

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 14384 of the North Cleveland Park Citizens Association, et al., pursuant to Sections 8102 and 8206 of the Zoning Regulations, from the decision of the Zoning Administrator, dated August 18, 1985, approving plans for making alterations and constructing an addition to the structure to establish a McDonald's fast food restaurant and not requiring any on-site parking and loading facilities where the proposal increased the seating capacity from seventy-five to more than 120 persons, the floor area from 2,000 square feet to more than 5,000 square feet and included a two-story structure which exempted existing on-site parking and loading facilities in a C-3-A District at premises 4323 - 4327 Wisconsin Avenue, N.W. (Square 1780, Lot 806).

DECISION DATE: May 14, 1986
HEARING DATE: June 4, 1986

FINDINGS OF FACT:

1. The property is located at the northeast intersection of Wisconsin Avenue and Windom Place and is known as premises 4323 - 4327 Wisconsin Avenue, N.W. The site is in a C-3-A District.

2. The land and improvements thereon are owned by Dimitri P. Mallios, George P. Mallios, and James Pedas, individually and as trustee, and consist of a two-story multi-use building (constructed in 1928) with a basement level. The owners have leased a portion of the first floor of the building to the McDonald's Corporation (McDonald's) pursuant to a lease dated December 28, 1984.

3. McDonalds applied for a building permit and filed conforming plans on June 18, 1985. Building permit No. 309407 was issued on August 14, 1985. At the time of the application and permit issuance, the proposed use of the property was a matter-of-right retail/service use in the C-3-A District under the Zoning Regulations.

4. McDonald's plans to construct two additions to be annexed to the existing building. The first addition is a two-story structure to be erected in the rear yard, consisting of a cellar and a story above it at the grade of the first floor of the present building. The second is a one

story structure to be erected in the front of the building for the purpose of a sidewalk cafe.

5. The appellant, North Cleveland Park Citizens Association, is a non-profit organization representing citizens residing in the area between Porter Street on the south, Albermarle Street on the North, Connecticut Avenue on the East and Wisconsin Avenue on the West. The other appellants are individual owners and residents of property located within two blocks of the site.

6. The appellants filed this appeal on October 25, 1985, alleging that the Zoning Administrator issued the building permit in error because the proposed addition increased the intensity of the use of the property by more than twenty-five percent without considering additional parking. Second, the appellants contend that the parking facilities which existed on the site on March 1, 1985, less than the minimum number of parking spaces now required, will be eliminated under the proposed modification of the building. Lastly, at the hearing the appellants raised, for the first time, the issue of whether McDonald's should be considered a place of public assemblage for purpose of the parking requirements.

7. The appellants argued that the Zoning Regulations require that the determination of the increase of the intensity of use must be based on the total increase in intensity of use the structure undergoes on or after May 12, 1958, whether the total increase occurs at one time or in successive stages. The manner by which the increased intensity of use is determined is significant, since parking spaces will only be required for additions which increase the intensity of use by more than twenty-five percent of the aggregate. The appellants asserted that a mix of uses existed at the building immediately prior to May, 1958: a dentist office, an orthodontist office, a dance school, two real estate offices, a beauty parlor, a dry cleaners, a barber shop, and a restaurant. In the opinion of the appellants, the combined retail use of the building in May, 1958 amounted to 3,950 square feet based on plans they have prepared. McDonald's proposed addition of approximately 1,636 square feet is greater than twenty-five percent of the intensity of use before May of 1958.

8. The appellants further argued that there was parking and loading occurring in the rear yard of the building, which would disappear if the addition was constructed. This was not rebutted by McDonalds or the Zoning Administrator. The appellants did not assert that this parking and loading constituted a valid use of the space, nor did they confirm that their evidence of the May, 1958, uses conformed with occupancy permits or that the floor areas attributed to such uses had been confirmed against

other public records of the floor plans in 1928 or later years.

9. For buildings existing prior to May 12, 1958, Paragraph 7201.42 provides that if the existing number of parking spaces now provided is more than the minimum number of parking spaces now required by the Regulations, the number of parking spaces cannot be reduced below the minimum number of parking spaces required by the Regulations. These "captured" parking space provisions apply only to valid parking spaces, not to areas which, although used for parking, do not satisfy the legal requirements such as size, access, and other similar provisions; only spaces that satisfy the requirements are so "captured".

