

Holland & Knight

800 17th Street, NW, Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Christopher H. Collins
202.457.7841
chris.collins@hklaw.com

October 21, 2014

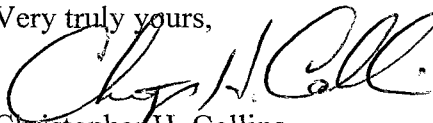
Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: Application No. 18793-Draft Order Denying Appeal

Honorable Members of the Board:

Attached is the draft Order filed on behalf of the Department of Consumer and Regulatory Affairs and the property owner, denying the appeal.

Very truly yours,



Christopher H. Collins

CHC/lc

Enclosure

cc: John Postulka, DCRA, Office of the General Counsel
Kinley Bray, Attorney for Appellants

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 18793 of Advisory Neighborhood Commission 2A and 22 West, A Condominium, pursuant to 11 DCMR, Sections 3110 and 3101, from a February 28, 2014 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs to permit the installation of signs on an under-construction Hilton Garden Inn in the CR District at premises 2201-2213 M Street, NW (Sq. 50, Lot 87).

HEARING DATE: September 30, 2014

DECISION DATE: October 28, 2014

DECISION AND ORDER

This Appeal was filed on April 28, 2014 by Sally Blumenthal, President, Board of Directors, 22 West, A Condominium ("22 West") (Exhibit 1). By letter dated April 28, 2014, Advisory Neighborhood Commission 2A ("ANC 2A") advised the Board that the ANC adopted a resolution on March 19, 2014, joining 22 West in submitting an appeal to the Board (Exhibit 5). The Appellants challenge the Zoning Administrator's determination that the installation of up to four signs on the façade of the Hilton Garden Inn (the "Hotel") was authorized by the Zoning Commission in PUD Order No. 07-21B.

The public hearing on this appeal was originally scheduled for July 22, 2014, but was continued to September 30, 2014. Appellants filed a Pre-Hearing Statement with exhibits on September 16, 2014 (Exhibit 21). On September 23, 2014 the Department of Consumer and Regulatory Affairs ("DCRA") filed a Pre-Hearing Statement in Opposition to the Appeal (Exhibits 23 and 24). On that same date, the PerStar M Street Partners LLC, the owner of property which is the subject of this appeal (the "Owner") filed a Motion to Dismiss the Appeal as untimely filed, more than 60 days after the Appellants had notice or knowledge of the zoning decision to approve the location of the signs, or reasonably should have had notice or knowledge of the zoning decision to approve the location of the signs (Exhibit 22). On September 24, 2014, the Owner filed a Pre-Hearing Statement in Opposition to the Appeal (Exhibit 25). On September 29, 2014, the Appellants filed a Response to the Motion to Dismiss (Exhibit 26).

At the Public Hearing on September 30, 2014, the Board heard arguments from the parties on the motion to dismiss and on the substance of the appeal. At its public meeting on October 28, 2014 the Board voted to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing

By Memoranda dated April 30, 2014, at the Office of Zoning ("OZ") provided notice of the appeal to the Zoning Administrator ("ZA"), at DCRA; ANC 2A, the ANC Single Member District Commissioner 2A-06; the Office of Planning; the Councilmember for Ward 2; and

Counsel for the Owner. Pursuant to 11 DCMR Section 3112.14, on May 20, 2014, OZ mailed letters providing notice of the hearing to the Appellants, the Owner, the ZA and ANC 2A. The notices were also published in the D.C. Register on _____.

Parties

The parties in this appeal were the Appellants 22 West and ANC 2A, the Appellee DCRA, and the Owner PerStar M Street Partners LLC. All four were automatic parties to the appeal pursuant to the definition of the term “Party”, as set forth in 11 DCMR Section 3199.1.

