, the Zoning Commission amended Section 5101.33 to the present wording which is, "Lunch counter, lunch room, cafe, or restaurant, but not including a drive-in type restaurant."

Drive-in type restaurants were familiar uses in the Washington area when the amendment took place. They were designed to provide accommodations to consume food in a vehicle rather than in a restaurant. A restaurant, as such, is not defined in the Zoning Regulations. However, under Section 1201.2, "Words not defined in this article shall have the meanings given in Webster's Unabridged Dictionary." Webster's defines a restaurant as "An establishment where refreshments or meals may be procured by the public; a public eating house."

11. The Zoning Administrator further testified that Burger King proposes to provide eighty-eight seats in its business. There is a gross floor area of 2,951 square feet on the site. Five parking spaces are required under the Zoning Regulations. Burger King will provide thirty-one. The Zoning Administrator further testified that the original plans contained a drive-in window, but that he did not approve the plans until the drive-in window was marked out of the plans. As to Church's Fried Chicken, it proposes to provide twenty seats. The gross floor area of the site is 1,500 square feet. No parking is required under the Zoning Regulations, but the facility will provide seventeen spaces.

12. As to the driveway, the Zoning Administrator testified that his office cannot dictate the layout of a parking lot. The Zoning Administrator has jurisdiction over the size of the parking space and the aisles. The Zoning Administrator cannot dictate the flow of traffic, entrances and exits.

13. As to the question on ANC notification, the ZA has no control over it. The Zoning Administrator is only one of many agencies that have to approve the plans before a permit is issued. The Permit Branch which comes under the Department of Licenses, Investigations and Inspections should be addressed as to this issue. The Zoning Administrator does not notify an ANC of receipt of an application in the Zoning Office.

14. The intervenors argued that the plans submitted provided for the construction of restaurants. Paragraph 5101.33 permits restaurants as a matter-of-right in C-1 zones. Appellant's challenge to the determination of the Zoning Administrator is principally based on the erroneous contention that "drive-in restaurants" are being provided. The restaurants involved are plainly not drive-in restaurants, which are designed to provide for the consumption of food in vehicles rather than within the restaurant. The drive-in restaurant was a familiar sight in the Washington area some ten or fifteen years ago. Outside facilities were provided for the taking of orders either by speakers or waiters. Food was served on trays attachable to the door of the vehicle, which were later removed either mechanically or by a waiter. Drive-in restaurants are no longer in vogue and have become non-existent in the Washington area.

What constitutes a drive-in restaurant has been considered by numerous courts and has been universally held to be an establishment designed to cater to or accommodate the consumption of food and beverages in automobiles on the premises of such establishments.

The Zoning Commission has determined that restaurants are an appropriate use in a C-1 District and it is axiomatic that the Board of Zoning Adjustment is without jurisdiction to prohibit what the regulations permit. Wheeler v. District of Columbia Board of Zoning Adjustment (DCCA) 395 A2d 85 (1978).

15. The intervenors also addressed the contention of the appellants that the restaurants will be operated in a manner which will create nuisance conditions. The intervenors denied that the establishments are operated in other than a proper manner. In any event, these contentions are purely speculative and do not come within the jurisdiction of the Board of Zoning Adjustment. The District Government has the necessary tools to correct any such conditions should they arise. The Board so finds.

16. The intervenors further argued that the appellant's contention concerning an alleged failure on the part of the Department of Economic Development to furnish notice to the Advisory Neighborhood Commission of the application for building permit is not a matter within the jurisdiction of the Board of Zoning Adjustment. This Intervenor has no duty in this respect and submits that the subject matter of this contention in no way involves the Zoning Administrator's administration of the Zoning Regulations.

17. There were many petitions submitted to the file signed by neighborhood residents objecting to the construction and operation of the subject businesses because of the litter, noise, traffic and other negative impacts that their operation would have on the neighborhood. There was also great concern that if the subject eating facilities are permitted as restaurants then at a future date they will seek relief from the Board to allow drive-in accommodations.

