

October 21, 2014

VIA ELECTRONIC FILING

Lloyd Jordan, Chair
Board of Zoning Adjustment
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Washington DC 20001

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Reference Number
035899.00001

Re: Appeal of Advisory Neighborhood Commission 2A and 22 West, a Condominium
BZA Appeal No. 18793
Appellant's Proposed Order

Dear Chairman Jordan and Members of the Board:

Enclosed for filing is the Appellant's Proposed Order, which was requested by the Board at the September 30, 2014 hearing in the above-referenced case. The following has been served on all participating parties via electronic mail. We look forward to the Board's decision in this matter on October 28, 2014.

Sincerely,



Kinley R. Bray

Enclosure

Cc: *See Certificate of Service*
ANC 2A
Matthew LeGrant, Zoning Administrator
John Postulka, Assistant Attorney General
Christopher H. Collins
Sally Blumenthal

AFDOCS/11409785.1

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October 2014, the foregoing was served by electronic mail upon the following:

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

Christopher Collins
Holland & Knight
Chris.collins@hklaw.com

Matthew LeGrant, Zoning Administrator
Matthew.legrant@dc.gov

John Postulka, DC Office of the Attorney General, DCRA
John.postulka@dc.gov

A handwritten signature in black ink, appearing to be 'Kinley R. Bray', with a long horizontal line extending to the right.

Kinley R. Bray

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 18793 of Advisory Neighborhood Commission 2A and 22 West, A Condominium, pursuant to 11 DCMR § 3100 and 3101, from the administrative decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs. Appellants allege that the Zoning Administrator erred in issuing a Determination dated February 10, 2014 stating that the terms of Zoning Commission Order No. 07-21B, which limited the location and signage associated with the construction of a Hilton Garden Inn approved as a Planned Unit Development, authorized up to four illuminated signs, including two signs along the roofline of the proposed building. Appellants contend that the Determination directly contradicts the language of the Zoning Commission's Order in Case No. 07-21B, and exceeds the Zoning Administrator's authority as it relates to interpreting or modifying the terms of a Planned Unit Development pursuant to 11 DCMR §§ 2409.2, 2409.6, 2409.7, 2409.8, and 2409.9. The subject premises is classified within the CR Zone and located at 2201 M Street N.W., and is subject to the terms of the Planned Unit Development approved in Zoning Commission Order No. 07-21B.

HEARING DATES: July 22, 2014 (postponed at request of Zoning Administrator)
September 30, 2014

ORDER

PRELIMINARY MATTERS

On April 28, 2014, Appellant 22 West filed an appeal of the decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs ("DCRA" or "Appellee") contained in a February 10, 2014 determination letter (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 up to four (4) (and, per the Permit, three (3)) signs on the Property. The Appellant claims that the Determination directly contradicts the express language of Zoning Commission Order No. 07-21B, and requests that the Board revoke the Determination and the Permit and further order DCRA to take all action necessary to require the removal of the impermissible signs installed as a result of the Determination and the Permit.

Also on April 28, 2014, Advisory Neighborhood Commission 2A ("ANC 2A" or the "ANC") filed a notice with the Board of its intent to join in the appeal of 22 West. The ANC and 22 West are hereinafter referred to collectively as "Appellants."

On June 23, 2014, PerStar M Street Partners LLC, the owner of the Property, via counsel, entered its appearance and notified the Board of its intention to participate in this matter as Intervenor.

Pursuant to notice, the Board scheduled a hearing on this matter for July 22, 2014. On July 14, 2014, the Appellee requested a continuance due to a scheduling conflict. The Board then notified the parties that the hearing would be rescheduled to September 30, 2014.

On September 23, 2014, Intervenor filed a Motion to Dismiss (Exhibit 22) the appeal for lack of timeliness, to which Appellants responded on September 29, 2014 (Exhibit 26).

The Board held the hearing on September 30, 2014. The Appellants and DCRA participated in the hearing, as did the Property owner, who participated as Intervenor. As a preliminary matter, the Board took up Intervenor's Motion to Dismiss for lack of timeliness. Upon hearing the argument of Intervenor and Appellants, the Board took the Motion to Dismiss under advisement and moved on to the merits of the appeal. The Board heard testimony from Sally Blumenthal, President of Appellant 22 West's Board of Directors, ANC Commissioner Florence Harmon, and Matthew LeGrant, Zoning Administrator.

Upon conclusion of the hearing on September 30, 2014, the Board left open the record in this matter for the purpose of receiving draft Findings of Fact and Conclusions of Law from the hearing participants, and set the matter for decision on October 28, 2014.

On October 28, 2014 public meeting, by a vote of ___ to ___ to ___, the Board upheld the appeal.

