
April 11, 2014

BY ELECTRONIC FILING

Lloyd J. Jordan, Esq.
Chairperson
Board of Zoning Adjustment
441 4th Street, N.W., Suite 210
Washington, D.C. 20001

Re: BZA Appeal No. 18735 of NH Street Partners Holdings, LLC
Appellant's Motion to Waive 14 day filing deadline and Submission of Toye
Bello's Response

Dear Chairperson Jordan and Members of the Board:

Attached is Appellant's Motion to waive the 14 day deadline to file materials into the record, pursuant to 11 DCMR § 3113.8 (Form 150) and Toye Bello's Response to DCRA and Intervenor's Pre-Hearing Statements.

If you have any questions please have the staff at the Office of Zoning contact the undersigned.

Very truly yours,

GREENSTEIN DELORME & LUCHS, P.C.



John Patrick Brown, Jr.



Lyle M. Blanchard, Esq.
Counsel for Appellant,
NH Street Partners Holdings, LLC

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion and Report were sent on April 11, 2014 to the following by electronic mail:

Mr. Patrick Kennedy, Chair, ANC 2A
2A01@anc.dc.gov

Melinda M. Bolling, Esquire, General Counsel, DCRA
melinda.bolling@dc.gov

John Postulka, Esquire, Assistant Attorney General, DCRA
john.postulka@dc.gov

John Epting, Esquire, Goulston & Storrs
jepting@goulstonstorrs.com

David Avitabile, Esquire, Goulston & Storrs
davitabile@goulstonstorrs.com

Cynthia Giordana, Esquire, Saul Ewing, LLP
cgiordana@saul.com



Lyle M. Blanchard, Esq.

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

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.:

BZA Case No. 18735

Motion of:

☐ Applicant

☐ Petitioner

☒ Appellant

☐ Party

☐ Intervenor

☐ Other _____

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

Waive the fourteen-day filing deadline pursuant to 11 DCMR § 3113.8.

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 Pre-Hearing Statements filed by DCRA and the Intervenor, including the letter from Mr. Armando Lourenco, offered new arguments and documents which were not previously part of the public record, not part of the subject permit application and approval process and/or not available to the Appellant. Based on this more complete record, this detailed response and rebuttal is intended to provide the Board of Zoning Adjustment a more full discussion of the zoning violations in sharp contrast to the cursory endorsement of the incomplete and flawed permit approval process.

CERTIFICATE OF SERVICE

I hereby certify that on this

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day of

April

Month

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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:

Lyle M. Blanchard

Print Name:

Lyle M. Blanchard, Esq., Greenstein DeLorme & Luchs

Address:

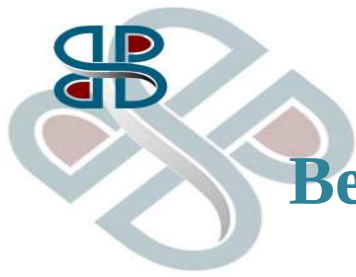
1620 L Street, NW, Suite 900, Washington, DC 20036

Phone No.:

202-452-1400

E-Mail:

lmb@gdllaw.com



Bello, Bello & Associates, LLC

April 11, 2014

Lloyd J. Jordan, Esq.
Chairperson
D.C. Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210 - South
Washington, D.C. 20001

**Re: BZA Appeals No. 18735
Response to DCRA and Intervenor's Pre-Hearing Statements**

On behalf of the Appellant, I have reviewed the Pre-Hearing Statements filed by DCRA and the Intervenor, including the letter from Mr. Armando Lourenco. Collectively, these filings offered new arguments and documents which were not previously part of the public record, not part of the subject permit application and approval process and/or not available to the Appellant in filing the original appeal or its pre-hearing statement. Based on this more complete record, I have prepared this detailed response and rebuttal which is intended to provide the Board a more full discussion of the zoning violations in sharp contrast to the cursory endorsement of the incomplete and flawed permit approval process provided by the Intervenor and Mr. Lourenco.

1. **Single Building / Building Connection**

A. **Facts**

The Zoning Regulations provide that there can only be one building on a single lot of record. Here there is only one lot of record, Lot 190. Thus, Intervenor is not able to build the proposed Hyatt Hotel unless it can accurately characterize it as an addition to the existing Marriott Hotel. The fact is that the Hyatt Hotel, if built, will have no natural or functional relationship to the existing Marriott Hotel.

