

BOARD OF ZONING ADJUSTMENT

441 4th Street, N.W.

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Appeal No. 17767

DISTRICT OF COLUMBIA'S
MOTION FOR SUMMARY JUDGMENT

The Appellee, District of Columbia (“Appellee” or “District”), by and through undersigned counsel, respectfully moves for summary judgment because there is no genuine issue of material fact and, as a matter of law, the Board of Zoning Adjustment (“Board” or “BZA”) Board must grant summary judgment in favor of the District in the appeal of Appellant, McLean Bible Church (“MBC” or “Appellant”).

Factual History of the Appeal

On September 19, 2007, MBC, through its attorney, submitted information to the District of Columbia Zoning Administrator, Matthew LeGrant (“ZA”), indicating its intent to use the ground floor of Uptown Theater, located at 3426 Connecticut Avenue, NW, Square 2069, Lot 816 (“the Property”), as a church. *See* Statement of Undisputed Facts ¶ 1 and 6. According to the submitted information, MBC planned to host worship services at the Uptown Theater every Sunday from approximately 6 a.m. to 12 p.m. *See* Statement of Undisputed Facts ¶ 7.

Following initial discussions with the Zoning Administrator about MBC's proposed use of the

Property, as a church. On September 27, 2007, MBC sent an email to the ZA indicating its belief that a Certificate of Occupancy was not required because the use of the Property as a church was

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an acceptable accessory use to the existing theater use. *See* Statement of Undisputed Facts ¶ 8. On October 15, 2007, the ZA responded by concluding that MBC's proposed use of the Property as a church was "not accessory to theatre use," rather it would be a separate use which required MBC to amend the existing Certificate of Occupancy or obtain a new one. *See* Statement of Undisputed Facts ¶ 9. *See also* Letter of the Zoning Administrator dated October 15, 2007 (hereinafter "Exhibit A"), at page 1. The ZA also concluded that because the church use was not a permitted use, as a matter of right within the CP/C-2-A district, MBC must obtain a special exception to use the Property as a church. *See* Statement of Undisputed Facts ¶ 10. *See also* 11 DCMR §§ 701.1, 701.4 and 1302.2. The ZA also concluded that MBC could apply for a Certificate of Occupancy for the church use, and the ZA would refer the application to the BZA for consideration of a special exception. *See* Statement of Undisputed Facts ¶ 11. *See also* Exhibit A. However, MBC did not apply for a Certificate of Occupancy for the church use. *See* Statement of Undisputed Facts ¶ 12.

Subsequently, on December 14, 2007, MBC appealed the ZA's decision to the BZA, pursuant to D.C. Official Code § 6-641.07(f) and 11 DCMR § 3200.2.¹ *See* Statement of Undisputed Facts ¶ 13. In its "Preliminary Statement of Appeal," MBC stated that the appeal covers only the ZA's conclusion, in the October 15, 2007 letter, that the "proposed use is not accessory to the theater use." *See* Appellant's Preliminary Statement of Appeal, dated December 13, 2007 (hereinafter "Exhibit B"), at page 1.

The Zoning District of the Property

The Property is zoned CP/C-2-A, which means that the Property is located in a C-2-A commercial zoning district, within the Cleveland Park Neighborhood Commercial Overlay

¹ D.C. Official Code 6-641.07(f) and 11 DCMR § 3200.2 state that "a "person aggrieved" may appeal an "administrative decision based in whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act" to the Board of Zoning Appeals."

District (“Cleveland Park Overlay”) and also within the Neighborhood Overlay District (“Neighborhood Overlay”). *See* Statement of Undisputed Facts ¶ 2. A church or place of worship and a movie theater are ordinarily permitted as a matter of right in a C-2 district, except that the additional restrictions of the Cleveland Park Overlay District supersede the uses (such as a church) permitted in a C-2 district by limiting the types of businesses that can be operated in that Overlay District. *See* 11 DCMR §§ 201.1, 721 and 1300-1306. The purpose of the Cleveland Park Overlay District, adopted in 1989, was to ensure that the specific area on Connecticut Avenue, where the Uptown Theater is located, will be devoted to specific retail and service uses. *See* Statement of Undisputed Facts ¶ 3. Section 1302.1 states:

Any building that occupies or is constructed on a lot in a designated use area within an NC Overlay District shall provide designated retail and service establishments on the ground level according to the requirements of this section and any additional requirements of the particular overlay district.

