DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-AA-794

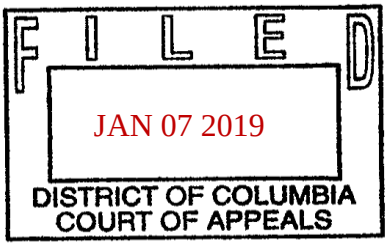
1731 NH AVENUE OWNER LLC, PETITIONER,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

and

WILLIAM SAWICKI, ET AL., INTERVENORS.



No. 17-AA-795

WILLIAM SAWICKI, ET AL., PETITIONERS,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

and

1731 NH AVENUE OWNER LLC, INTERVENOR.

On Petitions for Review of an Order
of the District of Columbia Board of Zoning Adjustment
(BZA-19027)

(Argued November 28, 2018 Decided January 7, 2019)

Before BLACKBURNE-RIGSBY, *Chief Judge*, and FISHER and MCLEESE, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: The Zoning Administrator determined that proposed renovations to the Carlyle Hotel, located at 1731 New Hampshire Avenue, N.W., complied with zoning regulations, and the Department of Consumer and

Regulatory Affairs (DCRA) issued building permits. However, the Board of Zoning Adjustment (BZA or Board) issued an order on March 7, 2017, reversing in substantial part the determinations made by the Zoning Administrator. CS Bond Street C Properties LLC (the hotel Owner at the time) petitioned for review, as did William Sawicki and other residents of the neighborhood (the Residents). We vacate the BZA's order and remand for further proceedings.

I. Factual Summary

The Carlyle Hotel is located in a district zoned R-5-D, classified as a medium-high density General Residence District. A hotel is permitted as a matter of right in such a district only if it was in existence as of May 16, 1980. The hotel may be "repaired, renovated, remodeled, or structurally altered," but "the gross floor area of the hotel may not be increased and the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased." 11 DCMR § 350.4 (e) (1958);[1] *see also* 11 DCMR § 199.1 (1958) (defining the terms commercial adjuncts, exhibit space, function room, guestroom areas, and service areas). A separate regulation provides that "[n]o part of [a commercial] adjunct or the entrance to the adjunct shall be visible from a sidewalk." 11 DCMR § 351.2 (c) (1958).

Although it is undisputed that the Carlyle Hotel existed prior to 1980, the earliest Certificate of Occupancy the parties could find was issued in 1986. The Owner acquired the hotel in 2012 and had an architect draw two sets of plans (an "as existing" plan showing how the space was being used at that time and a plan for renovations). On July 24, 2013, the Zoning Administrator confirmed by letter that the proposed renovations would comply with zoning regulations. An original permit was issued by the DCRA in 2014 and a revised permit was issued in 2015. On April 17, 2015, the Residents appealed to the BZA, contesting the issuance of the revised building permit. The BZA concluded that the revised permit had authorized "a net increase of 1,354 square feet . . . in total commercial adjunct and function room space," violating governing regulations. In addition, the permit "was unlawfully issued" because "the visibility of the first-floor restaurant was

[1] Proceedings in the underlying BZA appeal commenced in 2015, prior to the Zoning Commission's adoption of the 2016 Zoning Regulations. Therefore, the 1958 Zoning Regulations apply to this appeal. 11–A DCMR § 100.4 (b) (2016).

increased by moving it." These petitions for review followed. It was established during oral argument that all of the planned renovations have been completed.

II. Standard of Review

This court generally defers to the Board's findings unless the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *N St. Follies Ltd. P'ship v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584, 588 (D.C. 2008) (citation omitted). However, the BZA must state "with reasonable clarity" the basis for its decisions. *Dietrich v. District of Columbia Bd. of Zoning Adjustment*, 293 A.2d 470, 473 (D.C. 1972); *see also Draude v. District of Columbia Bd. of Zoning Adjustment*, 582 A.2d 949, 953 (D.C. 1990) ("[F]indings made by the BZA [must be] sufficiently detailed and comprehensive to permit meaningful judicial review of its decision."); *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C. 1990) (citation and quotation omitted) ("If the agency makes no finding of fact on a material contested issue, this court on review may not fill the gap by making its own determinations from the record, but must remand the case.").