To argue that the Hyatt Hotel is an “addition” to the Marriott Hotel, the Intervenor proposes a service corridor that snakes along the west side of the first floor of the proposed Hyatt. The service corridor will serve Hyatt service personnel, not the Marriott Hotel, its guests or the general public. In addition, the proposed plans show two other doors into the service corridor. None will be from the Marriott Hotel. One will be from a Starbucks and one will be from a Walgreens. The Starbucks and Walgreens are tenants of the Marriott Hotel, but are not “Commercial adjuncts” as defined in § 199.1, because neither are “within the hotel.” Separately, the plans reflect a carve-out to the Hyatt Hotel that would not block what appears to be the Marriott Hotel’s existing or intended emergency egress stairs to M Street.

B. No Meaningful Connection to Marriott

Intervenor and the Zoning Administrator (“ZA”) argue that in order to understand what constitutes a single “building,” one needs only look to the definition of “Building” in § 199.1.

Section 199.1 provides only a negative definition of what is **not** a “building.” It says that when there are separate structures or separate portions of a structure that are “separated from the ground up or from the lowest floor each, each portion shall be deemed a separate building.... The existence of communication between separate portions of a structure below the main floor **shall not be construed** as making the structure one (1) building.” (Emphasis added.)

The Intervenor and the ZA have argued that § 199.1 means that **any** technical communication or access between two structures or portions of a structure at the main floor only is sufficient to cause them to be deemed a single “building” even where, as here, there are clearly two different and unrelated occupancies (the Marriott Hotel and the competing Hyatt Hotel).

In fact, to understand what can reasonably be built on a single “lot of record” requires a deeper analysis of the Zoning Regulations. The “Building Permits” regulation (§ 3203.3) explicitly provides that:

a building permit ***shall not be issued*** ... unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record; except a building permit may be issued for...

(c) any combination of commercial occupancies separated in their entirety, erected or maintained in a single ownership shall be considered as one (1) structure.

(Emphasis supplied.)

Thus § 3203.3 says that there shall not be two structures on a single lot of record, and that only a narrow set of exceptions to that rule apply. Where, as here, there are clearly two separate occupancies, two structures or portions of a structure can be deemed a single structure *only* if the occupancies are maintained in a single ownership. This makes sense from a public policy perspective. Where a single owner builds two structures or portions of a structure, the public interest can be reasonably assured that sufficient and appropriate facilities will exist to serve both structures. In other words, where there is a single ownership it can be presumed that there will be a “meaningful connection” and relationship between any two structures built on a single lot of record which justifies the computation of the applicable zoning standards (e.g. parking , loading, yard requirements) based on the record lot and the buildings as a single unit as opposed to applying the zoning standards to each individual building.

In this case, there are two separate, directly competing and unrelated occupancies, the Marriott and the Hyatt. They do not have a single ownership or single management. They are not complementary or homogeneous occupancies, and no observant person would think that they are. In fact, they are directly competing occupancies. Therefore, there is no justification for applying the zoning standards to the Marriott and the Hyatt buildings as if they were a single building and in order for the Hyatt to properly receive a building permit it must have a “separate lot of record.” But the Hyatt on Assessment and Taxation Lot 880 does not have a “separate lot

of record” and therefore it is not entitled to a building permit. For this reason the existing building permit must be revoked.

When the definition of “Building” in § 199.1 is read in context with § 3203.3(c), it is also clear that if a structure does not meet the strict requirements of 3203.3(c) as in the case of a bona fide addition a “meaningful connection” and not a mere token connection must exist. Otherwise the intent and purpose of 3202 is clearly subverted. A “meaningful connection” is different than a “technical connection.”

Put more directly, in the absence of common ownership (which does not exist here), the definition of a building in § 199.1 and § 3202.3 clearly intend that in order for two occupancies to be deemed a single structure to be built on a single lot of record requires ***a meaningful homogeneous communication*** and relationship between the two occupancies which justify the application of the applicable zoning standards to the combined occupancies.

