

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

ORIGINAL

In re Appeal of McLean Bible Church)

(Appeal from a decision of the
Zoning Administrator)

Case No. 17767

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Report of Advisory Neighborhood Commission 3C

Pursuant to Section 3115.1 of Title 11 DCMR, ANC3C ("the ANC") hereby submits this report.¹

I. Preliminary Matters incident to the report, required by 11 DCMR §3115.1

The ANC considered the application at its regularly scheduled meeting on April 21, 2008, which was properly noticed a week in advance by publication in the *Northwest Current* newspaper and by publication on its website, www.anc3c.org. Six of nine members were present at the meeting and voted on the attached resolution, which passed with six votes in favor and none opposed. Five members of the ANC constitute a quorum. By express delegation, the undersigned, who is Commissioner for District 5 in ANC3C, where the subject property is located, is authorized to represent the ANC in all respects with respect to this matter.

The ANC urges the Board of Zoning Adjustment to affirm the decision of the Zoning Administrator in all respects. A copy of the ANC's resolution to that effect is attached hereto.

¹ ANC3c notes that this Report is filed one day later than specified in 11 DCMR §3115.1. ANC3C had hoped to have been served with copies of the papers filed by the applicant, either by applicant's counsel or by the Office of Zoning. Regrettably, the ANC was not served and the Office of Zoning declined a Commissioner's request to transmit by facsimile a copy of the papers submitted by the applicant. Consequently, the ANC has been deprived of the opportunity to respond to any arguments the applicant may have made.

BOARD OF ZONING ADJUSTMENT

Board of Zoning Adjustment
District of Columbia

CASE NO. 17767
EXHIBIT NO. 21

EXHIBIT NO. 21

II. Discussion

A. Statement of the Case and Undisputed Relevant Facts

This case is an appeal from a determination of the Zoning Administrator that the McLean Bible Church (“MBC”) may not use the premises of the Uptown Theater, 3426 Connecticut Avenue, NW, for the conduct of religious services as a matter of right. The Uptown Theater, located in the Cleveland Park Historic District and in the Cleveland Park Neighborhood Commercial Overlay District (“NCOD”), is the last for-profit large, single screen movie theater in the District of Columbia. The underlying zoning for the Cleveland Park NCOD is C-2A. Other for-profit theaters in the District of Columbia are of the “multiplex” type, with multiple, smaller individual theaters. For decades, the Uptown was the premier movie theater in the Washington metro area; and a number of films premiered there. In the 1960s, the Uptown was the only theater with the three-projector, 180 degree screen “Cinerama” system and was the site of the Washington area premiere of Stanley Kubrick’s now-classic film “2001: A Space Odyssey.” The presence of the Uptown Theater helps maintain the viability of the nearby restaurants and bars in the Cleveland Park NCOD.

MBC proposed to use the Uptown for holding three religious services every Sunday morning. On its website, MBC described this plan as “establishing its Uptown Campus.” Commercial real estate agents have reported to the undersigned Commissioner Beckner that MBC is seeking an additional 5,000 – 6,000 square feet of office space in the immediate vicinity to support its activities. This fact was confirmed by MBC’s representatives in a public meeting with the undersigned Commissioner Beckner, Ward 3 Councilmember Mary Cheh and other DC government representatives. Thus, given the relatively small size of the Cleveland Park NCOD, a reversal of the Zoning Administrator’s decision would clear the way for a significant change in

the character of the commercial strip by taking a substantial part of the property in the overlay district and converting it to a non-commercial, church use.

B. The Position of the ANC

Over the years, the ANC, its chair and its vice-chair have consistently urged the Zoning Administrator to enforce the zoning laws and regulations in the Cleveland Park NCOD; and both the chair and the undersigned Commissioner have testified before the Zoning Commission in support of amendments to the NCOD zoning regulations that would clarify them and make them easier to enforce. The attached resolution specifically states that “the ANC has an interest in seeing that zoning regulations are enforced to preserve the [Cleveland Park] NCOD.”

The expressed view of the ANC, as set forth in its resolution is (1) that the conduct of religious services in a movie theater is not an accessory use within the meaning of 11 DCMR and (2) that it supports the Zoning Administrator’s decision that MBC may not use the Uptown Theater for religious services as a matter of right because it finds that the zoning regulations establishing the Cleveland Park NCOD do not permit the use, as a matter of right, of the ground level floor of a building in the NCOD as a church. The ANC notes that this restriction is very limited in geographic scope and that a church may locate as a matter of right “almost anywhere” in the District of Columbia, other than in an NCOD. Thus, this restriction does not impose a substantial or undue burden on the Constitutional right to the free exercise of religion.

