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October 21, 2014

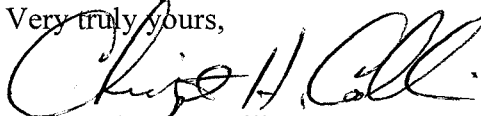
Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: Application No. 18793-Draft Order Dismissing Appeal

Honorable Members of the Board:

Enclosed is the draft Order filed by the owner of the property, dismissing the appeal as untimely filed.

Very truly yours,



Christopher H. Collins

CHC/lb
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

ORDER DISMISSING APPEAL

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, and his denial of Appellant 22 West's February 12, 2014 request for enforcement to prohibit the signs (Exhibit 6).

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 dismiss the appeal as untimely.

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 the signs on “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.” During the PUD application process, no reference was made by either of the Appellants to 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.

20. This appeal was filed:

- approximately 27 months after the PUD Approval (which included approval of the Sign location);
- approximately 18 months after the issuance of the Building Permit (which included the location of the approved Sign on the approved permit drawings);
- approximately nine months after the Hotel was under roof;
- approximately four months after 22 West saw the brackets and wiring for the approved Sign and made their inquiry to Owner's counsel;
- 77 days after being informed by Owner's counsel on February 10, 2014 that the brackets and wiring were for the installation of the approved Sign, and that the zoning authorities had confirmed that the Sign was permitted by the PUD approval, and was not in violation of the PUD Approval;
- 75 days after 22 West wrote to the Zoning Administrator, with a copy to the ANC, requesting enforcement of the PUD Approval; and
- 72 days after ANC 2A adopted the first of their two resolutions objecting to the installation of the approved Sign at the approved location.

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. An appeal must be filed within 60 days after the date the appellant "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).

If the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, an appeal must be filed no later than 10 days after the date that the structure is under roof. Section 3112.2(c) provides that notwithstanding § 3112.2(a) and (b), an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal. Finally, § 3112.2(d) provides that the Board may extend the 60-day time limit only if the appellant demonstrates that: (1) there are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal.

The Board has consistently affirmed that it "lacks jurisdiction to hear any appeal that is not filed in a timely manner." See, e.g., BZA Appeal No. 18300 of Ausubel, at p. 5 (April 11, 2012), citing Economides v. DC Board of Zoning Adjustment, 954 A. 2d 427, 434-35 (DC 2008); Waste Mgmt. of Md., Inc. v. DC Board of Zoning Adjustment, 775 A. 2d 1117, 1121-22 (DC 2001); Mendelson v. DC Board of Zoning Adjustment, 645 A. 2d 1090, 1093 (DC 1994)(the timely filing of an appeal with the Board is mandatory and jurisdictional; if an appeal is not

timely filed, the Board is without power to consider it); BZA Appeal No. 18070 of ANC 6B, at p. 4 (December 17, 2010). The 60-day time period for filing an appeal is strictly construed. See e.g., BZA Appeal No. 17430 of Rodut Associates of DC, LP (September 29, 2006) (appeal untimely filed three days after expiration of 60-day appeal period).

The Board has 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 the Appellant reasonably should have known of the authorization." BZA Appeal No. 17468, dated February 16, 2007, at p. 4. In order to find that this appeal was timely filed, this Board must determine that based on the facts of this case, the Appellants did not have notice or knowledge of a zoning decision to approve the Sign location, nor could they reasonably have had notice or knowledge of a zoning decision to approve the Sign location, until February 27, 2013, which was 60 days prior to the appeal date of April 28, 2014. The record in this case does not support such a finding. The Appellants in this case had actual notice or knowledge, or reasonably should have had notice or knowledge, of the zoning decision to approve the location of the Sign on a number of occasions, more than 60 days before they filed their appeal, and they failed to take timely action in any of those instances.

A. PUD Approval.

The Appellants participated in the PUD application process where the Hotel, including the Sign location, was approved in the PUD Order. They were present at the PUD hearing when the PUD applicant's signage plan was presented and discussed, including the plan which is shown on page 4 of Exhibit 36 of the PUD record. The PUD Order includes the authorization for the Sign, which is shown on page 4 of Exhibit 36 of the PUD record. The Appellants knew, or reasonably should have known, of the Zoning Commission's action. If they had a question or concern about the approved location of the Sign in the PUD Order, they could have taken appropriate action at that time to raise that issue. They did not do so, and their appeal is therefore untimely.

B. Building Permit Issuance and Commencement of Construction.

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 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 Building Permit was issued on October 24, 2012, and was posted on the Hotel property. Commencement of construction followed shortly thereafter, in full view of the public. The Sign location is shown on the approved Building Permit application plans, which were stamped with the approval of the Office of the Zoning Administrator (Exhibit 32), and were available for public viewing at DCRA. Even assuming that the Appellants did not have notice or

knowledge, or reasonably should have had notice or knowledge, of the approved Sign location in the PUD Order, they had an obligation, based upon prior decisions of this Board, to undertake due diligence after issuance of the Building Permit and commencement of construction, in order to file a timely appeal.