Here there is no such meaningful connection. Facts are important in making zoning determinations, and the facts in this case show that the Marriott and Hyatt hotels are entirely separate and therefore comprise separate, principal buildings. Key features include:

1. The parking levels below grade are separate and are independent of each other with neither pedestrian, nor vehicular cross access;
2. Each building is designed to maintain, independently and separately of each other, the minimum number of required exits in such manner as to function as two separate buildings;
3. The two buildings maintain two separate fire/life safety systems, such as sprinkler and fire alarm systems, necessitating the need for two independent fire control rooms or command centers;
4. The Marriott and the Hyatt hotel have two different addresses;
5. As discussed below, the so-called shared service corridor is not motivated by the need to establish meaningful connection between the two buildings, as it is compelled by the constraint of the necessity of making the “single building” function as two separate buildings because of the fact of separate ownership

entities. One only need imagine the practical difficulty upon the service and maintenance logistics for Walgreen and Starbucks without the necessary easement to access the court and rear of the Marriott through the service corridor; and

6. Neither the Marriott nor the Hyatt will have unfettered practical access to the aggregate number of loading berths given that two are housed within the Marriott building from which there is no direct access to the Hyatt side of the building.

Structures built for competing purposes with no amount of meaningful common facilities (*e.g.*, parking, service bays, entrances, etc.) cannot reasonably constitute a single building for purposes of complying with the Zoning Regulations. In this case there are two competing hotels with (i) separate ownership, (ii) no commercial connection, and (iii) no connection that would be visible to a consumer, hotel guest, visitor or passerby, and (iv) no meaningful physical connection. Under these facts, the Zoning Regulations do not reasonably permit that the two hotels be deemed a single “building” for zoning purposes. Doing so would step over the line of reasonable interpretation and eliminate any reasonable distinction between single and separate buildings thereby thwarting the purpose and intent of section 3203.

C. **Exceptions to Building Lot Control**

In fact, the Zoning Regulations expressly deal with the circumstance of two principal buildings or structures on one lot, such as are proposed in this case. See § 2517 (“Exceptions to Building Lot Control”). The Zoning Regulations contemplate a situation where two principal buildings or structures occupy a single subdivided lot of record. They provide that each building must comply with all applicable provisions of the Zoning Regulations when isolated within the boundaries of an imaginary or theoretical lot, as a matter of right such “that all requirements of this chapter (such as use, height, bulk and open spaces around each building) . . . are met.” 11 DCMR § 2517.2.

Intervenor has not sought to avail itself of § 2517. The reason is because Intervenor is unable to comply with several key zoning standards including parking , loading, public space and

rear yard requirements. In fact, the problem of complying with the tension in aggregate compliance with all applicable Zoning Regulations when a combination of commercial occupancies is not maintained in single ownership cannot be better illustrated than presented by the Hyatt building. And Interveners' strained attempt to meet the parking requirements for the proposed Hyatt is a prime example of the problems the Zoning Regulations anticipated when separate commercial occupancies on a single record lot are not held in common ownership.

The Hyatt originally sought and was issued a building permit to construct on "Lot 880" which is ***not*** a record lot. Thus, it is no surprise that the zoning reviewer rightfully requested record lot subdivision (see Intervenor's Exhibit H 1) and further sought explanation on why the proposed building is represented as an "addition."

It is readily apparent that Intervenor was unable to construct the Hyatt building on its own record lot or on a theoretical lot as set forth under § 2517 in conformance or compliance with the applicable minimum parking and loading requirements, amongst a myriad of other compliance difficulties. That is the singular driving force for the extraordinary effort undertaken to represent it as a single building along with the Marriott structure on a separate lot of record.

D. The Service Corridor Does Not In Fact Connect the Marriott and Hyatt Hotels

As noted above, the drawings identify a service corridor that will be used by Hyatt personnel. The drawings also identify a door from the Starbucks and one from the Walgreens which connect to the service corridor. These two doors cannot constitute a "meaningful connection" to the Marriott Hotel because they do not connect to the Marriott Hotel. The definition of "Hotel" in § 199.1 recognize "Commercial Adjuncts" to a hotel as only those within the hotel. Neither the Starbucks or the Walgreens connect to the Marriott Hotel, and are therefore not "within" the hotel. Thus, doors from these separate establishments cannot form part of a "meaningful connection" to the Marriott occupancy.

E. **Distinguishing Prior Case**

The Intervenor cites the decision of the BZA in Appeal No. 16646 in support of its argument that the service corridor connection is sufficient to comply with the “meaningful communication” requirement. I agree that that case is instructive, but not in support of the Intervenor’s tenuous position. The key aspects of Appeal No. 16646 are the following:

1. The subject property was in a residential district, not a commercial one.
2. The subject property and the related structure were owned by the same person, not by two unrelated persons.
3. The subject property was a owner-occupied single family dwelling, not two commercial properties and operations.
4. The involved tax lots were in existence prior to May 12, 1958 and are encumbered by a highway plan therefore meeting the exception to the record lot requirement pursuant to section 3202.3.

