

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington D.C. 20001

Appeal of NH Street Partners Holdings LLC

Appeal No. 18735

and

Appeal of Chadbourne & Park LLP

Appeal No. 18737

DCRA'S PRE-HEARING STATEMENT

With these appeals, Appellants allege that DCRA erred in issuing a permit for the construction of an addition to the Marriott Hotel located at 22nd and M Street NW. Because none of the many arguments made by Appellants have any merit, the appeal should be denied.

FACTS

This case arises out of a plan to build an addition to an existing Marriott Hotel. The addition will be a nine story structure that will be used as a Hyatt Hotel (hereinafter referred to as "the Addition.") The Addition and the Marriott will be located on record lot 190 in square 70. The Addition's address will be 2121 M Street NW. The property is zoned CR and is in the Dupont Circle Overlay District.

The existing Marriott Hotel was constructed in 1978. Additions to the hotel occurred in 1988 and 2006. 71 rooms were added in 1988 and 56 rooms in 2006. The new Addition will add 168 rooms and a 1750 sq foot function room. A

permit was issued on November 27, 2013 for the construction of the Addition.
DCRA Exhibit 1, Building Permit B1310607.

Appellants are the owners and tenants of the building adjacent to the proposed addition. They filed these appeals on January 24 and January 27, 2014 alleging that the Zoning Administrator erred in granting permission to build the Addition. They make identical arguments in their appeals. Specifically, they contend that (1) the Addition is not a true addition but rather a separate building, (2) there will be insufficient parking, (3) the loading requirements are not satisfied for the building, (4) the Addition's roof structure does not comply with setback requirements and (5) the building does not provide sufficient public space.

ARGUMENT

As will be explained below, there is no merit to Appellants' arguments.

1. The Addition and Marriott constitute one building.

Appellants' main argument is that the Addition is actually a separate building and, as a separate building, violates numerous Zoning Regulations. This argument is wrong because the Zoning Regulations provide that “[t]he existence of communication between separate portions of a structure below the main floor shall not be construed as making the structure one (1) building.” 11 D.C.M.R. § 199. The necessary corollary to this point is that a main floor communication between separate portions of a structure makes the structure into one building. As the Board stated in *Application 18263-B of Stephanie and John Lester* (2013):

[T]he definition of "building" under § 199.1 permits separate portions of a structure to be considered as a single building for zoning purposes provided that a communication exists between those separate portions at or above the main floor. For purposes of this definition, "communication" typically means access between the separate portions of the structure. (See BZA Appeal No. 16646 at 9.) The Zoning Commission has used the term "meaningful connection" to describe a communication sufficient to create a single building. See Z. C Order No. 08-34, *Center Place Holdings, LLC* (2011); Z.C. Order No. 05-36, *First Stage Consolidated PUD & Related Map Amendment-200 K Street, N.E.* (2006).

In this case, the existing Marriott and the Addition will be connected in three places on the main floor. DCRA Exhibit 2, Connection Drawing. In two locations, doors will provide access from retail space within the Marriott to a service corridor in the Addition. The third connection will be a door leading from the Marriott's egress stairs into a vestibule in the Addition. Because these connections provide "access between the separate portions of the structure" and allow people to move between the Marriott and the Addition, the Addition and the preexisting building constitute one building.

Even Appellants recognize that there will be access between the Addition and the Marriott. But Appellants seem to allege that the Marriott lobby and the Addition lobby must be connected. This argument has no support in law. There will be connections between the Marriott and the Addition which will allow movement between the Marriott and the Addition. As the Board has held on numerous occasions, this is all that is required. E.g. *Application of Stephanie and John Lester*; *Appeal No. 16646 of Daniel Serwer and James W. McBride* (2001). There is simply no legal requirement that the lobbies be connected.¹

¹ Appellants' argument is based on a PROPOSED rewrite of the Zoning Regulations. Obviously, proposed regulations are not law. Further, even under the proposed

2. The building has the necessary parking.

Apparently anticipating that their “separate building” argument is unlikely to carry the day, Appellants also advance a number of alternative arguments. The first of these is that the building does not have sufficient parking. They claim that the parking will not comply with 11 D.C.M.R. §§ 2101.1 and 2115.1-4. Appellants’ position is based on a misunderstanding of the facts.

In total, the existing Marriott and the Addition require 80 parking spaces. This is because the Marriott only necessitates 32 spaces. When the Marriott was first built in 1978, no parking was necessary.² DCRA Exhibit 3, Excerpt from Zoning Order 108, p 22-23. However, when 72 rooms were added to the Marriott in 1988 and 56 rooms in 2006, the Zoning Regulations required the Marriott to provide 1 parking space for every 4 of the new rooms for a total of 32 spaces.³ The Addition will add 168 rooms and a 1750 sq foot function room. Therefore, 48 more parking spaces will be required.⁴

There will be valet parking for the Addition’s required spaces. DCRA Exhibit 4, Parking Drawing. Per the Zoning Regulations, when more than 75

regulations, the 3 connections would qualify as a sufficient connection because they provide “passage between separate portions of the building.”