FINDINGS OF FACT

1. The Subject Property is located at 2201 M Street, NW and mapped in the CR District.
2. The Subject Property is located in Sq. 50, at the northwest corner of 22nd and M Streets, NW, and is improved with the Hotel that was approved by the Zoning Commission in PUD Order No. 07-21B, dated September 2, 2011.
3. The sign that is at issue in this appeal (the “Sign”) is located at the top of the vertical bay of the Hotel at the corner of 22nd and M Streets, facing east (Exhibit 22, Attachment A). That Sign and the other signage for the Hotel was discussed during the course of the PUD hearing. The Appellants attended and participated in the PUD hearing in opposition to the PUD application.
4. The Owner’s testimony to the Zoning Commission in Case No. 07-21B is included on pages 43-68 of the transcript of the October 27, 2011 Zoning Commission public hearing in Case No. 07-21B (Exhibit 22), and on the Video on Demand feature on the OZ website. Shalom Baranes, the project architect, began his presentation to the Commission on page 43 of the transcript. It is clear from the transcript and the video that Mr. Baranes was presenting the plans for the project that are in Exhibits 24 and 36 of the PUD record, including the signage plan on page 4 of Exhibit 36 of the PUD record (Exhibit 22, Attachment A). Referring to that signage plan which was projected onto the screen in the hearing room, Mr. Baranes pointed out at pages 55 and 56 of the transcript that “we are also proposing to include some signage on the building, something here for the retail on the north...on the south side, something here over the entrance door. And then these two spots at the very top of the vertical bay on the corner, these signs would be, approximately, 3 to 3.5 feet tall.” Although the signage plan shows two signs at the top of the vertical bay, facing south and facing east, the Owners have chosen to install only the Sign facing east.
5. The PUD transcript shows that Mr. Messervy, the Owner’s representative, discussed several issues in response to questioning from Commissioner Schlater, the only Zoning Commissioner who discussed the proposed signage during this case. That entire discussion is found on pages 116 through 124 of the October 27, 2011 transcript (Exhibit 22). Commissioner Schlater began on page 116 by stating “Let’s just jump in and address some of the ANC’s concerns”. The first issue he raised was the ANC’s concern that “the retail space [would] remain a community amenity and a restaurant”.

Mr. Messervy addressed that issue on pages 117 and 118 of the transcript. Commissioner Schlater then raised the second ANC issue beginning at the top of page 119—"Can we talk for a second about the signage, both the retail signage and then the hotel signage? First let's talk about the hotel signage." In response to the Commissioner's questions, Mr. Messervy described the high quality of the proposed signage and explained that the signage shown on the signage plan discussed by the architect depicted the "scale of what the signage in fact would be. And [the architects] walked through in terms of the dimensions of the signs." Messervy further explained that "the approximate size dimensions of the sign location is represented in the plans." Commissioner Schlater asked Mr. Messervy for an assurance that "there is a not going to be some large banner, neon sign", to which Mr. Messervy agreed. Commissioner Schlater concluded that discussion on page 121 of the transcript by stating "Okay. I'm satisfied you have addressed both of those [ANC] concerns".

6. The Appellants were present at the PUD Hearing when the architect was making his presentation to the Zoning Commission. The signage plan on page 4 of Exhibit 36 of the PUD record was projected onto the screen in the hearing room, and there was discussion between Commission Schlater and the PUD Applicant's witnesses regarding that plan. Neither ANC 2A nor 22 West raised concerns about the signage locations on that plan in their testimony at that hearing. A Post-Hearing submission by ANC 2A requested that the sign shown on Pages A.1 and A.2 of the Applicant's October 7, 2011 plans (Exhibit 24 of the PUD record) should be above the hotel entrance on the 22nd Street as shown on that plan, and not "at a different location, larger, vertically mounted on the façade of the hotel or illuminated from within." (Exhibit 27) During the PUD process, no reference or recommendation was made by either of the Appellants regarding the signage plan on page 4 of Exhibit 36 of the PUD record.
7. At the Zoning Commission's December 12, 2011 public meeting, where they took final action to approve the PUD, Commissioner Schlater stated at page 14 of the transcript that "I reviewed the order in pretty good detail and I think the Office of the Attorney General did an excellent job in capturing the discussion that we had," referencing the signage, among other issues. Reflecting Commissioner Schlater's comments on the signage issue, Finding No. 43(b) of PUD Order 07-21B states that "The Commission agrees with ANC 2A that there must be certainty that the actual signage will not differ from that depicted by the Applicant."
8. In Decision A.1. of the PUD order, the Commission specifically approved the PUD

