

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18735 of NH Street Holdings LLC and No. 18737 of Chadbourne & Parke LLP, pursuant to 11 DCMR §§ 3100.2 and 3200.2, of Building Permit No. B1310607 for new construction of a 9 story 168 guestroom hotel addition to the existing Washington Marriott Hotel at premises 2121 M Street, N.W. (Square 70, Lot 880).

HEARING DATE: April 15, 2014

DECISION DATE: May 20, 2014 (Bench Decision)

DECISION AND ORDER

These appeals were submitted on January 24, 2014 by NH Street Holdings LLC and on January 27, 2014 by Chadbourne & Park LLP, the owner and tenant, respectively, of the adjoining property, (the “Appellants”). The appeals both concern similar issues and were consolidated by the Board at the hearing. The appeals alleged that the Building Permit No. B1310607 (the “Building Permit”) was erroneously issued in violation of the Zoning Regulations for numerous reasons discussed below and must therefore be revoked. Following a public hearing on April 15, 2014, the Board of Zoning Adjustment (the “Board”) voted to approve the appeals.

PRELIMINARY MATTERS

Appellant Representation

Appellant NH Street Holdings LLC authorized John Patrick Brown, Jr. Esq., Lyle M. Blanchard, Esq. and Kate M. Olson, Esq. of Greenstein DeLorme & Luchs, P.C. to represent it during the Board proceedings. Appellant Chadbourne & Park LLP authorized Cynthia A. Giordano, Esq. of Saul Ewing LLP to represent it during the Board proceedings.

Notice of Public Hearing

By memoranda dated January 27, 2014, the Office of Zoning (“OZ”) provided notice of the appeals to the Office of Planning, the Zoning Administrator (“ZA”) at the Department of Consumer and Regulatory Affairs (“DCRA”) (the “Appellee”), Renaissance Centro M Street LLC (the “Property Owner” or “Intervenor”), and Advisory Neighborhood Commission (“ANC”) 2B. Pursuant to 11 DCMR § 3112.14, on February 3, 2014, OZ mailed letters providing notice of the hearing to the Appellants, ANC 2B, the ZA and the Property Owner.

Party Status

ANC 2B was automatically a party to this proceeding. The Board allowed the Intervenor to file. There were no other requests for party status.

The Appellants' Case

The Building Permit for the Hyatt hotel addition (the "Project") is in violation of at least eight (8) sections or subsections of the Zoning Regulations as enumerated and discussed below and must, therefore, be revoked. One, there is no meaningful or substantial connection of the proposed Hyatt hotel to the existing Washington Marriott Hotel ("Marriott Hotel") shown on the plans even though the Hyatt Plans characterize the proposed hotel as an addition to the existing Marriott Hotel. Two, the proposed Hyatt Hotel fails to provide the required number of parking spaces. Three, the compact parking spaces shown on the Hyatt Plans fail to comply with the requirement in Section 2115.4 that compact parking spaces "shall be placed in groups of at least (5) contiguous spaces with access from the same aisle." Four, Building Permit exceeds the percentage of compact spaces allowed. Five, the proposed hotel does not comply with the total number of loading facilities required by Section 2201. Six, the loading area for the Hyatt is located in an open court in violation of Section 2203.1. Seven, the penthouse setback from exterior walls does not comply with Section 400.7(b) of the Zoning Regulations. Eight, the Hyatt Hotel fails to provide the required public space at ground level required by Section 633.

DCRA's Case

DCRA claims that Appellant's arguments lack merit for the following reasons. The addition proposed by the Hyatt is not a separate building in that it has a communication between separate portions of the structure that make the structure one building in three places, two are from retail spaces in the Marriott into a service corridor in the Hyatt and the third is from egress stairs in the Marriott to a vestibule in the Hyatt. The parking is not insufficient based on no parking requirement when the Marriott was first built, only 32 spaces are required for the Marriott's later additions and the Hyatt requires only 48 spaces for a total of 80 required spaces between the two hotel. Valet parking will be provided in the Hyatt which waives the requirements of 2115.1 through 2115.4. Additional loading is not required under Section 2201.1 because the existing Marriott hotel already contains over 200 rooms. The location of the loading in an open court is not applicable for the same reason. The penthouse is sufficiently set back from the exterior walls as the west wall is not an exterior wall. The required public space was provided when original Marriott was constructed in 1978 and the Hyatt addition is not .new development that would trigger additional public space.