In addition, all BZA findings of fact and conclusions of law shall be supported by reliable, probative, and substantial evidence in the record. D.C. Code §§ 2-509 (e), 2-510 (a)(3)(E) (2012 Repl.). This court may reject a BZA decision if "conclusions legally sufficient to support the decision [do not] flow rationally from the findings." *Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427, 433 (D.C. 2008) (citation omitted). "Generalized, conclusory or incomplete findings are insufficient; subsidiary findings of basic fact on all material issues must support the end result in a discernible manner." *Levy*, 570 A.2d at 746. For reasons explained below, we conclude that many of the Board's conclusions are not supported by substantial evidence, are not sufficiently explained, or do not flow rationally from its findings.

III. Analysis

A. Baseline for Measurement

As mentioned above, the renovations of the hotel could not increase "the total area . . . devoted to function rooms, exhibit space, and commercial adjuncts." 11 DCMR § 350.4 (e); *see also* 11 DCMR § 351.2 (a) (1958) (same). The issues presented by petitioners relate to renovations of the basement and ground floors.

In order to determine whether there had been a prohibited increase in function rooms and commercial adjuncts, the BZA had to establish how much space had been devoted to those uses in the past.[2] It decided that December 2012, when the drawings showing existing use of hotel space were prepared, should be the baseline date from which to measure the various areas devoted to these uses because it was "the earliest timeframe for which complete information is available." Since there were no existing drawings showing the use of different areas within the hotel in 1980, the Residents agree that it was reasonable to use December 2012 as the baseline. We reject the Owner's argument that new uses begun after December 2012, but prior to the renovations, should also be considered.

It may have been reasonable to accept the 2012 drawings as a snapshot of how the space was used at a single period in time. However, it might also be reasonable to consider reliable evidence of previous uses of hotel space. It appears from its Order that the Board did not apply the 2012 baseline date consistently and considered testimony concerning prior use in making some conclusions but not others. For instance, the Board considered evidence of prior use of the 460 square foot storage room in the basement, but disregarded evidence about prior uses of the basement office space by different non-hotel businesses such as Great Addresses (a third party management company) and SBS International. We remand for the Board to reconsider the question of baseline date for determining use of the hotel space, to adopt a rule or rules to follow, and to apply its rule(s) consistently for each area in the hotel that remains at issue.

B. The Basement

3,192 Square Feet of Office Space. One of the principal issues in this appeal concerns 4,319 square feet of space in the basement. The BZA found that 3,192 square feet of that space had been used as the hotel's administrative offices and could not be classified as function rooms or a commercial adjunct because hotel administrative offices are included in the definition of "guestroom areas."[3] *See* 11

[2] The Board found, and petitioners do not contest, that "[t]here was no space devoted to exhibit space on the two floors as of December 2012 and no new exhibit space was approved."

[3] The BZA found that the remaining 1,127 square feet was commercial adjunct or function room space.

DCMR § 199.1 (1958). Although there was evidence that a portion of this space was used for a separate real estate business, the BZA determined that use did not fit within the definition of a commercial adjunct because it was not "subordinate to hotel use." *See* 11 DCMR § 199.1 (definition of commercial adjuncts). We agree with this conclusion. However, as mentioned above, the Board did not address testimony suggesting that there had been other prior uses of this space for businesses not directly related to the hotel. Because there is additional evidence the Board either did not consider or did not address in making its findings of fact, we remand for such findings and further explanation.

460 Square Foot Storage Room. The BZA categorized a 460 square foot room in the basement as commercial adjunct space. Petitioner Sawicki contends that because this room was labeled as "engineering office/storage," it should be classified as service space. Sawicki argues alternatively that even if some of this space was used as storage for a restaurant, it is not clear that all of the space was used for that purpose.

The BZA found "no merit in the [Residents'] assertion that the 460 square foot area described as an 'engineering room' was improperly characterized as a commercial adjunct. Notwithstanding its label, the space serve[d] the hotel's restaurant use and therefore is properly considered part of that commercial adjunct." Although there is some testimony that part of the basement was used as storage for a deli restaurant that was located on the ground floor in the 1980s and 1990s, it is not clear to which room the witness is referring. Moreover, it is unclear from the Board's findings what portion of this space was used for storage or if there was any evidence of the use of this space in 2012, the baseline date chosen by the BZA. These matters should be clarified on remand, consistent with the Board's reconsideration of the baseline rules, as discussed above.