C. Argument in Support of the Position

The Zoning Administrator’s decision has two components: (1) that conducting religious services is not an accessory use to the operation of a movie theater and therefore requires a separate certificate of occupancy and (2) that a church use is not permitted as a matter of right on the ground floor of a building located in an NCOD. The ANC will discuss them in turn.

1. The conduct of religious services is not an accessory use to the operation of a movie theater.

The Zoning Regulations provide, in part, that “. . . no person shall use any structure, land, or part of any structure or land for any purpose other than a one-family dwelling until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title and the DC Construction Code, Title 12 DCMR.” 11 DCMR §3203.1. The regulations define accessory use as “a use customarily incidental and subordinate to the principal use, and located on the same lot with the principal use.” 11 DCMR §199.1.

The principal use of the Uptown Theater, for which a certificate of occupancy has been issued, is the exhibition of motion pictures. The only likely accessory use to the showing of motion pictures is the serving of food – popcorn, soft drinks and candy – for the patrons to eat during the movie. In fact, a few movie theaters (such as some of the theaters in the complex at Mazza Gallery) have attempted to expand on the traditional movie theater concession stand formula by adding alcoholic beverages to the mix of food and drink offered to patrons.

However, in the common understanding, religious worship services are not “incidental or subordinate to” the viewing of motion pictures. The viewing of motion pictures is an essentially secular activity. While motion pictures may have religious themes or religious subject matter (e.g. “The DaVinci Code,” “The Ten Commandments,” “The Last Temptation of Christ”), the viewing of a motion picture is not considered a form of worship in any religion. So, it is simply impossible to say that the conduct of religious services is “incidental” to the showing of motion pictures. The two are essentially unrelated activities. At best, it might be possible to view a film as part of a religious service; but, again, viewing is a passive activity of the movie audience, and religious services are characterized by the active participation of the congregants in one form or another – chants, prayers, singing and so on. Moreover, where a motion picture is shown as part

of a religious service, it is the showing of the motion picture that is “incidental and subordinate” to the principal activity, which is religious worship; and not the other way around.

Consequently, the first portion of the Zoning Administrator’s decision – that the conduct of religious services in a movie theater requires a separate certificate of occupancy – is consistent with the zoning regulations and with the common understanding of the (non-existent) relationship between conducting religious services and showing movies.

2. A church use is not permitted as a matter of right in a Neighborhood Commercial Overlay District.

The second part of the Zoning Administrator’s decision – that a church may not operate as a matter of right on the ground floor of a building in an NCOD – is based on a careful analysis of the interplay between the NCOD regulations and the more broadly applicable Commercial District zoning regulations. The NCOD regulations contained in Chapter 13 of Title 11 DCMR establish an “upstairs, downstairs” system of zoning regulation that is more restrictive than the underlying Commercial District regulation. The NCOD regulations principally affect the “downstairs” portion of the building.² The purpose of the NCOD regulations’ further restrictions is “to preserve and enhance neighborhood shopping areas by providing the scale of development and range of uses that are appropriate for neighborhood shopping and services” . . . by “encourage[ing] retention and establishments of a variety of retail, entertainment, and personal service establishments, *predominantly in a continuous pattern at ground level*, so as to meet the needs of the surrounding area’s residents, workers and visitors . . .” 11 DCMR §§1300.1 and 1300.3(b); italics added. This goal is accomplished by enumerating specific uses (in section 1302.2) and by requiring that “any building that occupies . . . a lot in a designated use area within an NC [*sic*] Overlay District *shall* provide designated retail and service establishments *on the*

² See, 11 DCMR §§1302.1 and 1302.4: “The designated uses listed in § 1302.2 shall occupy no less than fifty percent (50%) of the gross floor area of *the ground level of the building . . .*” (italics added).

ground level according the requirements of this section and any additional requirements of the particular overlay district.” 11 DCMR §1302.1; italics added. There is a further requirement that the designated uses “occupy no less than fifty percent (50%) of the gross floor area of the ground level of the building” which is “the floor that is nearest in grade elevation to the sidewalk.” 11 DCMR §1302.4.