² Appellants’ contend that the required parking for the existing Marriott is 140 spaces. Even if this is true, it does not change the analysis. The reason being that regardless of the exact number of spaces required for the Marriott, the total number of spaces for the building exceeds 75 which is the determinative factor for valet parking. And any argument that the existing Marriott does not provide the required parking is untimely. See 11 D.C.M.R. § 3112.2.

³ This number is determined by the formula provided in 11 D.C.M.R. § 2101.1 (56+72=128/4=32).

⁴ Appellants themselves recognize that only 48 spaces are required for the addition. See Brief of NH Street Partners, p 6. This number is based on the fact that 42 spaces will be required for the 168 rooms (168/4) and 6 spaces for the function room (1750/300). See 11 D.C.M.R. § 2101.1.

spots are required and the property is in a CR District, valet parking can be utilized to satisfy the parking regulations so long as a “minimum of two hundred eighty-five square feet (285 ft.2) of parking area shall be provided for each required parking space.” 11 D.C.M.R. § 2115.9-10. And according to Section 2115.11, the requirements of Sections 2115.1 – 2115.4 are waived when valet parking is utilized. Here, there will be 378.4 sf of parking area per space. Exhibit 4. Therefore, the parking requirements will be satisfied by the valet parking.

3. The loading requirements are satisfied.

Appellants also contend that the building's loading facilities will not comply with 11 D.C.M.R. § 2201.1. The problem with this argument is that the existing Marriott already contains over 200 rooms. The Marriott has more than 400 rooms. The Addition will add 168 rooms. Per the Zoning Regulations, the latest increase in rooms does not trigger additional loading. 11 D.C.M.R § 2201.1. Rather, the same loading is required of hotels with more than 200 rooms regardless of whether the hotel has 201, 420, or 600 rooms. Therefore, contrary to Appellants' arguments, there are no additional loading requirements for the Addition.

The fact that the Addition does not necessitate any additional loading is key because another of Appellants' arguments is that a loading berth that will be added by the Addition is improperly located. According to Appellants, the loading berth as depicted on Sheet A102 of the plans is in an open court and they argue this is not allowed by 11 D.C.M.R. § 2203.1 which requires “required loading berths” to be located in specified areas.

Appellants are mistaken. A hotel with over 200 rooms needs to have two loading berths. The existing Marriott has the two required berths. DCRA Exhibit 5, Loading Drawings. Since the loading berth shown on Sheet A102 is an additional berth that is not required by the Zoning Regulations, it need not comply with 11 D.C.M.R. 2203.1. 11 D.C.M.R. 2203.1 only deals with the locations of "required loading berths." Because the berth shown on Sheet A102 is not required, the argument about the placement of the berth is without merit.

4. The penthouse is sufficiently set back from the exterior walls.

Another argument Appellants make is that the penthouse is only set back 7' 6" from the west exterior wall when it should be set back 17' 6" because that is the height of the penthouse. Appellants' argument is based on 11 D.C.M.R. § 630 which provides that the penthouse must "be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located." The argument misses the mark because the west wall is not an exterior wall.

For purposes of Section 630, an exterior wall is "a wall that faces a street or public alley or a 'wall set back from the property line that abuts a yard or court....' 'What distinguishes an exterior wall for zoning purposes is not whether it is exposed to the elements, but whether it is set back from a property line.'" *Appeal No. 18257 of Walter Parrs*, p. 10 (2012). Based on this definition, the west wall that Appellants measure from is not an exterior wall. This is because the wall will not face a street or alley and it will not be set back from a property line. Instead it will face a closed court that will be completely enclosed by the Addition and the Marriott. DCRA Exhibit 6, Roof Structure Plan Drawing.

Therefore, the wall is not an exterior wall for purposes of Section 630. As a result, Appellants' argument about insufficient setbacks is off base.

5. There is no violation of the public space requirements.

Appellants' final argument is that the project fails the public space requirements. This argument relies on 11 D.C.M.R. § 633 which provides that “[a]n area equivalent to ten percent (10%) of the total lot area shall be provided for all new development.” For purposes of this case, the key phrases are “lot area” and “new development.”