Intervenor' s Case

The Project is an addition to the existing improvements on Lot that is connected through multiple above-grade connections that satisfy current standards. The existing improvements comply with the loading requirements. The Project meets the parking requirement of 48 spaces through 48 valet parking spaces within its parking garage. The existing improvements comply with the loading requirements. The Project satisfies the loading requirements through a loading berth, loading platform, and delivery space that are properly located off a private alley at the rear of the property. The Project's roof structure is properly set back from all exterior walls. No setback is required from the west wall of the Project, which is an interior wall facing a closed court. The Project does not require any additional public space at ground level, nor does it replace or remove existing public space at ground level. Such space is already provided for on Lot 190.

ANC 2A

The subject site is located within the jurisdiction of ANC 2A, which is automatically a party to this application. In a report submitted March 25, 2014, ANC 2B indicated that, at a regularly scheduled monthly meeting with a quorum present, it voted to oppose the development until lighting issues had been resolved. (Exhibit 25). ANC 2B voted at its regular monthly meeting on April 15, 2014 to oppose the Appellee's public space application. A letter by the ANC noting that these concerns have not been addressed and its objection to the Project remains. (See Exhibit __)

FINDINGS OF FACT

1. The Building Permit (No. B1310607) was issued by Department of Consumer and Regulatory Affairs on November 27, 2013 and describes the work as "new construction of a 9-story, 168 guestroom hotel addition to the existing Marriott Hotel. The addition includes below grade parking, a swimming pool, fitness area and will have a complete fire protection system." (See Exhibit A of Ex. 16.)
2. The property which is the subject of the Building Permit is located at 2121 M Street, N.W. (Lot 880 in Square 70) in the DC/CR zone district (the "Hyatt Property").
3. Lot 880 comprises only a portion of Record Lot 190 in Square 70. Lot 880 is a 18,250 square-foot assessment and taxation lot located mid-block on M Street between the Marriott property at the corner of 22nd Street and the Appellants' office building property at the corner of New Hampshire Avenue, NW. (See Ex. 20.)
4. Lot 880 is the site of the proposed Hyatt hotel and according to the Building Permit will be a nine (9) story, 168 guestroom hotel addition to the existing Marriott Hotel
5. The Marriott hotel property is located on lots 881, 883 and 884 (see Exhibit B of Appellant's Appeal (Ex. 1)) at address 1217-1221 22nd Street, NW and 2119 M Street, NW (the "Marriott Property"). The Marriott Property lots are improved with a nine-story hotel with 462 rooms, 8 suites and 12,000 sq. ft. of meeting space (Exhibit H of .Ex.16) along with separate retail uses (Starbucks and Walgreens) on Lot 883.
6. The Marriott Hotel was first constructed in 1978 on what was then Record Lot 187 with subsequent additions in 1988 and 2007. The 1988 addition added 71 rooms and the 2007 addition added 56 rooms. Record Lot 190 comprises 64,664 square feet. (See Trans. p. 162.)
7. The Hyatt Hotel project proposes to add 168 rooms and a 1,750 function room on Lot 880 (the "Hyatt Hotel" or "Project"). The Appellee has not filed for a subdivision to combine all the lots, 880, 881, 883 and 884 into a new record lot as is required for new construction. Neither the Building Permit nor its application and plans reference Lot 190.
8. The Intervenor submitted a Building Plat at the hearing. However, the Building Plat is not stamped approved by DCRA as it should have been if it was submitted with the Building Permit application and plans, nor does the Building Plat show the required improvements on the Marriott Property for the ZA to review in relationship to the proposed Hyatt Project. (See Ex. 34 and Trans. p. 265-273.) DCRA subsequently filed a stamped Building Plat (See Ex.

42); however, this Building Plat also does not sufficiently depict the required improvement on the Marriott Property for the ZA to review. DCRA's subsequently filed Building Plans (Ex. 36-46) do not include plans (e.g., elevations, loading, parking levels, public space and roof structures) of the Marriott Building that would enable the ZA to adequately review the impact of the Hyatt addition.