By contrast, “[i]n those parts of the affected building. . . other than as delineated in this section, the use provisions of the underlying zone district shall apply.” 11 DCMR §1302.4(c). In simple terms, the narrower use restrictions of the NCOD provisions (11 DCMR §§1301-1304) apply only to the ground level of a building³; and the broader “underlying use” provisions of the zoning district apply to the upper floors of the building, if it has more than one floor.⁴

Moreover, the working relationship between the NCOD regulations and the zoning regulations for the underlying district is established by the “General Provisions” section of Chapter 13, which provides that the NCOD is “mapped in combination with the underlying Commercial District and not instead of [it]” (11 DCMR §1301.1) and that “*except as provided in §1301.3 and other provisions of this chapter*, all uses . . . permitted in accordance with this chapter and the . . . underlying district . . . shall be permitted.” 11 DCMR §1301.2; italics added. Section 1301.3, referenced above, provides that the more restrictive regulation shall govern in the event of a conflict between the NCOD and the underlying zoning.

This means that, on a ground floor, the permitted uses are only those specified by the NCOD at Section 1302.2 (because it is the “more restrictive provision” within the meaning of

³ In Cleveland Park, it is the ground level that fronts on the portions of Connecticut Avenue or Macomb, Ordway, Newark or Porter Streets that are within the NCOD. See, 11 DCMR §1306.3.

⁴ The neighborhood-specific provisions (beginning at Section 1306) may have additional, generally use or other restrictions that apply to the entire structure, not just the ground floor. For example, the Cleveland Park NCOD has a 40-foot maximum height restriction (§1306.6) and a specified floor/area ratio of 2.0 and only 1.0 can be occupied for non-residential use (§1306.7); and the Woodley Park NCOD has a flat prohibition on hotels, inns and fast food restaurants (§1307.2) and also regulates building height and floor/area ratio (§§1307.6 and 1307.7). For purposes of this discussion, these neighborhood-specific provisions are not relevant.

Section 1301.3); and on the upper floors, every use permitted in the underlying commercial district is permitted, absent some neighborhood-specific limitation such as the 40-foot building height restriction in the Cleveland Park NCOD (11 DCMR §1306.6) or the prohibition on inns, hotels and fast food restaurants in the Woodley Park NCOD (11 DCMR §1307.5).

The permitted uses on the ground floor in an NCOD are listed in Section 1302.2 of 11 DCMR. That section lists 23 specifically described uses as well as “any use that is permitted as a matter of right in the C-1 District pursuant to §§701.1 or 701.4.” 11 DCMR §1302.2(a).

Those two sections do not speak to the issue of churches. Rather, it is Sections 701.2 and 721.1, which are *not* incorporated by reference in Section 1302.2, that permit a church to locate in a Commercial District. A church is a permitted use in a commercial district under 11 DCMR §§701.2 (C-1 District)⁵ and 721.1 (C-2 District).⁶

The theater auditorium of the Uptown Theatre is nearest in grade elevation to the sidewalk and therefore the theater portion of the building is subject to the more restrictive NCOD regulations. Since those regulations do not include a church as an authorized use, a church is not a matter of right use for the Uptown Theatre; and the Zoning Administrator’s determination with respect to MBC was correct.

III. Conclusion

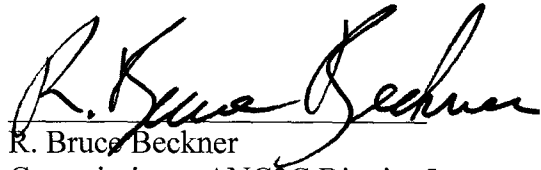
For the foregoing reasons, as stated in its resolution No. 2008-025 and discussed in further detail here, Advisory Neighborhood Commission 3C urges the Board to affirm the

⁵ See 11 DCMR §701.2 which permits, in a commercial district, any use permitted in an R-5 District under § 350.4; 11 DCMR §350.4(a), which permits, in an R-5 District, any use permitted in an R-4 District subject to the requirements of §§353 and 410; 11 DCMR §330.5(a) which permits, in an R-4 District, any use permitted in an R-3 District under §320.3; 11 DCMR §320.3, which permits in an R-3 District, any use permitted in an R-2 District under §300.3; 11 DCMR §300.3, which permits in an R-2 District any use permitted in an R-1 District under §201; and 11 DCMR §201.1(b) and (c), which permit in an R-1 District a “church or other place of worship” and a “parsonage, vicarage, rectory or Sunday school building.”

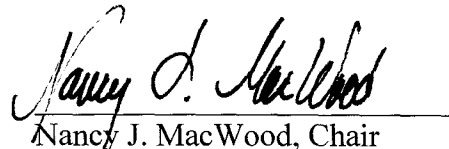
⁶ “Any use permitted in C-1 Districts under § 701 shall be permitted in a C-2 District as a matter of right.” 11 DCMR § 721.1.