"in accordance with the architectural plans and elevations prepared by Shalom Baranes Associates, dated October 7, 2011 (Exhibit 24), as supplemented by the plans presented at the public hearing (Exhibit 36) (the "Plans"), as modified by the guidelines, conditions and standards herein. Notwithstanding the notes on pages A1 and A2 of Exhibit 24, ... the hotel sign shall be above the hotel's entrance on 22nd Street as shown on those pages, and ... cannot be at a different location or be vertically mounted on the façade of the hotel or illuminated from within."

The Commission did not express any conditions in Decision A.1 with regard to the signage depicted on Exhibit 36, page 4 of the PUD record. The Board notes that the Sign is consistent with the signage plan shown on Exhibit 36, page 4 of the PUD record. Moreover, it is horizontally mounted, and not vertically mounted (Exhibit 25 D). The record in this case shows that the Sign will not be internally illuminated (Exhibit 6, Attachment F).

9. The location of the Sign on the Hotel is shown on the Building Permit application drawings that were approved for construction prior to issuance of the Building Permit. (Exhibit 22, Attachment C; and Exhibit 32). The approved plan showing the Sign is stamped with the following: "DCRA OFFICE OF THE ZONING ADMINISTRATOR COMPLIES WITH REQUIREMENTS OF DC ZONING REGULATIONS (11 DCMR)". Under that stamp is a signature with a handwritten note "5/16/12 (PUD 07-21)." Building Permit No. B1205651 (the "Building Permit") was issued on October 24, 2012 for construction of the Hotel. (Exhibit 22, Attachment B).
10. Construction of the Hotel commenced shortly thereafter, in full view of the public, including the Appellants. The Building Permit was posted on the site and the Building Permit application and drawings were available for public inspection at DCRA. The main roof of the Hotel was in place by August 1, 2013 (Exhibit 22, Attachment D).
11. On December 31, 2013, about 23 months after the PUD Approval, about 14 months after issuance of the Building Permit (which included the location of the approved Sign), and five months after the Hotel was under roof, 22 West first made inquiry about the placement of the Sign on the Hotel in an email to Owner's counsel, after seeing the brackets and wiring for the Sign installed on the side of the Hotel (Exhibit 22, Attachment E). In the email, 22 West stated its position in opposition to signage on the building, and commented that "in the last few days six brackets spanning about 15' have been installed on the 22nd Street façade above the 10th floor corner room and what appears to be wiring is dangling from the corner of the structure where the aluminum trim pieces have yet to be put in place."
12. By letter dated February 10, 2014 to Owner's counsel, the Zoning Administrator confirmed the substance of an earlier discussion with Owner's counsel about the signs approved by the Zoning Commission in the PUD approval. In the letter, the Zoning Administrator confirmed that Decision A.1 of the PUD Order allows the PUD Applicant

"to install up to four signs on the hotel's facades, and that the signs must be installed in the general locations and consistent with the dimensions as shown on the signage plan included as page 4 of Exhibit 36. I interpret the last sentence of Decision 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." (Exhibit 6, Attachment F).

