

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

**Appeal of 22 West, a Condominium
and Advisory Neighborhood
Commission 2A**

* **BZA Appeal No. 18793**
* **Public Hearing: September 30, 2014**
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APPELLANT'S PREHEARING STATEMENT

"I can just say that...this will be governed – the design of this building and the uses in this building...will be governed by the PUD. So we would have to come back to the Zoning Commission in order [to modify]."

-- Christopher H. Collins, Attorney for Applicant,
Zoning Commission Case No. 07-21B¹

The Appellant, 22 West, a Condominium, by and through its undersigned counsel and jointly with Advisory Neighborhood Commission 2A, respectfully submits this Prehearing Statement in support of its Appeal of the February 10, 2014 determination letter by Matthew LeGrant, Zoning Administrator (the "Determination"), which modified the express conditions of Zoning Commission Order No. 07-21B relating to permitted signs on the proposed Hilton Garden Inn at 2201 M Street, N.W. (the "Property") and authorized the issuance of a sign permit (Permit No. SG 1400204, the "Permit") permitting the installation of three (3) signs on the Property. The Determination directly contradicts the express language of Zoning Commission Order No. 07-21B and violates 11 DCMR §§ 2409.2, 2409.6, 2409.7, 2409.8, and 2409.9; therefore, for the reasons set forth below, the Determination and the Permit should be REVOKED and the Zoning Commission should order the Department of Consumer and

¹ Transcript, Zoning Commission Case No. 07-21B, October 27, 2011, at p. 153

Regulatory Affairs to take all action necessary to require the removal of impermissible signs installed as a result of the Determination and the Permit.

I. JURISDICTION.

The Board of Zoning Adjustment is authorized to hear this appeal pursuant to The Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended, D.C. Official Code §§ 6-641.01 to 6-641.15 (formerly codified at D.C. Code §§ 5-413 to 5-432 (1994 Repl. & 1999 Supp.))) (the "Zoning Act") and 11 DCMR § 3100.2.

II. STANDING.

22 West, a Condominium, is a residential development within 200' of the Property comprised of the individual unit owners within the condominium building. A significant portion of the 22 West Condominium building faces the corner of 21st and M Street and the signage that has been installed by the owner of the Property in accordance with the Permit authorized by the Zoning Administrator's Determination. 22 West is aggrieved by the decision of the Zoning Administrator, in part, because the illuminated signage is clearly visible and adversely impacts the property value, aesthetics, and quiet enjoyment of the residents of 22 West, who authorized their Board of Directors to participate as a party in Zoning Commission Case No. 07-21B (which party status was denied by the Zoning Commission for failure to reach a majority vote.²) and have authorized their Board of Directors to file this appeal on their behalf. The grievance of 22 West is fairly traceable to the Determination, and is likely to be redressed by a favorable decision on appeal. Moreover, the organization has standing on behalf of its members because (a) individual property owners would have standing to appeal as property owners within 200' of the

² See Zoning Commission Order No. 07-21B at page 3.

Property, (b) the interests 22 West seeks to protect are germane to the organization's purpose as an organization formed under the District of Columbia Condominium Act, and (c) there is no requirement that individual members or unit owners participate directly in this matter. Accordingly, 22 West has standing under District of Columbia law to bring this appeal. *D.C. Library Renaissance Project et al v. District of Columbia Zoning Commission*, 73 A.3d 107 at 113 (2013).

III. STATEMENT OF FACTS.

1. Zoning Commission Order 07-21 approved construction of a boutique hotel on the Property. The applicant, PerStar M Street Partners, LLC (the "Applicant") sought to amend the approved order in Case No. 07-21 by applying to the Zoning Commission to modify the approved PUD Order in Case No. 07-21. The modification was assigned Zoning Commission Case No. 07-21B.

2. Numerous community organizations, including the Appellants 22 West and the Advisory Neighborhood Commission 2A, as well as West End Friends and the West End Civic Association, actively participated in Case No. 07-21B, raising numerous issues that were deemed "contested issues" at the hearing before the Zoning Commission on October 27, 2011. These "contested issues" are addressed in detail by the Zoning Commission on pages 17 through 20 and in the approved conditions in Zoning Commission Order 07-21B, which is attached hereto as Exhibit A.

3. Among the "contested issues" was signage for the hotel and proposed restaurant. Throughout the record in Zoning Commission Case No. 07-21B, there are numerous requests, including from the Appellant, to limit the hotel signage to a single location above the entrance to

the hotel, and to prohibit illuminated or “vertically-mounted” signs attached to the façade of the proposed building. *See* 22 West Submission in Zoning Commission Case No. 07-21B, page 2, attached hereto as Exhibit B.