10. Approval for McDonald's planned addition was lawfully given and all zoning requirements had been met. The amendment of the Parking Regulations in March of 1985 grandfathered in any previous uses, since zoning laws are not retroactive. The Zoning Administrator used the immediately preceding uses of the structure in the determination of the increase of the intensity of uses. In computing the retail/service uses in the building, the Zoning Administration added the following:

| <u>Retail/Service Use</u> | | <u>Floor Area</u> |
|--|---|----------------------|
| existing restaurant | - | 3,603.53 square feet |
| barber shop | - | 887.50 square feet |
| children's clothing shop | - | 887.50 square feet |
| 27.42% of the common space on the first floor (ratio corresponding to percentage of total Retail/Service area of first floor) | - | 130.25 square feet |
| consignment shop | - | 739.89 square feet |
| tailor shop | - | 299.75 square feet |
| 27.42% of the second floor hallway (ratio corresponding to percentage of total Retail/Service area of second floor) | - | 148.45* square feet |
| 67.49% of the cellar area (ratio corresponding to percentage of total Retail/Service area of structure) | - | 584.12 square feet |

* figure represents

27.42 percent of 541.40 square feet of second floor
hallway not 72.46 square feet as erroneously testified to.

Total of all retail service establishments = 7,281.00 square feet. This total was reduced to 6,844.50 square feet because McDonald's elected to raze and replace 436.50 of the existing restaurant and the Zoning Administrator deducted this amount from the existing structure before considering the impact of the addition. The Zoning Administrator determined that the 1,636.93 square foot addition did not increase the intensity of use by more than twenty-five percent (25% of 6,844.50 sq. ft. = 1,711.12 sq. ft.).

11. In computing other uses of the building, the Zoning Administrator added the following:

Office Use

| | |
|-----------------------|--------------------|
| Real Estate 1st floor | 888.00 square feet |
| Dentist | 617.00 square feet |
| Real Estate 2nd floor | 267.00 square feet |
| Orthodontist | 722.00 square feet |

Other

| | |
|---------------------|----------------------|
| Dance School/Studio | 1,775.00 square feet |
|---------------------|----------------------|

12. The Zoning Administrator then determined the parking requirement for all of the retail/service uses under the 1958 and present Zoning Regulations and the other uses which occupied the building. The total amount of parking required for the present uses would not exceed that amount required for the 1958 uses. The parking requirements have in fact decreased from the level required based on the May 12, 1958 uses. The Zoning Administrator interpreted the regulations for current parking standards as requiring parking to be provided for the building only if the aggregate intensity of use has been increased by twenty-five percent or more. Thus, by no measure of intensity of use, either in terms of parking or actual increase in retail use, did the McDonald's proposed use exceed the twenty-five percent threshold.

13. The plain language of Section 7202 of the Zoning Regulations provides that floor area is the appropriate criterion by which to measure intensity increases for retail/service uses.

14. Neither parking nor loading were eliminated from the subject property. After reviewing the building permits, official surveys of the property, and occupancy permits, the Zoning Administrator was unable to find any evidence of the

existence of a loading or parking space on the subject property.

15. McDonald's presented testimony that no evidence of any rear parking or loading emerged from investigations it made at the time of negotiation of the lease. McDonald's received an affidavit of the owners indicating that since the owners' purchase of the subject property on August 14, 1984, the area adjacent to the alley at the rear of the property had not been used for either parking or loading and that they were unaware of any such use prior to that date. Under McDonald's plans, loading will take place at the front of the parcel on Wisconsin Avenue and not in the area alleged to be a loading zone and parking facility.

16. The Advisory Neighborhood Commission (ANC) 3F, within whose boundaries the property is located, submitted a timely report dated April 29, 1986, in support of the appellants. The ANC reported in its resolution that the Zoning Administrator erred in four regards. First, the Zoning Administrator had failed to require that parking be provided on the lot which McDonald's will occupy, although McDonald's will have additional seating capacity. Second, the Zoning Administrator failed to require that parking spaces be provided for the additional square footage of the addition, including the sidewalk cafe portion, and assumed that the entire building consisted of retail space. Third, the Zoning Administrator's decision would allow McDonald's to build where a loading and parking space formerly existed. Fourth, the Zoning Administrator's interpretation of the Zoning Regulations undermines the Comprehensive Plan for the District of Columbia.

17. During the hearing, this Board refused to entertain any testimony on the circumstances of the sidewalk cafe on the subject property and considered the issue of seating capacity or parking requirements for the sidewalk cafe to be under the exclusive jurisdiction of the Public Space Committee and not properly before this Board. The Zoning Regulations do not encompass public space.

18. This Board has previously decided (in BZA Appeal No. 10979, November 23, 1971) that a restaurant shall not be deemed as a place of public assemblage for the purposes of the parking regulations. For this reason, and also because the appellant raised this issue for the first time during the course of the hearing, this Board does not consider the contention as a part of the instant appeal.