11 DCMR § 1302.1. *See also* 11 DCMR §§ 1306.1 and 1306.2

The Neighborhood Overlay consists of specific zoning regulations designed to preserve and enhance neighborhood shopping areas, and includes several individual overlay districts, such as the Cleveland Park Overlay.² *See* Statement of Undisputed Facts ¶ 4. The Neighborhood Overlay regulations provide that only “designated retail and service establishments” shall occupy the ground level of a building. The ground level is the floor of the building “that is nearest in grade elevation to the sidewalk.” *See* Statement of Undisputed Facts ¶ 5. *See also* 11 DCMR § 1302.4(b). The approved “designated uses” consist of the following:

- “(a) Any use that is permitted as a matter of right in the C-1 District pursuant to §§ 701.1 or 701.4;
- (b) Library (other than public library).
- (c) Blueprinting or similar reproduction service;
- (d) Film exchange;

² *See* 11 DCMR §§ 1300.1 and 1300.2.

- (e) Interior decorating shop;
- (f) Laundry, self service;
- (g) Photographic studio;
- (h) Picture framing studio or shop;
- (i) Tailor shop or valet shop;
- (j) Telegraph office;
- (k) Antique store or shop;
- (l) Auction house;
- (m) Department store;
- (n) Display stand or store for mail order sales;
- (o) Dry goods store;
- (p) Furniture store;
- (q) Home furnishings sales;
- (r) Leather goods store;
- (s) Musical instruments and accessories sales;
- (t) Office supplies and equipment sales;
- (u) Optical goods store;
- (v) Pet shop;
- (w) Precision instrument sales; and
- (x) Theater, including motion picture theater”**

See 11 DCMR § 1302.2 (emphasis added).

Since 11 DCMR § 1302.2 does not list a church as a designated use, the Property cannot be used as a church as a matter of right in the Cleveland Park Overlay District. Therefore, in order for MBC to use the Property as a church, it must obtain a special exception from the BZA pursuant to 11 DCMR § 1304.1. Section 1304.1 allows for exceptions to the provisions of Chapter 13 where the BZA, after a public hearing, has granted a special exception. See 11 DCMR § 1304.1. See *e.g.* Application of *American Association of Homes and Services for Aging*, BZA No. 17011 (2003).

STANDARD OF REVIEW

An aggrieved party may file an appeal with the Board, if such party is affected by any decision based in whole or part upon any zoning regulation or map. See D.C. Official Code § 6-641.07(f) (2001). Pursuant to § 6-641.07(g), the Board is authorized to hear and decide an appeal where the aggrieved party alleges that there is an error in a decision or determination

made by the Mayor of the District of Columbia or any other administrative officer in the carrying out or enforcement of the zoning regulations. *Id.* See also 11 DCMR § 3100.2. While it is well settled that the Board has authority to hear and decide appeals asserted under the zoning regulations, as codified in Title 11 of the D.C. Municipal Regulations (“DCMR”), the Board’s Rules of Practice and Procedure do not specifically address motions for summary judgment.

The Board reviews motions for summary judgment pursuant to the same standard of review followed by the District of Columbia Court of Appeals. Under this standard of review, “[s]ummary judgment is appropriate only when the record, viewed in the light most favorable to the non-moving party, establishes that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” *TV Capital Corp. v. Paxson Communs. Corp.*, 894 A.2d 461, 466 (2006) quoting *Taylor v. Akin, Gump, Strauss, Hauer & Feld*, 859 A.2d 142, 146 (2004). In deciding whether there is a disputed issue of material fact, the Court must view the underlying facts and draw all reasonable inferences in favor of the non-moving party. See *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d. Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984); See also *TV Capital Corp.*, 894 A.2d at 466 quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970) (“[a]ny inferences that can be reached from subsidiary facts are resolved against the moving party.”). Material facts are those that “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