The “lot area” language is important because the “lot area” of record lot 190, which is where the entire building will be located, will be the same before and after the Addition is constructed. In other words, the Addition has no effect on the total “lot area.” Therefore, when the existing Marriott was built in 1978, the Marriott had to provide the required public space. And since the lot area is the same now as it was in 1978, in essence, Appellants are arguing that the Marriott has never complied with the public space requirement.⁵ Such a challenge is extremely untimely as the Marriott has existed for over 35 years. See *Basken v. DCBZA*, 946 A.2d 356, 367 (D.C. 2008)(a zoning decision does not “start another sixty-day appeal period as to any and all DCRA zoning decisions affecting a project that preceded issuance of” the decision.)

The “new development” language also indicates that the public space requirement was triggered when the Marriott was first built, not by the proposed Addition. The phrase “new development” is not generally understood to refer to

⁵ In fact, Appellants' explicitly argue that “the developer of the Marriott Hotel failed to provide the required ground level public space pursuant to 11 DCMR § 633.” Appellant's Pre-Hearing Statement, p. 14.

additions to existing buildings. The phrase is commonly used to refer to the construction of a new building or series of buildings. See DCRA Exhibit 7, Excerpt from Webster's Third New International Dictionary, Unabridged (2002)(defining "development" as "a developed tract of land: *esp*: a subdivision having necessary utilities.").

Interpreting the phrase "new development" to refer to new buildings, not additions to existing buildings, is also consistent with how the phrase "new development" is used in other places in the Zoning Regulations. For example, Section 500 of the Zoning Regulations provides that the purpose of the SP District is to act as a buffer to "ensure that *new development* is compatible in use, scale, and design with the transitional function of this zone district." Similarly Section 3302 states that purpose of the StE District is to "[d]esign and site *new development* sensitively to preserve existing gateways, vistas, and campus landmarks." In both of these regulations, the phrase "new development" seems to be a clear reference to the construction of buildings that did not exist before, not to additions to existing buildings. The fact that the Zoning Regulations use the phrase "new development" in other places to refer to new buildings, not additions, strongly indicates that the same purpose is intended when the phrase is used in Section 633. Thus, the public space requirement is not triggered by the proposed Addition.

But even if Appellants are allowed to raise the public space argument, the public space requirement is satisfied by the entrance and lobby of the Marriott Hotel. 11 D.C.M.R. § 633 provides that the public space must be "[a]n area equivalent to ten percent (10%) of the total lot area...[,] shall be located

immediately adjacent to the main entrance to the principal building or structure on the lot, and shall serve as a transitional space between the street or pedestrian right-of-way and the building...[,] shall be open to the sky or have a minimum vertical clearance of one (1) story or ten feet (10 ft.)...[,] shall be suitably lighted and landscaped for public use, and... shall be open and available to the general public on a continuous basis."

The entrance and lobby of the Marriott meets all of these conditions. It exceeds 10% of the total lot area, is located at the front entrance of the Marriott, serves as a transitional area, is 1 story in height and well lighted, and is open to the public at all times. DCRA Exhibit 8, Lobby Drawing. Therefore, the public space requirements for the building are satisfied by the Marriott's entrance and lobby.

CONCLUSION

For the reasons stated above, Appellants' arguments are without merit. Therefore, the Appeals should be denied.

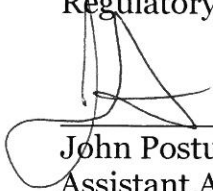
Respectfully Submitted,

IRVIN B. NATHAN
Attorney General for the District of
Columbia

MELINDA BOLLING
General Counsel
Department of Consumer and
Regulatory Affairs

Date:

3/25/14



John Postulka*
Assistant Attorney General
Office of General Counsel

Department of Consumer and
Regulatory Affairs
1100 4th Street, S.W., Suite 5266
Washington, D.C. 20024
(202) 442-8403 (office)
(202) 442-9447 (Fax)
john.postulka@dc.gov
*Attorney for Department of
Consumer and Regulatory Affairs*

*Admitted to practice in Michigan. Practicing in the District of Columbia pursuant to D.C. Court of Appeals Rule 49(c)(4).

CERTIFICATE OF SERVICE

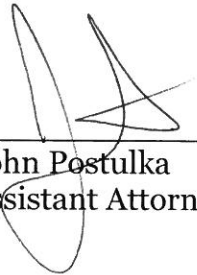
I hereby certify that on this 25th day of March 2014, a copy of the foregoing Brief was served via e-mail to:

David Avitabile [DAvitabile@goulstonstorrs.com]
John Epting [JEpting@goulstonstorrs.com]
Counsel for Intervenors

John Patrick Brown Jr. [JPB@gdllaw.com]
Cynthia Giordano [CGiordano@saul.com]
Counsel for Appellants

Date:

3/25/14



John Postulka
Assistant Attorney General