FINDINGS OF FACT

1. The subject of this appeal relates to property zoned CR located at 2201 M Street, N.W. The Hilton Garden Inn at issue sits on Lot 87 in Square 50.
2. Appellant 22 West, a Condominium, is the owner of 1177 22nd Street, N.W., which is a residential development within 200 feet of the subject property and is comprised of the individual unit owners within the condominium building.
3. Zoning Commission Order 07-21 approved construction of a boutique hotel on the property. The Applicant, PerStar M Street Partners, LLC, sought to amend that order by applying to the Zoning Commission to modify the approved PUD Order. The modification was assigned Zoning Commission Case No. 07-21B.
4. Numerous community organizations, including Appellants 22 West and ANC 2A actively participated in Case No. 07-21B, raising several issues that were deemed "contested issues" at the Zoning Commission hearing on October 27, 2011. One of the "contested issues" was the hotel's proposed signage regarding the location, orientation, and lighting of the signs. *See* Exhibit 21B at 2; Z.C. Order No. 07-21B at 7.
5. 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 on 22nd Street to the proposed hotel. At the hearing, Applicant requested to locate multiple signs on the building at the corner of 22nd and M Streets. *See* Exhibit 21D at 55-56.

6. During the hearing, Applicant also used Exhibit 36 as a set of plans related to the modification of the PUD. Applicant's architect referred to Exhibit 36 during questioning, but at no point was it referred to as a signage plan. The portion of Exhibit 36 in Case No. 07-21B depicting the location of signs was a single slide, at Page 4, which, according to the video and transcript of the hearing, appeared on screen for approximately 23 seconds.

7. At the conclusion of the hearing in Case No. 07-21B, the Zoning Commission requested post-hearing submissions from the parties in that case, including responses to the Applicant's post-hearing submission from the ANC. The ANC filed its response on November 15, 2011 (Exhibit 27 in the record in the instant case), which states the following:

"Sign. The ANC appreciates that the applicant in its response to the ANC has generally stated that the sign 'will not be like the Marriott' but would like to see specific language included regarding the Hilton Garden Inn sign should be made a condition of the Zoning Order. It should be above the hotel's entrance on 22nd Street, N.W., as shown on Pages A1 and A2 of the October 7, 2011 PUD Modification Submission prepared by Shalom Baranes Associates and cannot be at a different location, larger, vertically mounted on the façade of the hotel or illuminated from within."

8. The Zoning Commission issued Order 07-21B on November 28, 2011. The Order placed several restrictions on the signage for the proposed development. Specifically:

a. Finding 28 notes the ANC's request that the order contain "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 the flexibility to make such changes as are required to conform to the District's construction code;" and

c. Paragraph A1 of the Decision orders: "Notwithstanding the notes on pages A1 and A2 of Exhibit 24 [each note indicated that the location and dimension of the signage was for illustrative purposes only], 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. 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 floors. Ms. Blumenthal contacted the attorney for the Applicant in Case No. 07-21B, Mr. Collins, to inquire whether signage was being installed. Exhibit 6D.

10. Mr. Collins did not respond until February 10, 2014, at which point he said "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." Exhibit 6D.

11. Ms. Blumenthal testified at the hearing that, upon receiving Mr. Collins' e-mail, she phoned Sharon Schellin, the Secretary to the Zoning Commission, to inquire as to whether the Zoning Commission has modified the terms of Order No. 07-21B. Ms. Schellin informed Ms. Blumenthal that the Zoning Commission had not taken any further action in that case, and referred Ms. Blumenthal to the Office of the Zoning Administrator in DCRA for enforcement action.

11. Ms. Blumenthal contacted the Zoning Administrator Matthew LeGrant on February 12, 2014, to inquire if his office approved any signage on the development and explaining that the Zoning Commission Order No. 07-21B contained specific restrictions regarding signage. Ms. Blumenthal's e-mail to Mr. LeGrant specifically requested that he enforce Zoning Commission Order No. 07-21B and that he provide her with "a copy of any documentation of a decision by you, "zoning authorities," or any other DCRA official that found that a sign lighted from within and vertically mounted on the facade is permitted by the Zoning Commission's Order." See Appellant's Exhibit 6D.

12. Mr. LeGrant responded on February 19, 2014, saying "I have previously discussed this issue with Chris Collins . . . and will 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 by review by the middle of next week." Exhibit 21G. Mr. LeGrant e-mailed again on February 25, 2014 explaining that he would come to a decision by the end of that week. Exhibit 21G. Neither e-mail to Ms. Blumenthal contained any decision issued to the property owner authorizing a sign.

13. On February 28, 2014, Mr. LeGrant contacted Ms. Blumenthal, 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 . . ." Exhibit 21G. Attached to his correspondence, Mr. LeGrant included a Determination regarding the signs, which was dated February 10, 2014. Exhibit 6F.

14. On March 21, 2014, the Department of Consumer and Regulatory Affairs issued Permit Number SG1400204 which authorized three building signs for the development. Exhibit 21H.