Fitness Center. The BZA concluded that the fitness center was a commercial adjunct even though it was used only by hotel guests. The Board initially focused upon definitions, asserting without explanation that "[a] gym is closer to a commercial adjunct than a guestroom or any of the other hotel areas identified by the regulations," adding "particularly since the hotel could charge for its use or for additional services the gym could offer." Because the Board did not explain why a gym "is closer to a commercial adjunct than a guest room," and we are not aware of any evidence that the hotel planned to charge either guests or outsiders for its use or for additional services, we remand this issue for further explanation and appropriate findings.

Restrooms. The BZA refers to a 115 square foot restroom used "by hotel guests using the gym" and appears to count that space separately from the 930 square foot gym itself. This appears to be double counting, because we understand the record to show that this restroom is located inside the gym. Moreover, Petitioner CS Bond asserts (and Petitioner Sawicki does not dispute) that the BZA analyzed the wrong restroom as there are two other restrooms (each occupying 115 square feet) in the basement.[4] The renovation drawings support the conclusion that there are multiple restrooms in the basement. Therefore, we remand for the Board to clarify the proper classifications of the two restrooms located outside the gym and to recalculate the square footage of function room and commercial adjunct space accordingly.

C. The Ground Floor

2,652 Square Feet of Unusable Guestrooms. The Board concluded that 2,652[5] square feet of space could not be used as guestrooms for various reasons – lacking windows or having air-wall partitions. Petitioner CS Bond points to evidence in the record suggesting that some of these ground floor rooms had been used as meeting rooms because they were not up to code to use as guestrooms. Petitioner Sawicki points to evidence that, prior to the change in ownership, the rooms were sometimes used as guestrooms and at other times as meeting rooms. Because there is conflicting evidence and the BZA failed to weigh the evidence and make findings of fact, we remand for such findings and further explanation.

Visibility of the Restaurant. As mentioned above, 11 DCMR § 351.2 (c) (1958) states that "[n]o part of the adjunct or the entrance to the adjunct shall be visible from a sidewalk." Before the renovations began, a kitchen and restaurant/bar were located on the north side of the building and a separate dining area was located on the south side of the building. **[JA 24, 26]** The restaurant/bar

[4] During oral argument, Petitioner CS Bond asserted that only one of the 115 square foot restrooms in the basement is at issue since the other restroom was designated as function room space. This is not set forth clearly in the Board's Order.

[5] It seems there is a typo in the Order as to the total square feet of this space. On one occasion in the Order, the Board states that 3,652 square feet of guestroom space is on the ground floor. The record and underlying briefing reflect 2,652 square feet, and Petitioner Sawicki contends the correct total is 2,682 square feet.

area was located behind a corner window on the north side of the building. The renovation of the ground floor included relocating the kitchen and restaurant/bar area to the south side of the building so that the bar, dining area, and kitchen of the restaurant would all be located on the same side of the building. A similar corner window on the south side of the building looks into the new restaurant/bar.

The BZA concluded that "the visibility of the first-floor restaurant was increased by moving it" due to "expansion of the restaurant in its new location and the windows located along the first-floor wall." This conclusory statement is not satisfactorily explained. It is unclear, for example, if the Board was referring to an increased visibility through windows facing the front sidewalk or the side windows facing the alley. It is also unclear if there were more windows looking into the bar/restaurant/dining area after the consolidation of these rooms on one side of the hotel. As the Order reads now, this conclusion does not flow rationally from the Board's findings of fact. We therefore remand this section of the BZA's Order for further findings and explanation.

IV. Conclusion

We vacate the BZA's order and remand the issue of baseline date for the Board's reconsideration as described above. In addition, we remand the following issues for further explanation and findings: (1) classification of the 3,192 square feet of office space in the basement; (2) classification of the 460 square foot room in the basement; (3) classification of the hotel's fitness center in the basement; (4) classification of the two basement restrooms not located within the fitness center; (5) classification of the 2,652 square feet of guestroom and function room space on the ground floor; and (6) the increased visibility of the restaurant/bar area on the ground floor. We also remand for recalculation of the square footage of the areas that were used as function rooms, exhibit space, and commercial adjuncts prior to the renovations, consistent with the Board's new findings and conclusions.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

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