Building Connection

9. The Hyatt addition is separated from the Marriott Hotel by a non-public, service corridor located on Lot 880. The service corridor is a back of the house, ground-level corridor onto which two doors from the retail spaces (Starbucks and Walgreens) on Lot 883 open and one (locked) door from a stairwell opens. The door from the stairwell accesses a fire control room which Appellee characterizes as a "vestibule." These doors from the Marriott Building are mere communications between the buildings and are insufficient to provide a meaning connection between the Marriott Hotel and the Hyatt Hotel as the doors are inaccessible to the general public and guests of the two hotels.

Parking

10. The Hyatt Hotel provides 33 spaces per the plans submitted for permit, not the 34 noted on the zoning summary table. (See Sheet A002 of the Permit Plans in Exhibit C of Ex. 16).
11. The Zoning Regulations require one (1) parking space for every four (4) hotel rooms plus one (1) space for every 300 square feet of floor area in either the largest function room or exhibit space (11 DCMR § 2010.1).
12. Forty-eight (48) parking spaces are required for the Hyatt hotel as noted on Sheet A002 of the Permit Plans. The Permit Plans also note that 34 spaces are provided on the Hyatt Property and 14 spaces will be provided on the Marriott Property. (See Exhibit C of Ex. 16.)
13. The Marriott Hotel provided 89 parking spaces when it was constructed in 1978. Although the Zoning Regulations did not require a certain number of parking spaces, these 89 parking are considered as required spaces when additions are added later. Eighteen (18) additional parking spaces were required beyond the existing 89 spaces for the 1988 addition to the Marriott Hotel. (See Zoning Computation Sheets ZA-78-663 and ZA-88-97 in Exhibit I of Ex. 22)). Another 14 required parking spaces were added in 2007, which totals 121 required parking spaces at the Marriott Hotel. The Intervenor asserts that there are 140 parking spaces at the Marriott Property in total (See Exhibit K of Ex. 22.) However, no plans of the Marriott Building garage levels were provided to DCRA for the ZA to review with the Hyatt Project's Building Permit application. Further, applying the Zoning Regulations to the various Marriott additions, the correct number of required parking spaces is 169, which results in a deficit of 29 spaces at the Marriott.
14. The Hyatt Hotel is precluded from using the existing 121 (89+18+14=121) required parking spaces in the Marriott Hotel or any of the existing 140 parking spaces there. Thus, all of the required 48 parking spaces required for the Project must be provided within Lot 880, which results in a deficit of 14 spaces.

15. The compact spaces on the plans do not comply with the requirement of Section 2115.4 that compact spaces shall be placed in groups of at least five (5) contiguous spaces with access from the same aisle.
16. The compact spaces also fail to meet the requirement in Section 2115.4 that a maximum of 40% of parking spaces in an accessory parking area or accessory parking garage can be designated for compact cars. The Project Plans indicate that 20 of the 30 spaces (over 60%) are sized for compact cars.
17. The drive aisle widths are insufficient to meet the requirement of Section 2115.14 based on the plans submitted in that the valet spaces shown in the drive aisle severely constrict the aisle widths on lower level 1 and lower level 2. If the aisles are in fact 22 or 23 feet wide, having numerous valet spaces shown in the aisles would reduce the aisle width substantially below the 21 foot requirement. (See Exhibit B of Ex. 22 and Hearing transcript at p. 261-262).
18. In order to provide valet parking, the Hyatt must provide the threshold 75 parking spaces. However, the Hyatt is precluded from have valet parking, since it cannot utilize any of the 140 required parking spaces at the Marriott Hotel and the 33 spaces on the Hyatt Property are only 44% of the required 75 spaces. The parking garage of the Hyatt Project and Marriott Hotel parking garages are not interconnected and, thus, it is impractical to have valet parking for the Hyatt utilize parking spaces in the Marriott Hotel's separate parking garage.