19. ANC 3E, in a report dated May 6, 1986, recommended support of the appellant. Their arguments were identical to those of ANC 3F. ANC 3E is located across the street from the property. A member of ANC 3E testified in opposition as a disinterested commissioner. The Board is required by

statute to give "great weight" to the issues and concerns of an ANC reduced to writing and resulting in a recommendation. In addressing the concerns of the ANCs the Board finds:

- (A) The Zoning Administrator did not err in issuing a building permit to McDonald's, because the addition which McDonald's plans to construct will not increase the intensity of use of the aggregate building by more than twenty-five percent. Intensity of use for retail space is not measured by seating capacity.
- (B) The Zoning Administrator did not have to require that parking be provided for the additional square footage of the addition, including the sidewalk cafe, because neither increased the intensity of use of the building by more than twenty-five percent. Furthermore, as stated previously, this Board will not assume jurisdiction over issues concerning the sidewalk cafe. There is no evidence which can be adduced from the testimony presented and the materials submitted which shows that the Zoning Administrator acted on a belief that the entire building consisted of retail space.
- (C) There is no evidence that the lot contained either a legal parking or legal loading space.
- (D) The reference to the Comprehensive Plan by the Advisory Neighborhood Commission is to the Land Use Element. The provisions of the element are not self-executing. The Comprehensive Plan Act of 1984 (Section 102) provides in part that "the District elements of the Plan are a guide intended to establish broad policies and goals while affording flexibility for future goals while affording flexibility for future implementation and are not binding policy directives." The Land Use Element does not automatically change the Zoning Regulations. The Zoning Act as amended by the Home Rule Act requires that the Zoning Regulations "not be inconsistent with the comprehensive plan." It is the responsibility of the Zoning Commission to accomplish that task. The Board is limited to following the Zoning Regulations as they exist, and unless and until the Zoning Commission amends the Regulations to require the Board to determine whether an application is consistent with the Comprehensive Plan, that determination is beyond the scope of the Board's consideration.

CONCLUSIONS OF LAW AND OPINION:

The appellants and the ANC argue that the building permit application submitted by McDonald's to the Zoning Administrator does not sufficiently provide for parking as required by the provisions of the Zoning Regulations governing additions to structures built before May 12, 1958. Both appellants and the ANC maintain that the determination of the intensity of use should have been based on the square footage of retail use in the building on May 12, 1958, subtracted from the area of proposed retail use submitted to the Zoning Administrator. The interpretation of the following sections of the Zoning Regulations concerning parking requirements forms the basis from which both the appellants and the appellee argue:

- 7201.3 When the intensity of use of a building or structure existing before May 12, 1958, is increased by an addition or additions of employees, dwelling units, gross floor area, seating capacity, or other unit of measurement specified in Section 7202, parking spaces shall be provided for such addition or additions, provided:

- 7201.31 Parking spaces shall not be required for the addition or additions unless such addition or additions increase the intensity of use of such building or structure by more than twenty-five percent of the aggregate;

- 7201.32 Parking spaces for such addition or additions need not exceed the amount of parking spaces which would be required for the entire structure as proposed if constructed new; and

- 7201.33 The determination of the increase of intensity of use shall be based on the total increase in intensity of use such structure undergoes on or after May 12, 1958, whether such total increase occurs at one time or in successive stages.

- 7201.4 In the case of a building or structure for which the Zoning Regulations now require more parking spaces than were required when the building or structure was built:

- 7201.41 If the existing number of parking spaces now provided is less than or equal to the minimum number of parking spaces now required by these Regulations, the number of parking spaces cannot be reduced.

7201.42 If the existing number of parking spaces now provided is more than the minimum number of parking spaces now required by the Regulations, the number of parking spaces cannot be reduced below the minimum number of parking spaces required by these Regulations.

The Board concludes that the Zoning Administration was correct in the interpretation of the parking provisions. The "existing number of parking spaces" refers only to legal parking spaces, i.e. those recognized as legal by the Zoning Administrator. From the findings of fact Nos. 9, 10, 11, 12 and 13 and the application of the Zoning Administrator's interpretation, the Board concludes that the appellants have failed to sustain the burden of establishing that the intensity of use of the subject property increased by twenty-five percent by any measure contemplated under the Zoning Regulations. The Board further concludes that the appellants have not sustained their burden of proving that a parking or loading space existed on the property before the construction of the addition.

Accordingly, it is ORDERED that the appeal is DENIED and the decision of the Zoning Administrator is UPHeld.

VOTE: 5-0 (Lindsley Williams, Charles R. Norris, Paula L. Jewell, William F. McIntosh, and Carrie L. Thornhill, to deny and uphold).

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

ATTESTED BY:


EDWARD L. CURRY
Acting Executive Director

FINAL DATE OF ORDER: OCT 10 1986

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."

14384order/IBMIRD