Each of the first three characteristics clearly illustrate my point, that where there is single ownership of multiple structures, ***it is reasonable for zoning authorities to presume that the owner will construct structures that are consistent with and suitable for a single lot of record, from the perspective of a person*** utilizing the lot of record. Furthermore, in this instance the fourth characteristic provided an independent exemption from the record lot requirement in accordance with § 3202.3.

2. **Parking Requirements Are Not Met**

A. **Parking History and Calculations**

According to the Intervenor, the Marriott Hotel was built in the late 1970s with 89 parking spaces. It was expanded in 1988 by 71 hotel rooms, requiring an additional 18 parking spaces and 18 were added (for a total in 1988 of 107 parking spaces). The Marriott Hotel was further expanded by 56 rooms in 2006, requiring at least 14 additional parking spaces and apparently 33 are claimed to have been added (bringing the total to 140 parking spaces). Taken

in totality the Marriott record lot, including the proposed “Hyatt addition” is required to provide 169 parking spaces as follows:

89 spaces required at the time of the new construction of the Marriot;

18 spaces required at the time of the addition of 71 rooms

14 spaces required at the time of the increase in number of guestrooms by 56 rooms

48 spaces required for the Hyatt addition, including function space;

$89 + 18 + 14 + 48 = 169$ required parking spaces.

To demonstrate compliance, the Intervenor initially indicated on project plans that 34 parking spaces will be provided within or beneath the Hyatt structure, while 14 excess parking spaces on the Marriott parking facility will be used to comply with the minimum number (48) required for the Hyatt addition.

In fact, the project plans for the Hyatt addition depicted parking 31 parking spaces, a significant number of which did not comply with the parking space dimensional, size, design and striping requirements stipulated in respective sections of the Zoning Regulations.

The zoning reviewer accurately cited as a review comment the noncompliance of the proposed parking spaces with these applicable provisions, which elicited the afterthought of invoking the valet parking provisions of § 2115.9, including that all 48 additionally required parking spaces would now be provided within the Hyatt structure.

The fact is that there is no evidence that the project plans upon which approval and issuance of the building permit is predicated were revised to reflect compliance with the valet parking provisions, which the Hyatt structure is not entitled to, as further briefed below.

Further, the Intervenor asserts to provide an aggregate of 188 (140 + 48 valet spaces = 188) parking spaces for the Marriott record lot without the benefit of review of the parking plans for the Marriott structure

B. **Intervenor's Analysis of Applicable Parking Regulations is Wrong**

The Intervenor's position that it meets the parking requirements of the Zoning Regulation is premised upon its conclusion that the 89 parking spaces provided by the Marriott Hotel when it was first constructed are not required parking spaces and are therefore excess parking spaces which can be used by the Hyatt Hotel for compliance with its applicable parking obligations.

This theory is simply wrong, and is not supported by the plain language of relevant Sections of the Zoning Regulations or by the historical interpretation of those regulations. In fact, according to Intervenor's argument, the record lot site would be able to increase by 359 guestrooms (89 x 4 = 359) rooms before requiring any additional parking. This clearly cannot be right.

The central issue is whether the 89 parking spaces provided by the Marriott at the time of its original construction are now considered required parking or non-required parking. The Zoning Regulations speak directly to this issue. It is without dispute that the ZA's authority is limited to the interpretation and enforcement of applicable provisions of the Zoning Regulations as they exist at the time of the application for a building permit (see § 3202.4 (a) and (b) under the "Administration and Enforcement" Chapter), except as otherwise permitted under the vesting rules of § 3202.5.

Section 2100 applies to the parking issues here. The BZA has consistently interpreted § 2100.6 as granting parking credits to uses *in existence prior to May 12, 1958*. This credit system is *not applicable to uses established after May 12, 1958*. The Marriott Hotel was constructed in 1978, and therefore the credit system does not apply to it.

Section 2100.9 provides that the determination of increase in use be based on “the increase in intensity of use the structure undergoes on or after May 12, 1958, whether the total increase occurs at one time or in successive stages.”