Loading

19. As a free-standing building, the Hyatt Hotel does not provide the loading facilities required by Section 2201.1. A hotel (for guest room areas) in all districts is required to provide: (a) one (1) loading berth that is a minimum of thirty (30) feet deep; (b) one (1) loading platform of 100 sf; and (c) one (1) service/delivery space that is a minimum of twenty (20) feet deep.
20. As an addition, the Hyatt Hotel and the Marriott Hotel are deficient in providing the following: (a) minimum number and size of loading berths: 1 @ 30 feet deep and 1 @ 55 feet deep, (b) minimum number and size of loading platforms: 1 @ 100 sq. ft. and 1 @ 200 sq. ft., and (c) minimum number and size of service/delivery loading spaces: 1 @ 20 feet deep. (See Exhibit C of Ex. 22.)
21. The location of the loading facilities for the Hyatt Hotel also violates Section 2203.1. The loading area proposed on the Hyatt Property is located within an open court. However, pursuant to Section 2203.1, the Hyatt loading area cannot be provided "elsewhere on the lot" such as an open court, because the Hyatt Property is not located in a "Commercial" or "Industrial" district. Pursuant to Section 105 of the Zoning Regulations, the C-R zone district is a "Mixed Use (Commercial-Residential) District." and as such the C-R is a buffer district that minimizes negative impacts on adjoining property owners. (See Exhibit C of Ex. 16.)

Roof Structure

22. The penthouse setback from exterior walls shown on Sheet A300 of the Hyatt Plans ("North Elevation Plan") does not comply with the Zoning Regulations. The Regulations require that if

housing for mechanical equipment or a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located, pursuant to Section 400.7(b). The North Elevation Plan clearly depicts a ratio of less than 1:1. The set back of the west penthouse wall from the west exterior wall of the roof upon which the penthouse is located is only 7' 6" instead of the required 17' 6". (See Exhibit C of Ex. 16 and Exhibit D of Ex. 22.)

Public Space

23. Neither the Hyatt Hotel nor the Marriott Hotel provides the required public space at ground level required by Section 633. The underlying Lot 190 has a lot area of 64,446 square feet which would require 6,444 square feet of open space, including public space required independently by the Hyatt Property. There is no exemption for an "addition" in Section 633 and the public space provided by the Marriott Hotel is insufficient. The only exterior public space for the Marriott Building shown on the Plans is 1,776 sq. ft. which is insufficient for former Record Lot 187 and for the current Record Lot 190. The interior public space shown on the plans of 6,281 sq. ft. is inapplicable to the standard in Section 633 since is not public space accessible on a 24 hour basis. (See Exhibit E of Ex. 22.)

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.07(g)(3) (2008 Repl.)), to hear and decide appeals where it is alleged by the appellant that there is an error in any decision made by any administrative officer in the administration of the Zoning Regulations. (11 DCMR §§ 3100.2, 3200.2). In an appeal, the Board may reverse or affirm in whole or in part, or modify the decision appealed from (11 DCMR § 3100.4).

Incomplete Building Permit Plans

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. The Board is greatly troubled by Intervenor's failure to submit complete and accurate building permit plans required for the Zoning Administrator to make a well-informed determination of the applicable Zoning Regulations and compliance with those regulations. Section 3202 of the Zoning Regulations provides a detailed list of "necessary" documents and informed required to be submitted as part of a building permit application. In addition to the enumerated items, §3202.2 requires "other information necessary to determine compliance with this title." In the case, the Intervenor was seeking permission to construct an Hyatt hotel addition to the existing Marriott Hotel. However, Mr. Bello expertly testified that in his experience as a Zoning Administrator that the plans which were submitted and subject of review and approval were not complete or accurate under the circumstances, specifically the permit application

failed to show the existing Marriott Hotel to which the proposed addition was to constructed. In the end permit was issued to lot 880, not to underlying Record Lot 190 which will contain the existing Marriott Hotel and the proposed Hyatt Hotel addition. At the hearing, the Intervenor submitted a Surveyor's Building Plat for Lot 190 showing the new 9-story Addition to the Existing Building. This plat was not stamped as approved by the DCRA and was not part of the permit application or approved Permit Plans. As more fully described below, the incomplete and inadequate plans resulted in the Zoning Administrator's inability to make a well-informed and complete review and determination of zoning violations, including meaningful building connection, parking, loading, valet parking, rooftop set back and public space.