SUMMARY JUDGMENT IS PROPER BECAUSE MBC'S CHURCH USE IS NOT ACCESSORY TO UPTOWN THEATER'S EXISTING MOTION PICTURE THEATER USE, NOR IS IT PERMITTED IN A CP/C-2-A DISTRICT

The Board must grant Appellee's motion for summary judgment because the ZA correctly determined that MBC's proposed use of the Property as a church (a) is not an accessory use to the existing theater use that is authorized by Uptown Theater's Certificate of Occupancy, and (b) is not permitted on the ground floor in the CP/C-2-A district without a special exception.³

A church is not an "accessory use" to a theater, as defined by the zoning regulations and related case law. "Accessory use" is defined as "a use customarily incidental and subordinate to the principal use, and located on the same lot with the principal use."⁴ See 11 DCMR § 199. Moreover, use of a theater as a church or place of worship is not expressly identified as a permitted accessory use in the underlying C-2 commercial district. See 11 DCMR § 722.⁵

In the *Appeal No. 16246 of the Georgetown Residents Alliance*, the BZA held that a child development center was an accessory use (to the use of the Property as a university) because the child development center would be used exclusively by University faculty, staff, and students and would "support the teaching mission of the University." *Appeal of the Georgetown Residents Alliance*, BZA No. 16246 (1998) ("Georgetown case"). Georgetown Residents Alliance appealed the BZA's order to the District of Columbia Court of Appeals.

³ In making his determination, the ZA also advised MBC that a new or amended Certificate of Occupancy, specifically referencing the proposed church use, would be required since MBC is proposing a non-accessory use within the Cleveland Park Overlay and Neighborhood Overlay. Because the proposed church use is not a matter of right use in the CP/C-2-A district, MBC must obtain a special exception from the BZA in order to use the Property as a church.

⁴ Although the terms "customarily incidental" and "subordinate" are not defined in the Zoning Regulations, in such cases, the Zoning Regulations provide that the undefined words "shall have the meanings given in Webster's Unabridged Dictionary." See 11 DCMR § 199. "Customarily" means "commonly practiced" and "incidental" means a "minor consequence." See also Webster's Third New International Unabridged Dictionary (1986),

⁵ A mechanical amusement machine, child development home, a dwelling unit which is the principal residence of the caregiver; and a use which meets the definition of a home occupation are permitted accessory uses in a C-2 District. Additionally, other accessory uses customarily incidental and subordinate to the uses permitted in C-2 Districts shall be permitted in a C-2 District. See 11 DCMR § 722.

In the subsequent appeal to the District of Columbia Court of Appeals, the Court upheld the BZA's order holding that because the childcare center was to be used exclusively by university employees and students; childcare centers were customarily incidental to a functioning college or university; and no additional construction was proposed, the childcare center was accessory to the university.

The case at issue is distinguished from the *Georgetown* case, in that the church use is not "customarily incidental and subordinate" to the theater use in the same way that a childcare center for the children of university employees is accessory to the university's use. The childcare center on the university's property supported and advanced the university's primary use of the property, unlike a church which does not support or advance the use of a theater. In *National Cathedral Neighborhood Ass'n v. D.C. Bd. Of Zoning Adjustment*, the D.C. Court of Appeals similarly upheld the BZA's determination that athletic facilities were accessory to a school because athletics were "an adjunct to the educational mission of a school." *National Cathedral Neighborhood Ass'n v. D.C. Bd. Of Zoning Adjustment*, 753 A.2d 984, 986 (D.C. 2000). Again, by contrast, MBC's use of the theater as a church is wholly distinct from the primary business activity of the theater and its use for motion picture entertainment purposes. *See e.g. Zahn v. Board of Adjustment of City of Newark*, 133 A.2d 358, 361 (N.J. Super. 1957) (holding that a dry cleaning depot operated by a commercial laundry service in an apartment building was a distinct business activity, which was not incidental to the primary residential function of the building).