In this case, Intervenor’s counsel asked the ZA to wrongly interpret the parking provisions. The regulations applicable when the Marriott was first built provided that the minimum number of parking spaces that could be provided was 0 and the maximum was one for every 4 guestrooms. Thus, the Marriott could have chosen to provide 0 parking spaces or 89 parking spaces (354 divided by 4 equals 88.5). The Marriott chose to provide the maximum number of spaces (89). These calculations are reflected in the Computation Sheet (Exhibit I of Intervenor’s submission). The Marriott chose to provide the maximum number of parking spaces required. As a result the 89 spaces are required, not non-required spaces, and must be maintained and cannot be reduced as prescribed under § 2100.10 (a).

However any parking physically provided on site is deemed required parking which cannot be eliminated nor used as excess parking to offset additional required parking.

The Intervenor’s argument is that the Marriot was constructed after May 12,1958 at a time when the Zoning Regulations set forth maximum parking standards for hotels in the CR District and as such any parking which was provided can be deemed non-required excess parking. This is contrary to the plain language of § 2100.10.

The foregoing interpretation contradicts the plain meaning of § 2100.10 (a) and (b), which regulate reductions in parking spaces. Section 2100.10 (a) says quite clearly that if the existing number of parking spaces (e.g., those provided before the current regulations were in place) is less than or equal to the minimum number of parking spaces now required by law, the number of parking spaces cannot be reduced. And § 2100.10 (b) provides the corollary, that if

the existing number of existing parking spaces is more than required by current law, the spaces cannot be reduced to less than what current law requires.

If parking cannot be reduced beyond the minimum number of spaces required by current law, it is inconsistent to say that the Hyatt Hotel does not have to comply with *existing* regulations dictating the number of *minimum* parking spaces. To conclude otherwise one has to ignore § 2100.10 by treating the original 89 Marriott parking spaces as surplus. But under the existing parking reduction regulations they are not surplus; they are treated as required minimum parking requirements.

It is clear error for the ZA to have held that the Hyatt Hotel does not have to comply with the current regulations applicable to minimum parking spaces, by in effect allowing the existing Marriott parking spaces to be wrongfully classified as non-required parking, or excess parking spaces

This interpretation is consistent with prior zoning approvals for the Marriott additions. Specifically, the 1988 Marriott Hotel addition (which increased the number of guestrooms by 71) was subject to additional required parking of 18 spaces. This increased the number of required spaces in 1988 from the original 89 to a total 107 spaces (see Exhibit # I of Intervenor's submission). If the original 89 parking spaces were surplus, the Zoning Administrator would not have required the provision of additional parking spaces for the 1988 and 2006 additions.

C. **Current Parking**

Section 3202.2 sets forth an itemized list of documents and other information sufficient for the ZA to make a determination as to the compliance of a project with all applicable provisions of the Zoning Regulation. Even assuming that the Hyatt was a legitimate addition to the Marriott, then the Building Plat provided for the project should have been that of Lot 190, not Lot 880. Likewise the parking plan should have been for the entire parking garage, not limited

to the Hyatt garage levels alone. A central question in the appeal is whether the permit application documentation supports the ZA's conclusion that the Hyatt project complies with all of the provisions of the Zoning Regulations applicable to it. The Intervenor and the DCRA argue that the ZA's approval is inextricably tied to the Marriott building yet the relevant Marriott plans are not provided. For example, Intervenor's claim that the Marriott contains 140 parking spaces appears not to have been substantiated by submission of aggregate parking level layout or parking plan as a part of the review of the Hyatt addition. The Marriott garage plans would also have been needed to support Hyatt's claim that it would comply with the required 48 parking spaces by providing 34 spaces under the proposed Hyatt and use 14 spaces located in the Marriott garage.

D. **Review of the Valet Parking Provision of Sec 2115.9**

The Hyatt Hotel cannot invoke valet parking provisions to correct for deficiencies in the plan. Several other problems exist, all discussed below.

Section 2115.9 says that where at least 75 parking spaces are required and where parking will be provided in a parking garage, the valet parking provisions of the Zoning Regulations (§§ 2115.11-18) *may* apply.

However 75 parking spaces are **not** required by the Hyatt Hotel structure and the Hyatt is **not** providing 75 parking spaces. The Intervenor contends that the 75 parking space threshold is met by the combined parking facilities to be provided by the Marriott and the Hyatt. This claim is patently absurd and a clear subversion of the intent of section 2115 given that the parking garages for the two hotels are not connected. The Hyatt and Marriott parking garages are physically separated from one another in their entirety. Hyatt's parking is designed, and intended to be operated as an independent parking garage separate from the Marriott parking garage.