4. The Applicant’s proposed plans (Exhibit 24 in the record of Case No. 07-21B, Sheets A1 and A2), depicted a single sign over the entrance to the proposed hotel on 22nd Street. *See* Exhibit C.

5. Despite there being only one sign depicted on the plans in Exhibit 24, the Applicant requested at the hearing to locate multiple signs on the building at the corner of 22nd and M Streets. *See* Transcript of Hearing, page 55-56, attached as Exhibit D. The Commission spent considerable time at the hearing questioning the Applicant regarding the proposed signage and discussing the impact of such signage, given the level of community concern expressed in letters from the ANC, WECA, and the Appellant. The Applicant then clarified that it was requesting approval of a “signage zone” as depicted in the plans. Transcript of Hearing, page 119-121 (also attached as Exhibit D).

6. At no time during the hearing did the Applicant or its architect refer to a signage plan as part of Exhibit 36. Exhibit 36 in the Record of Case No 07-21B does not clearly identify signage locations, as it is a reduced powerpoint presentation that was used for the aid of the Zoning Commission during the Applicant’s presentation.

7. On November 17, 2011, the Applicant submitted its proposed order for the Zoning Commission’s review and consideration. *See*, Letter from Holland & Knight, Exhibit 48 in Case No. 07-21B, attached hereto as Exhibit E. In the proposed order, the Applicant requested flexibility from several zoning requirements and the ability to amend the plans to conform to the requirements of the D.C. Construction Code requirements; including the ability to provide a

range in the number of hotel rooms, to vary the location and design of all interior components; to vary the number, location, and arrangement of parking spaces; to vary the sustainable features of the proposed building; and to vary the location and design of the ground-floor components of the building to comply with District law and regulation. Specifically, with respect to signage, the Applicant's proposed order contained no restriction on the number, location, or type of signage; nor did the proposed order specifically request the flexibility to vary the number of signs, location of signs, or type of signage included in the proposed development.

8. Zoning Commission Order No. 07-21B clearly places numerous restrictions on signage for the proposed development. Specifically:

a. Finding 28 notes that the ANC requested the Commission to "include in this Order a condition that the hotel sign should be above the hotel's entrance on 22nd street as shown on Pages A1 and A2 of the Applicant's final set of plans (Exhibit 24) and that the sign cannot be at a different location or be vertically mounted on the façade of the hotel or illuminated from within;"

b. Finding 43(b) states that "the Zoning Commission agrees with ANC 2A that there must be certainty that the actual signage will not differ from that depicted by the Applicant. Therefore, the Commission is adding a condition that the hotel sign must be above the hotel's entrance on 22nd Street as shown [on] pages A1 and A2 of the Applicant's final set of plans (submitted as Exhibit 24) and that the sign cannot be at a different location or be vertically mounted on the façade of the hotel or illuminated from within. The Applicant will be granted flexibility to make such changes as are required to conform to the District's construction code;" and

c. Paragraph A1 of the Decision in Order 07-21B states: “Notwithstanding the notes on pages A1 and A2 [each note indicating that the location and dimension of the signage was for illustrative purposes only] of Exhibit 24, but subject to the flexibility allowed under Condition No. 7(e) (discussed at paragraph 43(b) in this Order), the hotel sign shall be above the hotel’s entrance on 22nd Street as shown on those pages and that the sign cannot be at a different location or be vertically mounted on the façade of the hotel or illuminated from within.”

9. At the decision meeting for this case, Commissioner Konrad Schlater noted “Mr. Chairman, I would just like to say that I reviewed the order in pretty good detail and I think the Office of Attorney General did an excellent job capturing the discussion that we had. In particular, related to the lay-by lanes, the discussion of the hotel sinage [sic] and the discussion of the Francis Field Park, and I am prepared to support this moving forward.” Transcript, December 12, 2011, at 15-16, attached hereto as Exhibit F.

10. On or about December 31, 2013, Appellant’s representative Sally Blumenthal observed the installation of mounting brackets on the façade of the hotel development above the highest floor. Ms. Blumenthal contacted Mr. Collins, the attorney for the Applicant in Case No. 07-21B to inquire whether signage was being installed, to which Mr. Collins responded on February 10, 2014: “The brackets in your photo are for a back-lighted sign, as shown on the plans approved by the Zoning Commission...I was double-checking with the zoning authorities to confirm that this sign is permitted by the Zoning Commission’s order...The sign is not in violation of the zoning order.” *See* Appellant’s Statement of Appeal, Exhibit D.