CONCLUSIONS OF LAW AND OPINION:

This Board has jurisdiction to hear appeals pursuant to the Zoning Act and the Zoning Regulations. Section 8 of the Zoning Act (D.C. Code, Sec. 5-420, 1973 Ed.) provides in pertinent part that the Board can "hear and decide appeals where it is alleged by the appellant that there is error ... in the carrying-out or enforcement of any regulations adopted pursuant to this Act." Section 8102 of the Regulations cites the Zoning Act and states that "appeals to the Board of Zoning Adjustment may be taken by any person aggrieved... by any decision... based in whole or part upon any Zoning Regulations or zoning maps adopted pursuant to the Zoning Act." Section 8206 provides that the Board "shall hear and decide appeals where it is alleged by the appellant that there is error ... in the administration or enforcement of these regulations."

All three of these citations have in common the requirement that an appeal be based upon error in administering or enforcing regulations adopted pursuant to the Zoning Act. The first contention advanced by the appellant is that notice required by the Advisory Neighborhood Commission's Act of 1975 was not given. That act was adopted by the City Council, and is not a part of the Zoning Act or the Zoning Regulations. The Board therefore concludes that it is without jurisdiction to consider this issue.

Based on the record, the Board therefore concludes that the sole issue for it to determine is whether the Zoning Administrator erred in determining that Burger King and Church's Fried Chicken constituted permitted restaurants under the Zoning Regulations. The Board concludes there was no error. Both facilities contain seating accommodations where food is to be consumed. They are not drive-in restaurants where food is consumed in vehicles rather than at spaces provided in a public facility or eating house. As restaurants, the Board concludes that they are permitted in the subject C-1 District.

The Board notes the contention of the appellants that Sub-section 5101.1, which cites the purposes of the C-1 District, requires that uses be limited to those which "provide convenient retail and personal service establishment for the day-to-day needs of a small tributary area..." The Zoning Regulations further specify in Sub-sections 5101.3 through 5101.6 which uses are permitted. The Board concludes that the Zoning Commission through its adopted Regulations, has specifically determined what uses are to be considered as meeting the description set forth in Sub-section 5301.1. The Commission did not establish that one type or size of bank would be permitted, and that another would not. As to restaurants, the only condition imposed is that "drive-in restaurants" were not to be permitted. As the Board has already concluded that the subject restaurants are not drive-in restaurants," the Board concludes that the Zoning Administrator did not improperly apply the C-1 District use regulations.

One further contention raised by the appellants must be disposed of. There is no specific regulation in the C-1 District authorizing a "carry-out" or delicatessen, where food is prepared for off-premises consumption. However, Paragraph 5101.34 permits as a matter-of-right "other similar service or retail use." The Zoning Administrator has consistently determined, and the Board has so ruled in many cases, that a "carry-out" or "delicatessen" is a permitted C-1 use.

The Board notes that the plans as originally submitted for both establishments contained drive-in windows, where food would be conveyed directly to occupants of motor vehicles. The Zoning Administrator properly determined that such facilities would constitute a "drive-in restaurant," and required before he would approve the plans that such windows be removed. The Zoning Administrator did not require that the proposed driveway configuration which would have served such windows be amended. The Board concludes that those driveways whose sole purpose was to serve the drive-in windows actually constituted a part of the drive-in use. The Zoning Administrator should have required that such driveways also be eliminated.

As to the citizen's concerns that at a future date, the drive-in window will be instituted, the Board replies that under the current Zoning Regulations it cannot be done in a C-1 District and that any exception thereto would have to come before the Board as a separate application and be scheduled for a public hearing on its merits. Accordingly, it is ORDERED that the Appeal is DENIED and the decision of the Zoning Administrator is UPHOLD except that those portions of

driveways whose sole purpose was to provide access to the proposed drive-in windows shall be DELETED.

VOTE: 4-0 (Walter B. Lewis, Charles R. Norris, Connie Fortune and William F. McIntosh to DENY the Appeal; Leonard L. McCants not voting, not having heard the appeal).

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

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 7 JUL 1980

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."