Sections 2115.9 and 2115.11 both provide that the parking regulations “may” be waived, not that they “shall” be waived. Since the parking space dimensional, size, design, and striping requirements may only be waived subject to the D.C. Department of Transportation’s (“DDOT”) determination specifying a twelve (12) hour peak period during which the parking facility is managed by employed parking attendants as set forth in § 2115.11. The ZA cannot waive these requirements prior to and without DDOT’s review and determination as required. It is likely possible that the DDOT could determine that valet parking for the Hyatt Hotel is likely to have a substantial adverse impact on M street traffic given that its design does not incorporate a drop off area and therefore is not conducive for valet parking as contemplated by the plain language of § 2115.11.

There is no evidence that the ZA referred the project plans to DDOT for review and determination whether in fact the project would meet DDOT’s criteria for supporting a waiver and for determination of a specified twelve (12) hour peak period.

Section 2115.12 requires the posting of a permanent sign which not only states that attendant assisted parking is required, but also state the hours during which attendant parking is required; ostensibly to coincide with the specified peak hours.

Section 2115.12 can be read to imply that attendant parking may not be available outside of the peak period, and that self-parking may be necessary, with the related need for maneuverability and ingress, egress access.

Section 2115.14 actually contemplates this scenario in stipulating that where aisles are provided, it shall comply with the standards set forth in §§ 2117.5 and 2117.6. Section 2117.5 requires a minimum aisle width of 20 feet for ninety degree angled parking.

The Hyatt building provides aisles in both of its parking levels, but Exhibit B does not indicate any dimensions for the aisle widths.

3. **Loading Requirements**

A. **Current Loading Requirements Are Not Met**

The Intervenor argues that the Marriott was originally constructed in the late 1970s with loading that complied with then-existing regulations applicable to a hotel with 354 hotel rooms. From this the Intervenor concludes that the ZA is foreclosed from interpreting the current Zoning Regulations as requiring additional loading, notwithstanding (1) that those same regulations have been amended to require greater loading for the same number of guestrooms, and (2) that the Marriott has been expanded twice and the Hyatt Hotel, if constructed, would be a third expansion (with the expansions totaling 295 rooms). In other words, the Intervenor's argument is that the Marriott Hotel could theoretically increase the number of guestrooms to without limitation, but provide no additional loading.

Loading is treated similarly to the parking regulations. Sections 2200.1 to 2200.9 provide for the conditions under which additional loading is or is not required, including with respect to additions.

Section 2200.9 subjects pre-1958 uses increasing in intensity to standards based on cumulative increases in intensity of use over a successive period. Therefore Intervenor is wrong when it argues that the loading requirements for the Marriott Hotel were fixed in stone when it was first built in the late 1970s. This error is particularly egregious when one notes that the minimum loading requirements, including dimensional standards, have been amended since the construction of the Marriott hotel in the 1970s.

If the requirements for loading berths remained the same as at the time of the original construction of the Marriott, the hotel would today be subject to providing twice what it was

required at the time of its construction since it has increased its intensity of use successively and cumulatively by 295 rooms.

At the time of the new construction of the Marriott, the Zoning Regulations required hotels to provide a minimum of one (1) and a maximum two (2) loading berths; and a minimum of three (3) and a maximum of six (6) service spaces **for each 200 rooms**.

In its “Statement of Reasons” (“Statement”) in ZC Order 314, Case No 79 -1, under the heading “Goals of the Revised Regulations” the Zoning Commission identified as an important goal, the need to reduce neighborhood impacts from the parking and loading activities of hotels (see page 14, goal No. 6): “[t]he Zoning Regulations cannot be made to apply retroactively. However, the Commission believes that all new or expanded hotels must provide adequate parking and loading facilities to accommodate the basic demands generated by the hotel.”

Also, the same “Statement” in item No. 10, under the section titled “Specific Regulations Adopted” set forth the following: “In addition, the Commission increased the required number of parking spaces in W and CR Districts, consistent with the recommendations of the Department of Transportation. The Commission also accepted DDOT’s recommendation to increase the size of loading berth facilities associated with hotels.”