11. On February 12, 2014, Ms. Blumenthal sent an e-mail to Zoning Administrator Matthew LeGrant inquiring about the approval of any signage on the development, and alerting the Zoning Administrator to the specific conditions regarding signage in Order No. 07-21B. *See*

Appellant's Statement of Appeal, Exhibit E. On February 19, 2014, Mr. LeGrant responded to Ms. Blumenthal, stating "I have previously discussed this issue with Chris Collins...and will re-review Zoning Commission's Order No. 07-21B. Once I conclude my review, I will let you know how the Order affects the proposed signage. I expect to conclude my review by the middle of next week." See e-mail correspondence from Matthew LeGrant to Sally Blumenthal, attached as Exhibit G. On February 25, Mr. LeGrant wrote to Ms. Blumenthal again, stating: "I wanted to give you an update...but I have not yet concluded my review of Zoning Commission's Order No. 07-21B. I have decided to examine the submitted exhibits and transcript to fully understand the Zoning Commission's intent regarding the proposed signage. I now expect to conclude my review by the end of this week..." Id.

12. On February 28, 2014, Mr. LeGrant again contacted Ms. Blumenthal, this time attaching a copy of the Determination, and stating "I conclude that the Zoning Commission's approval did not restrict the Hilton Garden Inn to a single sign that is referred to in Condition 1.A. In fact my examination of the totality of the record allows the hotel to have a total of four signs..." Id.

13. On March 21, 2014, the Department of Consumer and Regulatory Affairs issued the Permit, authorizing a total of three (3) building signs for the Property. Exhibit H.

13. On April 28, 2014, Ms. Blumenthal submitted this Appeal on behalf of 22 West, a Condominium, challenging the Determination and requesting that the Board of Zoning Adjustment revoke the Permit and require removal of the façade-mounted signs.

IV. ARGUMENT.

A. The Zoning Administrator Acted Outside the Scope of His Authority

The Zoning Administrator has limited authority to review and interpret the Zoning Regulations. Pursuant to the Zoning Act, it is the Board of Zoning Adjustment, not the Zoning Administrator, who has final administrative responsibility to interpret the Zoning Regulations. *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A2d 423 (citing D.C. Official Code, 2001 Ed. § 6-641.07(g)(4)) (2006). The Zoning Administrator likewise has a limited role to play in interpreting and modifying the conditions approved by the Zoning Commission in planned unit development (“PUD”) cases.

Section 2409.6 gives the Zoning Administrator the authority to approve minor modifications in the final plans as approved by the Commission, limited to the specific changes enumerated in subsections a-d of that regulation.³ Moreover, the Zoning Administrator must ensure that any modification is consistent with the intent of the Commission in approving the PUD (11 DCMR § 2409.7) and the Zoning Administrator must report to the Zoning Commission any minor modifications he approves. 11 DCMR § 2409.8. Finally, Section 2409.9 of the

³ Section 2409.6 reads:

“The Zoning Administrator shall have the authority to approve minor modifications in the final plans as approved by the Commission. These modifications shall be limited to the following:

- (a) A change not to exceed two percent (2%) in the height, percentage of lot occupancy, or gross floor area of any building;
- (b) A change not to exceed two percent (2%) in the number of residential units, hotel rooms, institutional rooms, or gross floor area to be used for commercial or accessory uses;
- (c) A change not to exceed two percent (2%) in the number of parking or loading spaces; and
- (d) The relocation of any building within five feet (5 ft.) of its approved location, in order to retain flexibility of design, or for reasons of unforeseen subsoil conditions or adverse topography.

Zoning Regulations clearly states that any proposed minor modification that cannot be granted by the Zoning Administrator under the powers enumerated in Section 2409.6 must be submitted to the Zoning Commission for its review and approval.

The proposed modification to the signage as specifically approved in the Zoning Commission's Order 07-21B is not among the list of modifications the Zoning Administrator is authorized to consider pursuant to 11 DCMR § 2409.6. Indeed, the Zoning Commission's Order itself, at Conclusion of Law 2 (Page 21), recognizes that the Zoning Administrator is not authorized to modify the approved PUD in this manner ("Because the modifications proposed by the Applicant could not be approved by the Zoning Administrator pursuant to § 2409.6, the Applicant submitted the proposed modifications to the Commission for approval.") As such, if the Applicant wanted to amend 07-21B further by seeking approval for up to four signs, the Applicant should have submitted that proposed modification to the Zoning Commission for further review.⁴

B. Assuming, *arguendo*, The Zoning Administrator had the authority to review and interpret the Zoning Commission's Order, the Determination is directly contradictory to the Zoning Commission's own language in the Order.

