

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**BOARD OF ZONING ADJUSTMENT**



Appeal No. 13698 of Penn-Carpenter, Inc., pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Zoning Administrator of September 14, 1981, to the effect that the proposed drive-through window service constitutes a drive-in restaurant in a C-1 District at the premises 3250 Pennsylvania Avenue, S.E., (Square 5539, Lot 17) or in the alternative, the application of Fay H. Burka, pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance from the use provisions (Paragraph 5101.33) to add a drive-through window facility to the existing restaurant use in a C-1 District at the premises 3250 Pennsylvania Avenue, S.E., (Square 5539, Lot 17).

HEARING DATE: March 10, 1982  
DECISION DATE: March 10, 1982 (Bench Decision)

FINDINGS OF FACT:

1. The Board granted the applicant in BZA Application No. 13685 permission to intervene in the subject appeal. The applicant in said case is the McDonald's Corp., which seeks to permit a drive-in window addition to its existing restaurant in a C-1 District located at 4950 South Dakota Avenue, N.E. The Board found a common issue involved.

2. The subject property is located in the middle of a C-1 zoning district at the northwest corner of the intersection of Pennsylvania Avenue and Carpenter Street, S.E. It is known as premises 3250 Pennsylvania Avenue, S.E.

3. The lot is triangular in shape with 178 feet of frontage on Pennsylvania Avenue and frontages of 37.17 and 49.40 feet on Carpenter and O Streets, respectively. The lot has a total area of 25,504 square feet and is improved with a one story brick building which houses a "Burger King" restaurant. The restaurant building occupies approximately 3,102 square feet or about twelve percent of the lot area. The remainder of the lot is paved and used for customer parking.

4. When it leased the property in 1977, Penn-Carpenter, Inc., franchisee of the Burger King Corporation, applied for a building permit to erect the existing restaurant. As originally submitted, the plans for the restaurant also included a drive-through window service. Upon review of the building permit application, the Zoning

Administrator insisted that the drive-through window be deleted from the plans, citing the prohibition in the Zoning Regulations against "drive-in" type restaurants in C-1 Districts. The drive-through facility was deleted and a building permit for the plans, as amended, was issued in 1979 for a restaurant use.

5. In January of 1980, the Penn Branch Citizens' Association and Advisory Neighborhood Commission 7B filed appeal No. 13180 with the Board of Zoning Adjustment. The citizens contended that since customers could carry-out their purchases instead of consuming them on the premises, the restaurant was a "drive-in type" restaurant and therefore the building permit was issued in error.

6. By decision and Order issued April 2, 1980, the BZA denied the citizens' appeal, concluding that the decision of the Zoning Administrator to issue the building permit for the proposed restaurant was not in error. The BZA found that the facility as approved by the Zoning Administrator was not a "drive-in type" restaurant. The Board noted in its opinion that "the plans as originally submitted... 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 BZA decision was affirmed by the District of Columbia Court of Appeals.

7. The appellant, Penn-Carpenter, Inc., now proposes to add a "drive-through" window on the west side of the existing restaurant building. This proposal would include the addition of a menu board to the north of the building and a service driveway along the perimeter of the lot. Customers would place their orders at a menu board which would be equipped with a two-way communications device. An attendant and cash register would be stationed at the service window to receive payment for and provide the customer with the purchase. After ordering, the customer would make a purchase at the service window and follow the driveway out the Pennsylvania Avenue curbcut.

8. The Zoning Administrator on September 14, 1980, denied the request to install and operate a drive-through window at the subject premises on the grounds that the plans for the restaurant as originally submitted contained a drive-in-window, where food would be carried directly to the occupants of motor vehicles, that the Zoning Administrator determined at that time that such a facility would constitute a drive-in-restaurant and therefore was prohibited in the C-1 District and that the Board of Zoning Adjustment in Appeal No. 13180, Order dated July 7, 1980,

ruled that the Zoning Administrator had made a proper determination.

9. The appellant argued that a drive-through window added to an existing restaurant, does not by itself convert its restaurant to a drive-in type restaurant prohibited by the regulations in a C-1 District.

10. The Regulations do not define the term "Restaurant", "drive-in restaurant" or "drive-through restaurant." The appellant contended that the legislative history of this provision that prohibits "drive-in" type restaurants supports applicant's contention that the Zoning Commission did not intend to prohibit drive-through service of the type proposed herein.

11. The prohibition against "drive-in type restaurants" in C-1 zoning districts was established on July 11, 1961, in Zoning Case No. 61-25 at the urging of local citizen groups. These citizens were concerned with the future prohibition of "car-hop" drive-in restaurants that were operating at various locations in the District of Columbia during the early 1960's. Drive-in restaurants in existence at that time were designed to enable customers to be served and to consume their purchases in parked automobiles on the premises of such establishments. Canopied parking spaces and speaker boards with menus were provided. Car-hops carried the food out to the cars on trays which were attached to the car door windows. Customers remained and consumed their food in their cars on the premises. The public hearing transcript for the zoning text amendment which prohibited "drive-in" type restaurants indicates that it was these particular activities that local citizen groups found objectionable. The citizens complained of noise generated by young people who tended to "hang out" at these establishments: shouting back and forth between parked cars, playing car radios at loud volumes, revving car engines and squealing car tires in the parking lot of the restaurant.