15. On April 28, 2014, 22 West appealed Mr. LeGrant's Determination letter received on February 28, 2014, alleging that the Determination was outside of the Zoning Administrator's authority and was contrary to Zoning Commission Order No. 07-21B. Exhibit 2.

CONCLUSIONS OF LAW

The Appeal was Timely

The intervening property owner moved to dismiss this appeal as untimely. If the Board determines that the appeal is untimely, it must dismiss the action, as "the timely filing of an appeal with the BZA is mandatory and jurisdictional." *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (DC 1994). An appeal must be filed with the BZA "within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR § 3112.2(a).

In this case, Intervenor has advocated multiple points at which the 60-day clock should have begun running, all of which would make Appellant's April 28, 2014 appeal untimely. The Board will address each of these in turn.

First, the owner suggests that the PUD Approval issued on November 28, 2011 permitted the sign at issue, and therefore began the 60-day clock for appeal. Even examining the PUD Approval in the light most favorable to the owner at this stage, the Board does not find that the language of the Zoning Commission Order was sufficient to put Appellant on notice that an appeal would need to be filed regarding the signage issue on or before January 28, 2012. Rather, as described further below, the Board finds that the PUD Order reflects the restrictive language pertaining to the number and location of a singular hotel sign that was advocated by the ANC in its Post-Hearing submission, and therefore no reasonable person would have understood that up to four signs, including a rooftop sign, were to be included as part of the PUD Approval.

Secondly, the property owner suggests that the issuance and posting of the building permit authorizing construction of the hotel building on the Property should have put Appellants on notice that a sign would be erected along the roofline of the building. The owner further argues that if Appellants had undertaken appropriate due diligence when the building permit was posted on the Property (sometime after issuance on October 24, 2012), they would have become aware of the sign at issue, which was shown on the building permit plans. The Board finds this argument unpersuasive for two reasons. First, under the District of Columbia Construction Codes, a building permit alone may not authorize the installation of a sign like the one at issue here. *See* 12 DCMR § N101.9.2. Instead, a separate sign permit must be obtained to erect such a sign. *See id.* Second, it is undisputed that the Permit authorizing the sign in question was not issued until March 21, 2014, more than sixteen months after the building permit was issued. If the Appellant believed that it had permission to erect the sign in question, the Board does not understand why a sign permit would have been sought over a year after such authorization had been obtained. Therefore the Board rejects Intervenor's assertion that the appeal period expired on or before December 24, 2012.

Next, Intervenor reasons that when the Appellant observed the brackets and wiring for the sign in December of 2013, Appellant had actual knowledge of the sign and was therefore on notice to file an appeal on or before March 2, 2014. This too is a flawed argument. Actual knowledge of a potential zoning concern differs from actual knowledge of a zoning decision to be appealed. While upon observing the construction activities, including installation of what appeared to be brackets at the roofline, Appellant had suspected that a sign was possibly being constructed, Appellant had no actual or constructive knowledge of a zoning decision that authorized the installation of a roofline sign. Moreover, it is undisputed that as soon as Appellant witnessed such construction, Appellant diligently investigated the basis for such work, and inquired with numerous parties (including the Zoning Administrator) to determine if, in fact, a sign was being placed, and if so, how such placement did not violate the Zoning Commission Order.

Finally, the owner argues that owner's counsel's reply to Appellant on February 10, 2014 confirmed that a zoning decision had been made, and Appellant was then on notice of the 60-day appeal window (which would have expired on or before April 10, 2014). However, in reviewing the correspondence, the Board finds no actual confirmation to Appellant that any zoning decision had been made. Rather, Mr. Collins' e-mail simply stated that "zoning authorities" had confirmed that the sign was permitted under the Commission's Order. In response, Appellant continued the due diligence process by contacting the staff of the Zoning Commission and ultimately the Zoning Administrator. In response to a direct inquiry from Appellant as to whether a decision had been made, on February 19, 2014 (nearly 10 days after apparently issuing the Determination to Intervenor) the Zoning Administrator made no mention of the existence of any Determination and responded "I have previously discussed this issue with Chris Collins, of Holland and Knight, the counsel representing the Hilton Garden Inn, 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." Moreover, the Board finds that the Determination was not published on DCRA's website and therefore neither the Appellant nor the general public had knowledge of the Determination until it was sent by Mr. LeGrant to Appellant as an attachment to his February 28, 2014 e-mail. While the determination letter attached to the correspondence from the Zoning Administrator was dated February 10, the language in the Zoning Administrator's prior correspondence prior could not have reasonably put Appellant on notice that a decision had already been made, especially given that this determination was not published in any fashion whatsoever.

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.