Notwithstanding the fact that the Zoning Administrator does not possess the authority to modify Zoning Commission Order 07-21B, it is clear that the Zoning Administrator's review

⁴ We turn the Board's attention to another Zoning Commission case wherein an applicant did seek a modification to approve a change in the number, location, type, and copy on signs permitted: In Zoning Commission Case 06-11K/06-12K, the Commission recently approved an amendment to a Campus Plan / PUD for George Washington University's School of Public Health so that the signage on the proposed building might reflect recent substantial gifts received by the University that will fund the construction of the proposed development approved in that case. The requested change in signage was approved as a minor modification by the Zoning Commission, and reflects the appropriate procedure for amending design details and conditions of approval dictated by the Zoning Commission. See Exhibit I, attached.

directly contradicts the Zoning Commission's specific intent in including a condition relating to signage.

The Commission specifically rejected the Applicant's request for an unlimited amount of signage, as requested in the Applicant's proposed order. Instead, the Commission found that the ANC's request for limitations on the number, location, and type of signage included in the proposed development was reasonable and consistent with the Zoning Commission's mandate to "encourage high quality development that provides public benefits," and "protects and advances the public health, safety, welfare, and convenience." 11 DCMR §§ 2400.1-2.

In at least three places within Order 07-21B, the Zoning Commission recognizes that there should be a single sign, speaking in singular terms about the location and type of sign that will be permitted under Order 07-21. In its Conditions of Approval, the Commission states with stunning particularity that "notwithstanding the notes on pages A1 and A2 of Exhibit 24," which contained a disclaimer noting that the location and dimension was for illustrative purposes only, the Commission sought to limit "the hotel sign" (singular) to a location above the hotel's entrance on 22nd Street. Moreover, the Commission continued "the sign cannot be at a different location or be vertically mounted on the façade of the hotel or illuminated from within." Condition 1A (emphasis added).

The Determination cites a certified, enlarged copy of Exhibit 36, which, like Exhibit 24, contained disclaimer language noting that it is for illustrative purposes only, and we suspect, much like it did with respect to Exhibit 24, the Zoning Commission would reject in this instance. The Order makes reference only to a hotel sign – and not to other signs – and therefore the Zoning Administrator writes, "I interpret the last sentence of Decision No. A. 1. to only impose a limitation regarding the hotel sign to be located above the hotel's entrance on 22nd Street, but not

as a limitation on any of the other proposed signs,” yet no other signs are discussed in the record of this case. The Determination is an effective modification of Order 07-21. To the extent that the Zoning Administrator is authorized to make such an interpretation, and we submit that under the Zoning Act and Zoning Regulations he is not, his decision clearly violates the requirement that the Zoning Administrator’s modification be consistent with the Zoning Commission’s intent. It is clear from the plain language of Order 07-21B that the purpose of limiting the signage of the proposed development was to address the concerns of ANC 2A, 22 West, and others regarding the number, location, and illumination of signage on the proposed building, and therefore the Zoning Administrator’s action is inconsistent with the Zoning Commission’s intent.

V. WITNESSES.

Sally Blumenthal will testify on behalf of 22 West. We reserve the right to call other witnesses as are reasonably necessary to present this case on appeal.

VI. EXHIBITS.

- A. Zoning Commission Order 07-21B
- B. 22 West Submission in Zoning Commission Case No. 07-21B, October 24, 2011
- C. Sheets A1 and A2, Exhibit 24, Zoning Commission Case No. 07-21B
- D. Excerpts of Zoning Commission Transcript from October 27, 2011
- E. Applicant’s Proposed Order, November 17, 2011
- F. Excerpts of Zoning Commission Transcript from December 12, 2011
- G. E-mail correspondence from Matthew LeGrant to Sally Blumenthal
- H. Sign Permit (the “Permit”)

- I. Zoning Commission Order 06-11K/06-12K and accompanying request for minor modification to amend approved signage for The George Washington University Milken Institute School of Public Health

In addition, the Appellant reserves the right to submit additional documents as evidence in this appeal at the hearing on this matter.

VII. CONCLUSION.

By the own admission of counsel for the Applicant in Case No 07-21B, *any* modification to the design of the proposed development would need to return to the Zoning Commission for review: *"I can just say that...this will be governed – the design of this building and the uses in this building...will be governed by the PUD. So we would have to come back to the Zoning Commission in order [to modify]."* Transcript, October 27, 2011, at 153. Instead, however, the Applicant sought to modify an unfavorable condition of approval in Order 07-21B by asking the Zoning Administrator to "interpret" the specific language of the Zoning Commission. In so doing, the Zoning Administrator exceeded the bounds of his authority under the Zoning Regulations and issued a Determination directly counter to the Zoning Commission's intent in limiting the signage included in the proposed development. Accordingly, we respectfully request that this Board (1) REVERSE the Determination, and (2) ORDER the Department of Consumer and Regulatory Affairs to take all action necessary to require the removal of impermissible signs installed as a result of the Determination and the Permit.

Respectfully submitted,

ARENT FOX LLP



Kinley R. Bray

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2014, the foregoing was served by Email and First Class Mail upon the following:

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