12. The appellant contended that the drive-through service proposed in the present circumstances is not the type of use that the Zoning Commission ever intended to exclude at this location. There is no evidence in the Commission record nor in the subject record that a window service produces the objectionable effects on residential areas that were the cause of the prohibitive amendment directed against the "car-hop" drive-ins. At the time the amendment was adopted by the Zoning Commission, the Commission could not have foreseen a window service restaurant, a use that the appellant argued is different in operation and effect than "drive-in" type restaurants.

13. The appellant argued that the proposed drive-through service clearly would not cater to or

accommodate the consumption of food and/or beverages in automobiles on the premises of the restaurant. Rather, the proposed drive-through facility would merely eliminate the necessity of getting out of the car for persons who wish to carry out their purchases for consumption off the restaurant premises. Such customers already have the ability to carry out from the restaurant; the drive-through window merely makes it more convenient. The drive-through customer service driveway does not empty into a lot where customers may park and consume their purchases; it leads customers directly off the premises.

14. The appellant argued that the Courts in other jurisdictions generally look to such indicators as "car-hop service" and "eating in parked cars" in determining whether an eating establishment may be characterized as a drive-in restaurant. An Ohio court has found that a drive-in restaurant is generally associated with "car-hop" service where customers consume food and drink in their automobiles. Ederer v. Board of Zoning Appeals, 248 N.E. 2d 238 (1969). In Franchise Realty Interstate Corporation v. RAB, 340 N.Y.S. 2d 446 (1973), a New York State court stated that "[A]ny establishment which has a significant component of its business in eating in parked adjoining cars may be characterized as a "drive-in." Franchise Realty at 450. The appellant argued that since the proposed drive-through customer service driveway leads the customer to the restaurant exit, the drive-through service would not result in carry-out customers consuming their purchases on the restaurant premises. In another case, the same court held that "a strict construction of the term "drive-in restaurant" requires that it be held to include only an operation devoted primarily or exclusively to service of patrons in their cars." Vitolo v. Chave, 314 N.Y.S. 2d 51, 58 (1970).

15. The Zoning Administrator testified that a "drive-in" type and a "drive-through" type of restaurant are one and the same and that the only difference today is the use of terminology. Both involve the use of an automobile to obtain the same result.

16. The Zoning Administrator further testified that as set forth in Findings Nos. 4 and 6, the same issue and the same property was involved in a prior case, and that the issue had been resolved by the BZA.

17. The appellant submitted no judicial authority for drive-through type restaurants, nor did it submit judicial authority from the District of Columbia Courts for drive-in type restaurants.

18. In a C-1 District, a "drive-in" type restaurant has been a prohibited use since 1961. A "drive-in" restaurant is

first permitted in a C-2 District, under Paragraph 5102.33R. A drive-in is not defined in the Zoning Regulations.

19. Under Section 1201.2 of the Regulations, "Words not defined in this article shall have the meanings given in Webster's Unabridged Dictionary." Webster's Unabridged Dictionary defines a "drive-in" as "A place of business (as a motion picture theater, bank, or refreshment stand) laid out and equipped so as to allow its patrons to be served or accommodated while remaining in their automobiles".

20. The Board finds that the proposed "drive-through" window service falls clearly within the Dictionary definition of a "drive-in," regardless of the terminology applied by the appellant. The proposed facility is unquestionably designed, laid out and equipped to serve patrons while they remain in their automobiles.

21. The Board by a Bench Decision, denied the appeal and sustained the determination of the Zoning Administrator. The applicant then proceeded on the subject application for a variance from the use provisions. Prior to completing its case in chief, the applicant moved to dismiss the application with prejudice. The Chair granted the motion to dismiss the application for a use variance.

CONCLUSIONS OF LAW AND OPINION:

The Board concludes that the appellant has not met its burden of proof in demonstrating any significant difference between a drive-in type and drive-through type of restaurant that would warrant a reversal of the determination of the Zoning Administrator. The Zoning Administrator's decision was based on the record and the Zoning Regulations in effect at the time that the building permit was requested. Neither the Zoning Administrator nor the BZA can substitute their definitions of terms from sources outside that is prescribed in the Zoning Regulations. The Board concludes that the terms "drive-in" and "drive-through" are synonymous. The proposed plans of the appellant would convert a restaurant into a drive-in restaurant which is a prohibited use in a C-1 District. The Zoning Administrator properly concluded and rules that such conversion is not permitted. Accordingly, it is ORDERED that the Appeal is DENIED and the decision of the Zoning Administrator is UPHeld.

VOTE: As to the Appeal: 4-0 (Walter B. Lewis, Connie Fortune, William F. McIntosh and Charles R. Norris to DENY; Douglas J. Patton not present, not voting).

VOTE: As to the Application: The Chair GRANTED the applicant's Motion to DISMISS.

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

