



BEFORE THE ZONING COMMISSION OR
BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA



FORM 150 – MOTION FORM

THIS FORM IS FOR PARTIES ONLY. IF YOU ARE NOT A PARTY PLEASE FILE A
FORM 153 – REQUEST TO ACCEPT AN UNTIMELY FILING OR TO REOPEN THE RECORD.

Before completing this form, please review the instructions on the reverse side. Print or type all information unless otherwise indicated. All information must be completely filled out.

CASE NO.: 19047

Motion of:

☐ Applicant

☐ Petitioner

☒ Appellant

☐ Party

☐ Intervenor

☐ Other _____

PLEASE TAKE NOTICE, that the undersigned will bring a motion to:

Reconsider and rehear the case.

Points and Authorities:

Please state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion, including relevant references to the Zoning Regulations or Map and where appropriate a concise statement of material facts. If you are requesting the record be reopened, the document(s) that you are requesting the record to be reopened for must be submitted separately from this form. No substantive information should be included on this form.

The board upheld the ZA order under the theory that two principal uses are allowed on a residential lot. The board explicitly cited case 17069 as precedent supporting two principal uses on a single lot in a residential zone. However, the order in case 17069 explicitly stated that only one principal use was present on the lot. "The Board concludes that the addition of the sale of prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs is not an "expansion" of the grocery use, but an inherent part of that use." The decision is not based in law but is arbitrary and capricious. The board made errors of law. Additionally the board ignored clearly written zoning regulations governing matter or right uses on alley lot and created a new right not in the zoning regulations and in the process set new precedent invalidating the zoning regulations governing Car Sharing spaces in an R-2 zone in section 11-301.1

Private parking space not defined, Zoning Administrator's definition of parking lot not supported by zoning regulations. Webster's definition of 'temporary' should be used.

CERTIFICATE OF SERVICE

I hereby certify that on this

09

day of

May

, 2016

I served a copy of the foregoing Motion to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of Planning

in the above-referenced ZC or BZA case via:

☐ Mailed letter

☐ Hand delivery

☒ E-Mail

☐ Other _____

Signature:

Michael Cushman

Print Name:

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Board of Zoning Adjustment
District of Columbia
CASE NO.19047
EXHIBIT NO.49

Motion to Reconsider – BZA Case 19047

This motion to reconsider case 19047 is made because material facts of the case were not available at the time of the hearing.

Only with the issuance of the order was it possible to determine what rationale was used to dismiss the appeal and to discover that the supposed precedent does not exist.

The BZA Case 19047 Order reads:

“A private garage on an alley lot is a matter-of-right use in an R-4 zone because it is permitted in an R-1 zone. (11 DCMR §§ 201.1(o), 330.5(a).) The Zoning Regulations are silent as to whether *open private* parking spaces on an alley lot are a matter-of-right use. The only distinction between a private garage and a *private* open parking space is that the former is covered and the latter is not. To the Board, that is a distinction without a difference. In both circumstances the owner is engaging in a long term lease with a third party for the use of the space. The Zoning Administrator distinguished the situation from a parking lot, in which parking is arranged for on an hourly or daily basis. (See Finding of Fact No. 14 and Hearing Transcript of July 21, 2015, p. 81.)

The Board therefore agrees with the Zoning Administrator that private open parking spaces on an alley lot, which are being leased on at least a monthly basis, are properly considered a distinct principal matter-of-right use. Since the open parking spaces on the subject property met those criteria, the Zoning Administrator did not err in issuing a certificate of occupancy authorizing “open parking spaces – 4.”¹ (*emphasis added*)

The board decided the case on two grounds

- 1) There is precedent for finding 2 principal uses on one lot in a residential zone. BZA Case 17906 was cited by chairman in argument introduced only after appellant made his case. There was no time or possibility to check and correct the record.
- 2) There is a private garage use written into the zoning regulations; a private garage is like a private parking space; there is no mention of private parking space in the zoning regulations; the Board decided that they would write new law and approve a new ‘private parking space on an alley lot’ as a matter of right.

¹ BZA order Case 19047, page 6.

The Board accepts the redefinition of parking lot advanced by the ZA in clear mis-reading of the text of the zoning regulations.

Errors:

- 1) The case cited in precedent was not based on the two principal uses on a single residential lot. The order did not find two principal uses on the lot. It found one principal use.