Appellant's argument that changes in the use of theaters in recent years supports its claim of accessory use, is wrong. *See* Exhibit B at p.3. Without asserting any legal authority or facts for this assertion, MBC states that "uses which may not have been customarily incidental to other

uses in 1958, when the current Zoning Regulations were enacted, or even twenty years ago, may well qualify as incidental uses today given advances in technology and related cultural shifts occurring over the last several years.” *Id.* Based on these recent changes, Appellant contends that the ZA erred in his determination that MBC’s church use of the theater is not an accessory use.⁶

Despite Appellant’s assertions, the common element in the above-mentioned cases is that an accessory use must be directly related to the primary mission of the predominant use. Even where courts have defined accessory use to reflect recent developments or changing business practices, the proposed accessory use must still promote or support the principal use. *See State of New Jersey v. P. T. & L. Construction Company, Inc.*, 389 A.2d 448, 453 (N.J. 1978). In *P. T. & L. Construction*, the New Jersey Supreme Court held that a heliport on construction company’s building, which was used by company employees to travel to construction sites, was customarily incidental to the construction business use of even though most construction firms did not have one because heliports were “increasingly coming into vogue” in that industry and “there is a distinct functional relationship” between such use and the construction business. *State of New Jersey v. P. T. & L. Construction Company, Inc.*, 389 A.2d at 453. Here there is no connection between the theater and the church use other than the proposed common use of the facility. The church use does not further or directly relate to the theater’s mission. By contrast, a concession stand is an accessory use to a movie theater and directly relates to a theater’s business use.

Even if some theaters around the country are being used for church services, this does not make the use an accessory use to the theater. Rather, the use of theaters as churches in other

⁶ Again, the Appellant has not asserted any legal authority or facts in support of its argument. Recent developments in the “use” of theaters does not change the black letter law of the District’s zoning regulations.

jurisdictions, and even in other zoning districts in the City, merely reflects that the applicable zoning regulations in those cases allow a church use as a matter of right. Thus, MBC's ability to use theaters in other cities, or even in other districts in D.C., has no bearing on the accessory use issue which is raised here. Accordingly, a church is not an accessory use to the principal theater use as defined by the District's zoning regulations.

Lastly, the Cleveland Park Overlay and Neighborhood Overlay do not permit a church use on the ground floor of a building without a special exception. *See* 11 DCMR §1302, *supra*. The allowed uses in these Overlay Districts are specifically enumerated in the regulations and do not include a church or place of worship, in contrast to other zoning districts in the District of Columbia where churches are a matter of right use and are not precluded by the respective Overlay District. *See* 11 DCMR §§ 1302 and 1306, *supra*.⁷ Accordingly, the church cannot utilize the ground floor of the Property absent a special exception.

CONCLUSION

As a matter of law, MBC has failed to establish that the ZA erred in his October 15, 2007 letter. Accordingly, the Board must grant summary judgment in favor of the District and dismiss MBC's appeal.

Respectfully submitted,

JILL STERN
General Counsel
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS

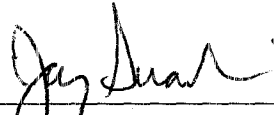


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⁷ Note that the Cleveland Park Overlay and Neighborhood Overlays add additional regulations to the underlying C-2-A commercial district. *See* 11 DCMR § 700 et seq. *See also* 11 DCMR §§1300 – 1302 and 1306.



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CERTIFICATE OF SERVICE

I, Lauren Goss hereby certify that on May 1, 2008, a copy of the District of Columbia's Motion for Summary Judgment was sent first class mail to:

Denny Harris, Director of Ministry Operations
McLean Bible Church
8925 Leesburg Pike,
P.O. Box 9300
McLean, VA 22102-9300

Theodore Pedas Circle Management Co.
4018 Brandywine Street, NW
Washington, DC 20016

Advisory Neighborhood Commission 3C
4025 Brandywine Street NW
Washington, DC 20016-1843

AMC Entertainment
920 Main Street
Kansas City, MO 64105


LAUREN GOSS

Cleveland Park Citizens Association

Cleveland Park Citizens Association

George Idelson, President
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g.idelson@verizon.net

To: DC Board of Zoning Adjustment
From: Cleveland Park Citizens Association
Subject: #17767 – (Appeal of McLean Bible Church)
Application for Party Status (Intervenor)
Date: May 5, 2008

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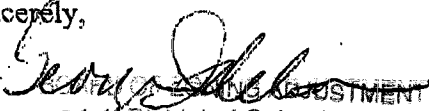
On April 28, 2008, in a 6-0 vote, and with a quorum present, the Cleveland Park Citizens Association (CPCA) was authorized by its Executive Committee to intervene in Case #17767, in support of the Zoning Administrator's ruling. (See resolution attached.) CPCA hereby requests party status in this matter. CPCA will appear without legal counsel.