Thus, it is simply wrong to argue, as Intervenor does, that parking and loading berths requirements were fixed in the 1970’s for the Marriott Hotel record lot. They were not. The Zoning Regulations have increased the parking and loading berth requirements, and those increased obligations, embodied in the Zoning Regulations, apply to the Hyatt Hotel. There is no argument to support the Intervenor’s preferred outcome in this case: complying with parking and loading berth requirements that are less restrictive than existed even in the late 1970s.

It appears that the successive increase in intensity of use on the Marriott record lot has not been subjected to compliance with the loading berth and other related requirements in effect at each of the prior expansions of the Marriott Hotel. But nothing prohibits the ZA from reviewing for compliance the totality of the increase in intensity of use, as set forth under § 2200.9. Indeed, the law requires it.

The “Statement of Reasons” offers an insight into what the Zoning Commission’s intent and purpose was in critically evaluating the adverse impact of hotels on neighborhoods where they exist and plan to expand and setting forth amendments to mitigate those impacts pertaining to parking and loading requirements.

Any interpretation which contends that a hotel may increase the intensity of use of number of guestrooms without regard to the current Zoning Regulations not only flies in the face of basic zoning principles, it runs contradictory to the plain meaning of amended provisions (which sought to increase the size of loading berth facilities associated with hotels).

The Marriott Hotel has expanded twice and now seeks a third expansion. If the Hyatt Hotel is approved, the record lot’s intensity of use will have increased by a total of 295 guestrooms. Nonetheless, it has never complied with the requirement of providing a single loading berth that is 55 feet deep. Nor has it complied with the obligation to provide a sufficient number of berths.

The problem with Intervenor’s interpretation of the loading regulations is self-evident. Even if it is conceded that the loading provisions are silent on whether additional loading is required for a successive tier of guestrooms over 200 [this is the Intervenor’s argument], it is beyond dispute that the Marriott record lot has increased in intensity of use by a successive 295

rooms combined since the amendment to the loading provisions requiring a greater number and a greater depth of 55 feet.

Perhaps the most important comment of all is that the loading berths provided within the Marriott building cannot serve the proposed Hyatt Hotel, since they are inaccessible from one interior space to another. So in the end the Intervenor's argument is entirely theoretical, because the Hyatt Hotel is entirely separate, physically and in ownership, from the Marriott Hotel. In the end it makes literally no sense for Intervenor to argue that the Marriott loading berths satisfy the regulations applicable to the Hyatt Hotel. And any line of analysis that leads in that direction is wrong legally, and from a policy perspective.

B. Location of Required Loading Berths

Section 105 of the Zoning Regulations, entitled "Zone Districts" states that the purpose of this section, is to divide the District of Columbia into distinct zone districts.

As set forth in § 105.1 (c) the Commercial-Residential zone district ("CR") is defined as a Mixed Use District. It is not a Commercial District.

The plain text of § 2203.1 (b) (3) is unambiguous in that required loading berths are only permitted to be located anywhere on a lot only in **Commercial and Industrial Districts**. The term of reference is "Districts" in other words zone districts as set forth in § 105.1, not commercial and industrial properties.

The Hyatt lot and proposed structure converts what was otherwise a side yard into a court. In fact, since the six (6) delivery spaces the Marriot was required to provide at the time of its new construction are now located within an open court created by the proposed Hyatt building, a new nonconformity not in existence is created.

4. **Roof Structure Setback**

Section 400.7 (b) provides that if a penthouse is erected on the roof of a building or structure, “it shall set back from all exterior walls a distance at least equal to its height **above the roof upon which it is located.**” (Emphasis supplied.)

This subjects penthouses to the prescribed set back from the exterior wall of the roof or that portion of the roof of the building or structure upon which the roof structure or penthouse is located; recognizing that the roof of a single building may not be monolithic, may be separated by courts, as in the instance of the Marriott/Hyatt roof, and may vary in height or by story.

The roof of the Marriott structure is separated by a closed court from the roof of the proposed Hyatt hence the Hyatt penthouse cannot be deemed to be located upon the roof of the Marriott structure; nor can that exterior wall serve as the wall from which the set back alluded to in § 400.7 (b) is intended since the roof structure is not located upon it.

Section 411.4 allows more than one penthouse or roof structure when roof levels vary by one (1) floor or more and as further specified. Going by Intervenor’s logic, both roof structures under this scheme are subject to the set back requirement set forth under § 400.7 (b) from only one exterior wall.