Chairman Jordan on dual principal use during the hearing: "I cannot think of a use that allows two building uses but we certainly have other similar principal uses within a lot. And I gave you an example Case No. 17906 which was where this Board did a heck of a job discussing accessory uses, double principal uses on a lot and etc. which allowed in that grocery store case where it was a grocery store and then they tried to do some prepared food that the Board dismissed it and said the relief was not necessary because of the mere fact that you would have the two principal uses because they're not accessory. The packaged food is not accessory to a grocery store, which I had some issues with that but the case did say that. So I think what's before the Board, if we want to draw a line saying that it is an allowable principal use to have a parking space is as similar as you would have a parking garage in the alley. That's what it comes down to me. And I would argue that there's something wrong with it so it would be allowable under the C of O but as a separate principal use. I don't think this is an accessory use. I just don't see the accessory use. I don't think it meets anything about an accessory use. I don't care how we care to stretch it, go around the corner, sneak up on it. We just couldn't get that as an accessory use. It was a good try but in my opinion it just didn't get there. But I certainly can buy the argument that it's a principal use allowable like a private garage and that had not been instructive in the regulations about it. That was just my thought on it."

Text from BZA Case 17906 order:

"Because the sale of prepared food is part of the principal use, no new C of O or amendment to the existing C of O is required. ... For this same reason, the Board does not view the proposed sale of prepared food to constitute an expansion disallowed by 11 DCMR § 2000.2. The Board concludes that the addition of the sale of prepared sandwiches, donuts, hot coffee, tea, and cooked hot dogs is not an "expansion" of the grocery use, ***but an inherent part of that use.*** ...

The Office of Planning recommended approval of a special exception for an "accessory prepared food shop," as the name for the use which most closely approximated the

Applicant's proposal and also corresponded with a definition in the Zoning Regulations. During the hearing, however, the OP representative made clear that OP was uncertain whether relief was needed, and was persuaded it was needed largely by the "authority of the Zoning Administrator" in sending the Applicant for zoning relief. Trans. at p. 55, lines 2-12. When questioned whether, in the absence of a referral from the Zoning Administrator, OP would have determined that the Applicant needed relief, the OP representative replied that without such a referral, the Applicant "didn't need an application. He already operated a grocery store and that what he's proposing was just part of what's usually in a grocery store." Trans. at p. 56, lines 12-19 and 57, lines 1-3. **OP and the Board are therefore in agreement that the proposal does not amount to any sort of new use, but is an inherent part of a grocery store use.**

The ZA capriciously redefines a parking lot from the zoning regulation definition in section 199. The ZA has determined that the 4 parking spaces on a tract of land [used for the temporary parking of motor vehicles when the use is not accessory to any other use] is a parking lot only if such spaces are "open to all persons willing to pay a temporary fee."²

The Board accepted the ZA's interpretation³.

² Finding of fact 14 in BZA order for case 19047.

³ MR. LEGRANT: My office has approached the situation as follows. The regulations do require that a parking lot in an R-4 district on an alley lot requires a special exception. Several years ago I was posed with the issue of a situation similar to this but that particular situation was all private parking garages. And at that point in time I had to distinguish private from public parking. So as the intervener noted, a *public parking arrangement is something that is for the temporary storage of a vehicle where someone comes in a financial transaction, they park temporarily and they leave.* Whereas, a private parking garage is a situation in which a lease or a contract is set up for a specified individual. In the alley lot arrangement, typically -- and I've found this in several instances -- people will start with their private parking garage. They will lease a private parking garage space from a property owner for use because they live in a nearby like a row-house or something that fronts a public street. Then we're faced with the situation of some arrangement upon an open parking area. It's not in a garage, it's just an open parking space. The Code is silent as to whether a private parking space on an alley lot is permitted as a matter of fact. The Code is silent on this. My office has ruled that that situation is a matter of right by virtue of the fact that the closest definition is a private parking garage. And as my counsel noted, this is a very common arrangement. I've not been faced to date, perhaps except of this appeal, of that being challenged for that arrangement. So I have construed that a private open parking arrangement, not a public private parking lot where someone comes in and says hey I want to park here for the day and I can give you ten bucks. Now typically it's a monthly or a longer lease arrangement, those are permissible use on an alley lot.

ZA usage of parking lot is a very specific variant of a parking lot. Apartment parking lots and grocery store parking lots are “parking lots”, however, they are also classified, in most cases, as accessory parking spaces because they are on the same lot and accessory to other uses. BZA Cases and common usage of parking lot make it clear that parking lot – as defined in the zoning regulations and used in zoning and in common usage – includes other variants of “parking lot” beyond the pay-to-park-by-the-hour suggested by the ZA.

Errors: The ZA makes an issue of the term of the lease in evaluating whether parking is “temporary”. The definition of a parking space as a space to be used exclusively for “temporary parking” of a motor vehicle means that the vehicle moves on and off the lot, and has no link to tenancy or lease.

