

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

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

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BZA Appeal No. 18793

OPPOSITION TO INTERVENOR'S MOTION TO DISMISS

Appellant 22 West hereby files this Opposition to Intervenor's Motion to Dismiss and respectfully requests that the Board deny said Motion to Dismiss for the following reasons:¹

Intervenors' motion to dismiss Appellants' appeal as untimely distorts the facts of this case and the case law controlling the issue, is in direct contradiction to Intervenor's own counsel's e-mail correspondence to Appellant 22 West's representative, and ignores the e-mails between the Zoning Administrator and 22 West's representative, which clearly indicate that prior to February 28, 2014 a decision was in process but not yet complete. The correct triggering event for this appeal is, at the earliest, the February 28, 2014 e-mail from the Zoning Administrator attaching his February 10, 2014 Determination Letter (60 days prior to the filing of this appeal) and, at the latest, DCRA's issuance of a sign permit on March 21, 2014 – a mere 38 days prior to the filing of this action by 22 West.

The "decision [or] determination complained of" is the issuance of the Zoning Determination on February 28, 2014, which modified the express language of Condition 1.A of Zoning Commission Order No. 07-21B. The issuance of a sign permit to Intervenor on March 21, 2014 was a direct result of that Zoning Determination. Appellant 22 West's initiation of this

¹ In addition to the reasons set forth in this pleading, Appellant 22 West notes for the record that this case was initially scheduled to be heard on July 22, 2014. At the request of Appellee DCRA, on July 21, 2014, by notice from the Deputy Director of the Office of Zoning to all parties, the hearing was postponed to September 30, 2014. Intervenor's Motion to Dismiss and Pre-Hearing Statement were filed on September 24, 2014 and served to Appellant's counsel via electronic mail only at approximately 5:00 p.m. on that day, less than one week before the scheduled hearing date. Since Intervenor's counsel noted its entry of appearance with the Board in this case on June 23, 2014, Appellant are at a loss as to why such motions could not have been made well in advance of the Board's hearing. Accordingly, the Appellant respectfully requests that the Board forgive the late filing of this response, which was assembled as quickly as possible given the limited amount of time before the scheduled hearing.

appeal on April 28, 2014 was, therefore, timely, as it was initiated prior to the “minimum of 60 days from the date of the administrative decision complained of.” 11 DCMR § 3112.2(c).

On or about December 31, 2013, Appellant’s representative Sally Blumenthal observed the installation of what appeared to be mounting brackets on the façade above the highest floor of the hotel development that is the subject of the instant appeal. On the same day, Ms. Blumenthal contacted the law firm that had represented Intervenor (via Wayne Quin, with whom Ms. Blumenthal has a longstanding professional relationship) to inquire whether signage was being installed. Mr. Quin indicated that he would pass the e-mail along to Mr. Collins. Having received no response from Mr. Collins, Ms. Blumenthal inquired of Mr. Quin in person as to the status of the project and signage in late January 2014. Mr. Quin indicated he would have Mr. Collins contact Ms. Blumenthal. Indeed he did, on February 10, 2014, stating: “The brackets in your photo are for a back-lighted sign, as shown on the plans approved by the Zoning Commission²...I was double-checking with zoning authorities to confirm that this sign is permitted by the Zoning Commission’s order.” (e-mail from Christopher Collins to Sally Blumenthal, February 10, 2014, attached to Appellant’s Statement of Appeal at Exhibit D)(emphasis added). Mr. Collins made no reference to any sign being part of the building permit, noted in Intervenor’s Motion to Dismiss as having been issued more than 18 months prior. If, as Intervenor claims, the sign was permitted by the issuance of Building Permit No. B1205651 on October 24, 2012 (the “Building Permit”), what need would Intervenor have to “double-check” with the authorities that the sign was permitted?³

² The plans approved by the Zoning Commission show no backlighted signs.

³ Moreover, the six-week delay between Ms. Blumenthal’s observation of brackets being installed during construction of the hotel and the response from Mr. Collins did not represent a failure to undertake due diligence, as Intervenor alleges, but was rather, we speculate, an intentional delay on the part of Intervenor’s counsel until the Zoning Determination was in hand.

Prompted by Mr. Collins' e-mail, 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. On February 19, 2014, despite (as Appellant later learned) having issued a Zoning Determination letter just two days prior, Mr. LeGrant replied "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, Appellant's Prehearing Statement, Exhibit G (emphasis added). It can hardly be said that 22 West did not undertake its required due diligence.

On February 25, 2014, 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 the week..." *Id.* (emphasis added). Finally, On February 28, 2014, Mr. LeGrant contacted Ms. Blumenthal, this time attaching a copy of the February 10, 2014 Zoning 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." *Id.* (emphasis added).

It is simply not plausible that Mr. LeGrant and Mr. Collins believed at this time that the signage in question was approved with the issuance of the Building Permit in October of 2012. If so, there would be no reason for the Zoning Determination requested by Intervenors in February 2014. Mr. LeGrant's e-mail is unambiguous and states that a decision was in process

as of February 19, 2014 and was made on February 28, 2014. The only question in this scenario is why the Zoning Administrator failed to state to an inquiring citizen that a determination on the matter in question had been made on February 10, two full days prior to her inquiry (and, quite coincidentally, the same day on which Mr. Collins finally saw fit to respond to the inquiry Ms. Blumenthal made to him in December).