Zoning Administrator's decision in this case in all respects and to deny the appeal of McLean Bible Church.

Respectfully submitted,

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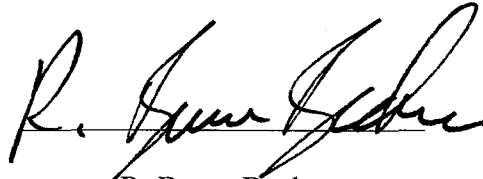
R. Bruce Beckner
Commissioner ANC3C District 5

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Nancy J. MacWood, Chair
ANC3C

Certificate of Service

I hereby certify that, on this, the 14th day of May, 2008 I caused to be served by electronic mail and or facsimile, the foregoing "Report of ANC3C" to Peter Nickels, acting Attorney General for the District of Columbia, George Idelson, President of the Cleveland Park Citizens' Association and to Whayne Quin, counsel for the appellant, McLean Bible Church.



R. Bruce Beckner

	ADVISORY NEIGHBORHOOD COMMISSION 3C GOVERNMENT OF THE DISTRICT OF COLUMBIA <i>CATHEDRAL HEIGHTS • CLEVELAND PARK •</i> <i>MASSACHUSETTS AVE. HEIGHTS</i> <i>MCLEAN GARDENS • WOODLEY PARK</i>
Single Member District Commissioners 01-Lee Brian Reba; 02- Gloria Day; 03-Stephanie Zobay 04-vacant; 05-Bruce Beckner; 06-Trudy Reeves 07- Richard Rothblum; 08-Catherine May; 09-Nancy MacWood	4025 Brandywine Street, NW Washington, DC 20016-1843 P: (202) 657-5725 F: (515) 474-8595 Website http://www.anc3c.org

ANC3C RESOLUTION NO. 2008-025

Resolution Regarding the McLean Bible Church's appeal of the Zoning Administrator's decision that a church cannot locate in the Uptown Theatre pursuant to zoning restrictions

WHEREAS the McLean Bible Church of Fairfax County, Virginia (“MBC”) has concluded a sublease of the Uptown Theatre, 3426 Connecticut Avenue, NW to conduct religious services every Sunday for the coming year;

WHEREAS the Uptown Theatre is within the boundaries of this ANC, the Cleveland Park Historic District and the Cleveland Park Neighborhood Commercial Overlay District (“CPNCOD”);

WHEREAS on October 15, 2007 the Zoning Administrator has issued a ruling that the use of the Uptown Theater for religious observances is not a use that is permitted as a matter of right in the CPNCOD;

WHEREAS MBC has exercised its right to appeal the Zoning Administrator’s decision to the Board of Zoning Adjustment (“BZA”);

WHEREAS MBC’s appeal (Case No. 17767) is going to be heard by the BZA on May 20, 2008;

WHEREAS a reversal of the Zoning Administrator’s decision will make it possible for the Uptown Theater to be used for religious services rather than motion picture exhibition seven days a week;

WHEREAS MBC - or any other religious institution - is free to use a building almost anywhere in the District of Columbia, outside of the CPNCOD, for religious services as a matter of right;

WHEREAS this ANC finds that zoning regulations establishing the CPNCOD do not permit a church use on the ground level of a building within the CPNCOD as a matter of right, such as is proposed for the Uptown Theater by MBC;

WHEREAS this ANC finds that the conduct of religious services is not an accessory use to a motion picture theater, but is a separate use and therefore requires a separate certificate of occupancy; and

WHEREAS this ANC has an interest in seeing that zoning regulations are enforced to preserve the CPNCOD

NOW THEREFORE BE IT RESOLVED that ANC3C supports the Zoning Administrator's ruling that the Uptown Theater cannot be used for religious services as a matter of right;

BE IT RESOLVED that ANC3C desires to exercise its right to participate in MBC's appeal of the Zoning Administrator's decision by appearing in that appeal in support of the Zoning Administrator's ruling;

BE IT FURTHER RESOLVED that ANC3C authorizes Commissioner Beckner, the Chair or their delegates to represent the Commission in this matter before the BZA and elsewhere.

Attested by

A handwritten signature in black ink, appearing to read "Nancy J. MacWood".

Chair, on April 30, 2008

Nancy J. MacWood

This resolution was approved by a vote of 6-0 on April 21, 2008 at a scheduled and noticed public meeting of ANC 3C at which a quorum (a minimum of 5 of 9 commissioners) was present.