13. Owner's counsel responded to 22 West's inquiry on February 10, 2014, confirming that "the brackets in your photos are for a backlighted sign, as shown on the plans approved by the Zoning Commission..." Owner's counsel stated that he confirmed "with the zoning authorities that this Sign is permitted by the Zoning Commission's order...The sign is not in violation of the zoning order." (Exhibit 22, Attachment F).
14. Six weeks after writing to Owner's counsel, 22 West then sent an email to the Zoning Administrator on February 12, 2014, with a copy to ANC 2A06 Single Member District Commissioner Florence Harmon, requesting that the Zoning Administrator "enforce the provisions of the Zoning Commission's Order No. 07-21B" with regard to location of the Sign, and requesting certain other documents (Exhibit 22, Attachment G).
15. At the request of Appellant 22 West, Appellant ANC 2A reviewed this matter at their public meeting of February 15, 2014. The 22 West representative reported at that ANC meeting that the Sign recently appeared on the building, and she then "contacted the Zoning Administrator to ask that they enforce the zoning order and explain why the sign conforms to the order." The ANC adopted a resolution at that meeting asking the Zoning Administrator to enforce the zoning order for the Sign (Exhibit 22, Attachment H).
16. On February 28, 2014 the Zoning Administrator responded by email to 22 West's February 12, 2014 email, with a copy to the ANC 2A06 Single Member District Commissioner, attaching his February 10, 2014 letter to Owner's counsel. In his email, he stated that

"the Zoning Commission's approval included Exhibit 36... That exhibit shows not only the sign '...above the hotel's entrance on 22nd Street...', but also a sign on the top of the exterior of the building...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, one for the ground floor restaurant, and three for the hotel [two at the top and the one sign above the entrance] of which the latter is limited to have the particular characteristics that are referred to in Condition A1." (emphasis in original).

He concluded that "the present installation of the [Sign] is not a violation of PUD 07-21B, so no enforcement action is applicable." (Exhibit 22, Attachment I).
17. ANC 2A adopted another resolution on March 19, 2014 joining 22 West in submitting an appeal to the Board of the Zoning Administrator's response (Exhibit 22, Attachment J).
18. A sign permit for installation of the Sign was issued on March 21, 2014. Zoning approval for the sign installation is shown on the permit application documents, with the notation "PUD 0721B ZA letter".
19. This appeal was filed on April 28, 2014.

CONCLUSIONS OF LAW

The Board is authorized by section 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative office in the administration of the Zoning Regulations. Based on the evidence of record, the Board concludes that the Zoning Commission approved the Sign location in the PUD Order, and that zoning approval has been properly granted by the Office of the Zoning Administrator for the Sign location in the Building Permit Application and in the Sign Permit Application.

A. The PUD Order Authorizes the Sign at Issue.

Based upon a review of the PUD evidence and testimony, and the PUD Order, the Board concludes that the PUD Order includes the authorization for the Sign location, which is shown on page 4 of Exhibit 36 of the PUD record. The Zoning Commission incorporated the plans in Exhibit 36 as part of its approval.

The testimony and questioning at the Zoning Commission hearing indicates that the Sign is allowed. The Applicant explicitly stated that it was “proposing to include some signage on the building, something... for the retail on the north – on the south side, something... over the entrance for the hotel. And then... at the very top of the vertical bay on the corner.” The questioning at the hearing also referenced the numerous proposed signs. In light of these statements, it is clear that the Zoning Commission was aware that the plan was for the building to have more than one sign. The Zoning Commission did not explicitly reject the four sign proposal, nor did the Commission specifically reject the Sign at issue in the appeal. Finding No. 43 of the Order states that “there must be certainty that the actual signage will not differ from that depicted by the Applicant.” The PUD Order incorporates Exhibit 36 which shows the Sign as proposed by the Applicant.

B. The Zoning Administrator Properly Approved the Sign in the Building Permit Application.

Based upon the evidence of record in this appeal, the Board concludes that the Office of the Zoning Administrator properly approved the Sign location on the building permit application plans, based upon a review of the terms of the PUD Order and the PUD plans referenced in the Order. At the public hearing on this appeal, the Zoning Administrator (who testified as an expert in zoning matters) stated that he reviewed the PUD plans and the Order and other relevant documents, and determined that PUD Exhibit 36, which includes the signage plan, shows the Sign at the top of the building, and was specifically referred to in Condition A.1 of the PUD Order. He testified that when the building permit application was reviewed in 2012, his office reviewed the entire PUD Order to determine compliance of the building permit application documents with the terms of the PUD approval. Zoning approval was granted for the Sign location by his office in 2012 because the Sign location was included in Exhibit 36 of the PUD record. The Board agrees with this conclusion, since Zoning Commission Exhibit 36, which was expressly incorporated into Condition A.1. of the PUD Order, specifically shows the Sign where it has been installed.