Hyatt Addition to the Existing Marriott is Not a Single Building

The Board recognizes that historically the single building connection may have been literally used to "game the system" to achieve more favorable treatment from height and other zoning purposes. However, the Board is unwilling to accept that any purported building connection is sufficient to establish a bona fide single building. The Zoning Commission has held, and the Board accepts, that a connection between an existing building and an addition must be a "substantial" or "meaningful" connection for the structure to be considered a single building for Zoning purposes. Z.C. Case No. 08-34 (2011) and Z.C. Case No. 04-36 (2006).

Here, the Board finds 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 Walgreens 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.

Hyatt Addition Does Not Meet Parking Requirements

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 as stipulated by the Intervenor:

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

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.

Valet Parking Not Authorized

The Hyatt Hotel cannot invoke valet parking provisions to correct for failure to provide the required number and proper configuration (size, width, compact ratio and location) of parking for the Hyatt Addition.

Section 2115.9 states 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 is without a reasonable basis and a clear subversion of the intent of § 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 more likely than not that the DDOT determine that valet parking for the Hyatt Hotel will 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.

Violation of Loading Requirements

A. Current Loading Requirements

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 current Zoning Regulations cannot require 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, the loading requirements for the Marriott Hotel were not 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 cannot be determined that the 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.

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. However, the ZA is required to review for compliance the totality of the increase in intensity of use, as set forth under § 2200.9 for the Hyatt Addition.

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.

Significantly, the loading berths provided within the Marriott building cannot serve the proposed Hyatt Hotel, since they are inaccessible from one interior space to another.

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

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 Marriot 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.

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

Public Space Requirements

Under §633, the original construction of the Marriott Hotel in 1978 was required to provide public space at ground level equal to ten (10) percent of the lot area of then Lot 187 (59,291.195) or 5,929 square feet. After the original construction, the Marriott was required to maintain that level of public space. Subsequently, the record lot underlying the Marriott was increased to 64,445 98 square feet (current 190). With the increased size of Lot 190 and the new development of additions to the existing hotel, the required public space should have been maintained and should have increased to 6,444 square feet. The current Hyatt addition clearly constitutes “new development.” BZA Order Nos. 17794, 17794-A of NH Street Partners Holdings, LLC (variance from public space requirement for renovation and expansion of existing office building). In this case, there is no evidence that the permit plans provided any information on compliance with the applicable public space requirements and the Zoning Administrator made no determination on this issue. The Board find that the permit should not have been issued without a review for compliance with the public space requirements. Further, the Board finds that the permit clearly violates §633.

After the fact, that Intervenor has provided new information that claims that the existing Marriott and Hyatt addition comply with §633 by providing 1776 square feet of public space in front of the Marriott entrance and another 6,821 square feet within the Marriott lobby. The Board finds that the interior Marriott Lobby space does not comply with §633 because it clearly is; 1) not open and available to the public on a continuous basis; and 2) not located as a transition between the street or pedestrian right-of-way and the building structure or structure. Finally, the interior lobby space is clearly counted against the gross floor area of the building.

Based on the findings of fact, the Board was persuaded by the Appellants that errors had occurred in the decision by the ZA to approve the Building Permit application and plans authorizing the construction of the Hyatt Hotel.

Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10 (d)(3)(B)) requires that the Board’s written orders give “great weight” to the issues and concerns raised in the recommendations of the affected ANC. As noted, the ANC had concerns with proposed development and opposed its impacts and adverse effects on the residential quality of life.

Based on the findings of fact and conclusions of law, the Board concludes that the Appellants have satisfied the burden of proof with respect to their claims of error in the administrative decision, made by the ZA to allow the issuance of Building Permit (No. B1310607) to the Property Owner for a hotel addition in the DC/CR District at 2121 M Street, NW (Square 70, Lot 880). Accordingly, it is therefore **ORDERED** that the appeal is **GRANTED**, and the Property Owner is directed to submit revised plans to DCRA consistent with the Zoning Regulations

VOTE: -0- (Lloyd L. Jordan, Marnique Heath, Jeffrey L. Hinkle, and Peter May
to approve; and one Board member, S. Kathryn Allen, not participating.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT A majority of Board members
approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL
TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.