Further, since both the Marriott and Hyatt structures are deemed, by Intervenor, a single building on a separate lot of record, and assuming that the roofs are of the same height and do not vary by one (1) floor or more, then it is limited to a single roof structure, as prescribed and limited 411.3, excluding elevator cores.

There is no evidence that the ZA was presented with a complete roof plan in order to make a compliant determination.

The roof structure located upon the roof of the Hyatt building does not set back an equal distance to its height from the exterior wall of the roof upon which it is located. Further, the

“single building” may very well contain more than one roof structure, because the project documents relied upon to obtain the building permit was insufficient, as prescribed and set forth in § 3202.2 (a), (1) through (4) and (b), (1) through (3).

For all the foregoing reasons, the project does not comply with applicable provisions of the roof section chapter.

5. **Public Space Requirement**

Based on Exhibit J (Computation Sheet ZA-78-663) of Intervenor’s submission, the lot upon which the Marriott was constructed was lot 187 and that lot was 59,291.95 square feet in area.

By the time of the 1988 addition (which increased guestrooms by 71), the Marriott lot had become Lot 190 and increased in area up to 64,445.98 square feet in area (see Intervenor’s Exhibit J; Computation Sheet ZA-88-97). So contrary to Intervenor’s assertion, the Marriott was not constructed on Lot 190. Therefore, the original Marriott lot (Lot 187) increased 5,154 square feet after its original construction to become the current Lot 190.

At the time of its construction, the Marriott would have had to provide 5,929.195 square feet of public space to obtain a building permit, but going by Exhibit E provided by the Intervenor, only 1,776 square feet of public space remains today.

It is a settled matter that the required open space, or any requirement of the Zoning Regulations for that matter, cannot be reduced or eliminated without approval of the BZA.

As Lot 190 is a separate lot of record upon which a single building is located, then what the Hyatt construction permit presents is, at a minimum, an opportunity for the ZA to require the replacement of the unauthorized reduction in a required public space based on a comprehensive review of the totality of the lot and “single building” thereupon. The Intervenor is in favor of

such comprehensive review when applicable to its parking analysis, but opposed in the instance of the required open public space.

Intervenor's arguments about the District being estopped from requiring such public space is analogous to suggesting that there is some form of statute of limitation placed on enforcement of a violation of the Zoning Regulations when such violation comes to light; and profoundly so when the opportunity arises out an application for a building permit to replace what was eliminated or reduced without authorization. There is no such limitation.

When the ZA fails to seize the opportunity to identify and mitigate a violation of the Zoning Regulations, it is deemed usurpation of the authority of the BZA.

The Intervenor's theory is odd from another perspective. It amounts to an argument that a willful act of violation of a specific provision of the Zoning Regulations somehow metamorphosis into a legal nonconformity, deserving of specified protections set forth in Chapter 20 of the Zoning Regulations. But this is in direct conflict with the definition of "Nonconforming structure" set forth in § 199.1:

"Nonconforming structure - a structure, lawfully existing at the time this title or any amendment to this title became effective, that does not conform to all provisions of this title or such amendment, ***other than*** use, parking, loading, and roof structure requirements. Regulatory standards that create nonconformity of structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, yard, court, and residential recreation space requirements."

Emphasis added. It cannot be argued that the Marriot Hotel is a structure in lawful existence when it willfully violated the Zoning Regulations by reducing in area the required public space without authorization after the issuance of its original certificate of occupancy. This is true notwithstanding that successive additions were permitted and issued other certificates of occupancy to accommodate its increases in intensity of use. Multiple violations do not amount to a conforming use.

The public space requirement was in effect at the time of the new construction of the original Marriott Hotel in the late 1970s, and has remained in effect to date without amendment. The Marriott was constructed on Lot 187, not Lot 190. Whereas the Marriott record lot has increased in size or area since its construction, the area of required public space has been significantly reduced unlawfully and without authorization.

In fact the certificate of occupancy upon which the Marriott Hotel now claims a status of lawful existence is rendered invalid because of the unlawful act of reducing the required area of public space upon which its original issuance was predicated

The after the fact representation by the Intervenor that an interior lobby of the Marriott serves to comply with the public space requirement provisions stretches the plain language and interpretation of those provisions beyond any reasonable or credible limit.

6. **Conclusion**

For all the foregoing reasons, it is my considered opinion that the ZA erred in issuing the building permit for the Hyatt structure or building.

Sincerely,



Toye Bello
Bello, Bello & Associates, LLC