When there is a zoning determination based on the issuance of a building permit, a subsequent validation of that decision does not start a new appeal period. See BZA Appeal No. 17830 of Cooper, dated February 18, 2009, at p. 3. The appellant in that case appealed the issuance of a Certificate of Occupancy for a grocery store building in the Reed-Cooke Overlay, challenging the size of the store and the sale of alcohol. This Board determined that those zoning decisions "were made at the building permit stage, and were validated by the subsequent issuance of the C of O." Id. at page 3 (emphasis in original). Recognizing that the C of O "contained no new information and did not constitute the 'first notice' to the Appellant," the Board dismissed the appeal, holding that the "certificate of occupancy does not...start another sixty day appeal period...". Id. at 4, citing Basken v. DC BZA, 946 A. 2d 356, 367-68 (DC 2008).

C. The Zoning Administrator Properly Approved the Sign Permit

The Board concludes that the Zoning Administrator properly approved the Sign Permit issued on March 21, 2014 for installation of the approved Sign. The approval of the Sign Permit is consistent with the terms of the PUD Order and the approved Sign location in Building Permit approval.

D. Appellants' arguments are otherwise without merit.

Appellants' position is that because there is language in the PUD order providing that "the hotel sign must be above the hotel's main entrance on 22nd Street... and that the sign cannot be at a different location or be vertically mounted on the facade of the hotel or illuminated from within," only one sign is allowed. The Appellant's contention is that the Zoning Commission's use of the phrase "the hotel sign" illustrates an intention to limit the hotel to one sign.

However, the language Appellant relies on does not say that the hotel can only have one sign. If the Zoning Commission wanted to limit the hotel to one sign, it would have specifically said that the hotel can only have one sign. It did not do so.

The phrase "the hotel sign" simply does not mean that only one sign is allowed. Although the word "the" followed by a singular noun can refer to a single person, place, or thing, it also can refer to a general version of that noun. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014). So the phrase "the hotel sign" is ambiguous, especially when one considers the use of the word "signage," which is a plural form of the form word sign, at other places in the Order and the incorporation of Exhibit 36 into the Order. Since the phrase "the hotel sign" is ambiguous, it simply cannot be relied on by itself to resolve the dispute involved in this case. Rather, it is necessary to consider other factors. As explained above, the other factors including the incorporation of Exhibit 36 and the questioning and testimony at the hearing indicate that the hotel may have more than one sign, including the sign at issue.

In light of our findings above, we need not address the Zoning Administrator's refusal to take enforcement action to stop the installation of the approved Sign. In its email to the Zoning Administrator in this case, 22 West requested "enforcement of ZC Order No. 07-21B"; plus copies of any documentation of any zoning approvals for the Sign; and a copy of the "direction" by the Zoning Administrator "that the brackets and electrical service shall be removed to

preclude future installation of" the Sign. However, we note that this Board has held in BZA Appeal No. 18256 that enforcement by the Office of the Zoning Administrator is "a discretionary function left to the discretion of the Zoning Administrator (citations omitted)...,to which no individual has a legal right." Id. at pp. 8-9.

The Board is required to give "great weight" to the issues and concerns raised in writing by the affected ANC. 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) (2001)). ANC 2A is one of the Appellants in this case, and the Board has addressed the issues and concerns of ANC 2A in the body of this decision.

Based on the findings of fact and having given great weight to the issues and concerns of ANC 2A, the Board concludes that the PUD Order approved the Sign location at issue in this appeal; and that the approval by the Office of the Zoning Administrator of the Sign location in the Building Permit and the Sign Permit was proper, based upon the Zoning Commission's approval of the Sign location in the PUD Order; and that neither the Zoning Administrator's February 28, 2014 email to the Appellants, refusing to take enforcement action, nor his February 10, 2014 letter to Owner's counsel confirming the prior approvals of the Sign location, was a new appealable zoning decision. Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**.

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

The majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA 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.