The Zoning Determination letter was not provided to Ms. Blumenthal before February 28, 2014. The Zoning Determination letter was not published at all. See Zoning Determination Letters, published at dcra.dc.gov, retrieved September 29, 2014, attached as Exhibit A hereto. 22 West inquired of the Intervenor as soon as it noticed what appeared to be roofline signage being installed on the premises. It was the Intervenor's counsel who alerted 22 West to a pending decision of the "zoning authorities." Upon learning this, 22 West promptly inquired of the Zoning Administrator. His response also indicated that a decision was in process – and when that process had "concluded" he attached a determination in his e-mail on February 28, 2014. This appeal was initiated 59 days later, within sixty days of the date on which the Appellant first learned of the decision.

Section 3112.2 of the Zoning Regulations establishes a filing deadline of 60 days from the date on which an Appellant (1) has actual notice or knowledge of the decision complained of, or (2) reasonably should have had notice or knowledge of the decision complained of, whichever is earlier. The Board's initial inquiry must first be "when the Appellant knew or should have known of that issue." BZA Appeal No. 17468. It is undisputed that Appellant 22 West first learned of the Zoning Administrator's decision to modify the unequivocal language of Condition 1.A of Zoning Commission Order 07-21B, which limited the sign for the Hilton Garden Inn to one location above the entrance of the hotel on 22nd Street on February 28, 2014 when that

decision was e-mailed by the Zoning Administrator to Appellant's representative. Certainly, the Zoning Administrator could have disclosed that the decision had been made eighteen days prior (and just two days prior to Ms. Blumenthal's inquiry) but instead, Mr. LeGrant indicated that Intervenor's counsel had requested he review the issue of whether a sign on the roofline of the Hilton Garden Inn would be permitted in accordance with the Zoning Commission's Order in Case 07-21B, but it is also undisputed that Mr. LeGrant did not disclose the existence of such a decision in his correspondence to Ms. Blumenthal. The decision was not published in the Zoning Determination letter repository on DCRA's website – the only public repository of such determinations. Therefore, Appellant could not have had actual notice of the decision prior to February 28, 2014.

The Board has also held that when an Appellant asserts a certain date as the basis for its zoning appeal, "the regulations require that the Board determine if there is an earlier date when Appellant reasonably should have known of the authorization." Id. In this case, as soon as it became apparent that signage was being installed on the roofline of the Hilton Garden Inn, Appellants began inquiring as to the authorization for that signage. And, in response to such inquiries, neither Intervenor nor Appellee Zoning Administrator offered that the decision to authorize such signage was made with the issuance of the Building Permit on October 24, 2012. No, instead, each responded that an inquiry had been made of the Zoning Administrator by the Intervenor and that the Zoning Administrator was reviewing Zoning Commission Order 07-21B to see whether roofline signage was indeed authorized by the Zoning Commission. If either the Zoning Commission, in its order, or the Building Permit had authorized the installation of such signage, there would have been no reason for Intervenor to "double-check" with the Zoning Administrator.

Moreover, the installation of signage is not an action that is authorized by a Building Permit alone. 12A DCMR § N101.3 states “no sign...that exceeds 1 square foot (0.093 m sq) in area...shall be erected, made a part of a building, painted, repainted, placed, replaced, hung, re-hung, altered, repaired structurally, changed in color, made to flash, or maintained without a permit issued in accordance with this section by the code official.” Further, “Nothing within this section shall be construed to grant any greater area nor any greater illumination than limited by specific order of the Board of Zoning Adjustment or Zoning Commission. If such a specific order prohibits any signs or illumination, such specific order shall take precedence over the provisions of this section.” 12A DCMR § N101.9.2 (emphasis added). Thus, any application for a sign permit, which is clearly required for the erection of a sign, pursuant to Section N101.3 of the Building Code, must undergo a review by zoning.

Although the Building Permit was issued in October 2012, the Intervenor did not apply for the Sign Permit until November 14, 2013. The Sign Permit, issued March 21, 2014, lists as its basis for Zoning Approval “PUD 07-21B, ZA Letter.” *See* Sign Permit, attached as Exhibit H of Appellant’s Prehearing Statement. Assuming the sign was permitted by the language of the PUD Order, there would be no need to referenced a “ZA Letter.” Zoning reviewed the Sign Permit application on March 21, 2014 – the same day the Sign Permit was issued. Despite Intervenor’s assertions to the contrary, the sign could not have been installed prior to the issuance of the Sign Permit on March 21, 2014. That permit was predicated on a Zoning Determination letter. Thus, the earliest date on which anyone would have known of the decision to approve the sign in question was the date on which the Zoning Administrator issued his determination – February 10, 2014. Because the Zoning Administrator failed to publish the determination on its website, however, that decision was not available to anyone but the

Intervenor until February 28, 2014. Thus, the earliest date on which the Appellant knew or should have known of the decision was the date of the direct correspondence from the Zoning Administrator, and this appeal was timely filed within sixty days of that communication.

For all of the foregoing reasons, Appellants respectfully submit that Owners' motion to dismiss should be denied in its entirety and that Appellants appeal be ruled as timely.

Respectfully submitted,

ARENT FOX LLP



Kinley R. Bray

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September 2014, the foregoing was served by electronic mail upon the following:

Advisory Neighborhood Commission 2A
2a01@anc.dc.gov

Christopher Collins
Holland & Knight
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Matthew LeGrant, Zoning Administrator
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John Postulka, DC Office of the Attorney General, DCRA
John.postulka@dc.gov



Kinley R. Bray

EXHIBIT A

Zoning Determination Letter Archive

(attached separately)