Therefore, based on the totality of the circumstances, the Board finds that the Appellant did not know or have reason to know that a decision had been made to be appealed prior to February 28, 2014, and therefore the 60-day window to bring an appeal began on that date. Thus, because the appeal was filed on April 28, 2014, the appeal was within the 60-day window and therefore timely. Accordingly, the motion to dismiss is denied.

Merits of the Appeal

The Board of Zoning Adjustment is authorized to hear this appeal pursuant to The Zoning Act, D.C. Official Code § 6-641.07(g)(2). Specifically, the Board may affirm, reverse, or modify any determination made by officials in the administration of Zoning Regulations. 11 DCMR §§ 3100.2, 3100.4.

In determining whether the appeal should be granted and Mr. LeGrant's Determination reversed as outside the scope of his authority as a Zoning Administrator, it is necessary for the Board to determine what the intent of the Zoning Commission was related to signage in Order No. 07-21B. The Order Decision addressed signage only briefly in paragraph 1.A, but in examining the totality of the Order, as well as the record, the Board concludes that the Order only allowed one hotel sign, to be located above the Hilton Garden Inn's 22nd Street entrance and subject to the limitations set out in the Order.

The Board finds it compelling that at every instance in the Order where signage was discussed, the Commission referenced Exhibit 24 at A1 and A2, which only included the one sign above the hotel entrance. Most telling, in Finding 43(b), when the Commission noted that it shared concerns with the Appellants regarding hotel signage, it only referenced those portions of Exhibit 24. This was the same Exhibit 24 that ANC's response referenced in its request that the Order limit signage, which the Commission recognized in Finding 28. In fact, the Commission's Order used language almost identical to that language in Finding 28 from the ANC's response.

While the Appellee argues that the Zoning Commission relied on Exhibit 36, which includes, among other things, a signage plan, traffic circulation information, and architectural renderings, in its approval of the Hilton Garden Inn project, the Board is not persuaded that the Commission intended Exhibit 36 to modify the architectural plans presented in Exhibit 24 at A1 and A2. In reviewing the record, the Board notes that Exhibit 36 was not used primarily to discuss signage, but instead for a general presentation on the project to the Commission. Further, the one instance within Exhibit 36 that does refer to signage was not visible or discussed for any significant length of time at the Commission's hearing. Therefore, the Board concludes that the Zoning Commission incorporated Exhibit 36 into its order generally and not with the specific intent to include the exhibit's reference to signage.

The Applicant also argued that because there is no challenge to a sign over the restaurant, clearly the Commission intended there to be more signs than only mentioned in the Order. While it may be true that the Commission intended more signs than only the one mentioned, it is important to recognize that all the instances discussing signage in the Order refer to “hotel” signs. Therefore, while restaurant signs may have been permitted by the Order, that is not the issue of this appeal. This appeal is directly focused on the use of hotel signs, an issue the Board finds the Commission did decide upon. Therefore, Applicant’s reasoning is unpersuasive.

Thus, based on the totality of the record, the Board concludes that Zoning Commission Order No. 07-21B intended that the proposed Hilton Garden Inn have only one hotel sign, located above the entrance on 22nd Street. Therefore, any other signage outside of the one permitted would be in contradiction to the Zoning Commission Order.

Because the Zoning Commission Order only permitted one sign, the Board finds that the Zoning Administrator acted outside of the scope of his authority in issuing the February 10, 2014 Determination letter. The Zoning Administrator has limited authority to interpret Zoning Regulations and Zoning Commission orders. In addition, any interpretation must clearly be in line with the Zoning Commission Order. Further, while a Zoning Administrator may interpret Zoning Commission Orders on a variety of issues if there is confusion, the Zoning Administrator may only approve modifications from the Order as enumerated in the regulations, including small changes related to height, occupancy, and parking, but none related to signage. *See* 11 DCMR § 2409.6. In addition, any modifications must be consistent with the Zoning Commission Order and the Zoning Administrator must notify the Zoning Commission of such modifications. *See* 11 DMR §§ 2409.7-8.

As the Board has concluded that Zoning Commission Order No. 07-21B limited the Hilton Garden Inn to one hotel sign, Mr. LeGrant’s Determination is not consistent with that Order. Further, there is no regulation that would allow Mr. LeGrant to modify the Order related to signage. The Board concludes that this Determination letter, based on our interpretation of Zoning Commission Order No. 07-21B, was outside of the scope of Mr. LeGrant’s authority, and is therefore invalid.

Therefore, for the reasons stated above, it is hereby **ORDERED** that:

- a. the motion to dismiss the appeal as untimely is **DENIED**.
- b. the appeal is **GRANTED**. The February 10, 2014 Determination letter is **REVERSED**, and the Department of Consumer and Regulatory Affairs is **ORDERED** to take all action necessary to require removal of any existing sign on the hotel that is not consistent with the plans as depicted on Exhibit 24 at A1 and A2 in the record of Zoning Commission Case 07-21B.