The definitions from Zoning Regulation Definitions section 199.

Lot, parking - a tract of land used for the temporary parking of motor vehicles when the use is not accessory to any other use.

Parking space - an off-street area accessible and of appropriate dimensions to be used exclusively for the temporary parking of a motor vehicle. (31 DCR 6585)

Garage, private - a building or other structure, or part of a building or structure, not exceeding nine hundred square feet (900 ft.²) in area, used for the parking of one (1) or more motor vehicles and having no repair or service facilities

BZA Case 17607 Order p 6 shows “parking lot” referencing four off-street parking spaces.

“The Applicant's project will provide four off-street parking spaces, as required under zoning regulations. The Board conditions its approval of the requested special exception as suggested by DDOT, requiring the Applicant to construct the public alley at the rear of the subject property consistent with DDOOT standards, thereby ensuring adequate vehicular access to the project's parking lot.”

Recent activity surrounding the Anacostia Playhouse – which required a variance from parking requirements despite having procured parking off-site – on a lot across an alley -- a parking lot.

[“Exhibit A is the Anacostia Playhouse.”](#) The former H Street Playhouse, which is in the process of moving from Northeast, is supposed to host a show this spring and participate in two festivals in June. But city regulators recently slapped a "Stop Work" notice on its door for doing interior construction work without a building permit, which it can't get because it doesn't meet the parking requirements.* The holdup has taken its owners by surprise; the space's low-bulk commercial/light manufacturing zoning requires it to have one parking space for every 10 seats of capacity, or 15 spaces—and it does. **But the parking lot is across an alley and technically on a different tax lot. So the owners have to go through an appeal**

process; even if they're successful, they might not be able to open before October, leaving them and their scheduled performers in logistical and financial straits.⁴

A Parking Lot is a collection of parking spaces on a lot where parking is not accessory to other uses.

The characteristic of "private parking spaces", which as the Board notes is not written into the zoning regulations, is that they are used as accessory parking. The private parking spaces attached to residences are "accessory parking". The reason why private parking is not included in the zoning regulations is specifically because private parking spaces are parking spaces that are accessory to other uses.

Zoning regulations pertain to permitted USES, not ownership. Courts have emphasized that land use regulations must be based on the land use impacts of property use, not the identity of the users of the property. Thus a lease does not permit a use that would otherwise be forbidden.

The impact of parking on an alley lot where the parking is not accessory to any other use is not determined by whether it is leased or owned. The use as a parking lot.

The definition of parking lot and parking space is clearly written in the zoning regulation and very clear. Temporary means "not permanent". Webster's dictionary is required to provide guidance.

temporary

: continuing for a limited amount of time : not permanent

: intended to be used for a limited amount of time

permanent

: lasting or continuing for a very long time or forever : not temporary or changing

: continuing or enduring without fundamental or marked change : stable

tenant

1 a : one who holds or possesses real estate or sometimes personal property (as a security) by any kind of right

b : one who has the occupation or temporary possession of lands or tenements of another; specifically :

one who rents or leases (as a house) from a landlord

2: occupant, dweller

⁴ <http://www.washingtoncitypaper.com/blogs/housingcomplex/2013/03/20/out-damned-spot-how-d-c-s-onerous-parking-requirements-slow-development/>

Findings of Fact which were ignored:

"Uses permitted as a matter of right on an alley lot in an R-4 District where the alleys are less than 30 feet wide are artist studio and private garage, and uses permitted as a special exception are storage of wares and goods, parking lot, parking garage, and public storage garage.⁵"

- The only uses permitted as a matter of right on an alley lot in the R-4 District where the alleys are less than 30 feet wide are an artist studio (11 DCMR § 2507.5) and a private garage (11 DCMR § 201.1(o)).
- For a private garage on an alley lot under § 201.1(o), the garage structure is limited to a maximum of 900 square feet in size and can only be located on an alley lot that was recorded prior to November 1, 1957 (11 DCMR § 2300.5).
- Storage of wares and goods, parking lot, parking garage, and public storage garage uses are permitted by special exception in the R-4 District where surrounding alleys are less than 30 feet wide and the alley lots were recorded prior to November 1, 1957. (11 DCMR § 333).
- Accessory Parking Spaces could also be provided on the Site pursuant to § 214, so long as they are located on a lot with a minimum area of 4,000 square feet and a minimum width of 40 feet. Accessory Parking Spaces must also be within 200 feet of the area to which they are accessory

⁵ BZA Case 18787 Findings of Fact (Page 6, para 14)