CPCA has acted on behalf of Cleveland Park citizens and testified formally before DC agencies many times since the founding of the association in 1911.

The Cleveland Park Neighborhood Commercial Overlay District was enacted in 1989 to ensure a diverse mix of affordable retail uses on Connecticut Avenue and to minimize the impact of those businesses on local parking and traffic congestion. CPCA played a significant role in enactment of the Overlay, and has monitored its enforcement ever since. CPCA has been intimately involved in efforts to improve and clarify the Overlay's terms. Because of our history in this connection, CPCA was an invited partner with the Office of Planning in helping to write new definitions of the terms for eating and drinking establishments. (Those revisions were adopted as Zoning Commission Order 06-23.)

CPCA, in close cooperation with ANC-3C, has been the leading advocate for enforcement and clarification of the Overlay. Our position on the present appeal is consistent with this role. We believe that the Overlay plays an important role in enabling the neighborhood businesses to survive and contribute to the quality of life in Cleveland Park. Because CPCA has long been identified with the Overlay, the community has looked to us to represent its interests on all matters concerning this important zoning regulation. Failure to uphold the ruling of the Zoning Administrator would impair the integrity of the Overlay; accordingly, we have a high level of concern about the outcome of this appeal.

Sincerely,


George Idelson, President
District of Columbia

CASE NO:

17767

EXHIBIT NO.

17

Cleveland Park Citizens Association

**080428 CPCA Resolution: Neighborhood Commercial Overlay and McLean Bible Church
(Passed by the CPCA Executive Committee, by a vote of 6-0, on April 28, 2008)**

WHEREAS the McLean Bible Church, in 2007, made arrangements with the Uptown Theatre to conduct regular Sunday morning religious services in the theater, and

WHEREAS the DC Zoning Administrator has ruled that such a use would violate Chapter 13 of the Zoning Regulations, which reserves the ground floor space in the Cleveland Park Neighborhood Commercial Overlay District (CPNCOD) exclusively for retail services and sales (plus the theater and the library); and

WHEREAS the Mclean Bible church has appealed the ruling of the Zoning Administrator that prohibits use of the theater for church purposes; and

WHEREAS this appeal is to be heard by the Board of Zoning Adjustment, and possibly thereafter in court; and

WHEREAS the Cleveland Park Citizens Association has consistently defended the Overlay Districts as important instruments of protection for the quality and balance of the neighborhood business districts in our community, and has been intimately involved in efforts to refine and clarify the applicable regulations; and

WHEREAS it is clear that the Zoning Regulations restrict ground floor space in the CPNCOD to uses that appear on the prescribed list of uses, and religious establishments are not on that list; and

WHEREAS Neighborhood Commercial Overlay Districts are a few small enclaves in D.C.'s zoned land, and are the only areas in all of the residential and commercial zones in the city in which churches cannot locate as a matter of right, and thus cannot be construed as a burdensome constraint on churches; now therefore be it

RESOLVED that the Cleveland Park Citizens Association strongly supports the position of the Zoning Administrator as legally correct, and necessary to maintain the integrity of the Zoning Regulations; and be it further

RESOLVED that the Cleveland Park Citizens Association authorizes its officers to petition the Board of Zoning Adjustment to accept the Association as an Intervenor in the appeal case and any related litigation, and to testify in accord with this Resolution.

Cleveland Park Citizens Association

Cleveland Park Citizens Association

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To: DC Board of Zoning Adjustment
From: Cleveland Park Citizens Association
Subject: #17767 – (Appeal of McLean Bible Church)
Application for Party Status (Intervenor)
Date: May 5, 2008

Fax transmittal, Page one of three.

Attention: Richard Nero
202-727-6072

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