Appeal No. 17468 of ANC 6A involved the renovation of an existing three unit apartment building in an R-4 zone to increase it to six units. The number of units was shown on the permit application documents, but not on the building permit. The building permit was posted on the property and there was clear evidence to the public that construction was underway. Permits for electrical, plumbing and HVAC were issued later, showing six units. The ANC appealed the issuance of the electrical, plumbing and HVAC permits, and contended that it did not have actual notice of the decision to convert from three units to six units until informed by its constituents after issuance of the electrical, plumbing and HVAC permits.

However, the Board found in that case that the posting of the building permit on the property, and the construction activity on the property, were sufficient to put the ANC and its constituents on notice of a zoning decision:

[T]here were a series of activities that should have put the [Appellants] on notice of the decision complained of dating back to [the date] when the owner posted the building permit on the property and when the construction began. While the permit and the construction may not have put the [Appellant] on notice of the exact nature of the construction, the regulations contemplate an obligation within a reasonable period of time to undertake due diligence to determine such nature. The nature of the work was evident in the Application for the Building Permit, filed at DCRA and available for public viewing."

See BZA Appeal No. 17468 of ANC 6A, *supra*, at p. 4 (emphasis added). The Board noted that the subsequent issuance of the electrical, plumbing and HVAC permits did not constitute the zoning approval to increase in the number of units; rather the approval for the increase was granted by issuance of the building permit. The Board dismissed that appeal as untimely filed.

The Appellants in this appeal had actual notice and knowledge of the construction of this 123,768 sq. ft., 90 ft. tall hotel building during its 21-month construction period, from August 2012 to May 2014. The Hotel was under roof by August 1, 2013. ANC 2A received notice of the issuance of the Building Permit in 2012 per the notice requirements of DC Official Code, Section 1-261(c)(3). If the Appellants had a question whether the Building Permit application plans showed the Sign location, they could have undertaken due diligence by reviewing the Building Permit application documents on file at DCRA, in order to be able to file a timely appeal at that time. Had they done so, they would have seen the Sign location on the approved Building Permit plans. They did not do so, and their appeal is therefore untimely.

C. Actual Knowledge of the Sign Brackets on the Building

The Appellants had actual notice or knowledge of the location of the Sign approved by the Zoning Commission when 22 West noticed the brackets and wiring for the Sign on the Hotel

a few days before December 31, 2013. Based on this Board's ruling above in BZA Appeal No. 17468 of ANC 6A, once the Appellants saw the brackets and wiring for the Sign, had "an obligation within a reasonable period of time to undertake due diligence to determine" whether the Sign was previously authorized, in order to file a timely appeal. They did not do so, and their appeal is therefore untimely.

D. Confirmation By Owners' Counsel of Zoning Authorization of Sign Location.

On February 10, 2013, Owners' counsel notified 22 West that the brackets were for the Sign installation as approved in the PUD Order, and that he confirmed with the zoning authorities that the Sign was permitted by the PUD Order. At the very least, this correspondence gave 22 West actual notice or knowledge, or at minimum they reasonably should have had notice or knowledge, of the zoning decision referred to in that correspondence, thus beginning the 60-day timeframe for filing an appeal. This Board has so held on a number of instances. "Subsection 3112.2(a) provides that the time for filing an appeal begins when 'the person appealing the administrative decision had notice or knowledge of the decision complained of.' There is no requirement that the person also knew the basis of the decision. Instead, knowledge of a decision starts a 60-day clock for determining that basis and the existence of any error." BZA Appeal No. 18469 of Susan L. Lynch, at p. 8 (March 19, 2013). See also BZA Appeal No. 17513 of ANC 2E at p. 8 (January 4, 2008) (knowledge of the decision complained of, not knowledge of the rationale of the decision, is what begins the 60-day appeal period).

In BZA Appeal No. 17468 of ANC 6A, *supra*, involving the conversion of an apartment house from three units to six units, the Board found that even assuming that the conversion of the building from three units to six units was difficult to notice because it was internal to the building, there was other "public" activities that should have put the Appellants on notice. In this case, 22 West saw the publicly-visible brackets and wires for the Sign a few days before December 31, 2013, and received a confirmation from Owner's counsel on February 10, 2014 that they were for the installation of the Sign, which was approved for zoning.

Thus, even assuming that the Appellants did not have notice or knowledge of the Zoning decision to approve the Sign location in the PUD Order, or reasonably should have had notice or knowledge of the Zoning decision to approve the Sign location in the PUD Order, and assuming that they can be excused for their lack of due diligence in reviewing, after commencement of construction, the Building Permit application and the approved permit plans which show the location of the Sign, and further assuming that they can be excused for filing the appeal more than 10 days after the Hotel was under roof, they nonetheless had actual knowledge of the brackets and wiring for the approved Sign, and a confirmation from Owner's counsel on February 10, 2014 that the Sign was approved for zoning. There can be no dispute that they knew or should have known by then. Appellant ANC 2A was on notice two days later, on February 12, 2014, when Appellant 22 West wrote to the Zoning Administrator, with a copy to the ANC 2A06 Commissioner, and included the February 10, 2014 confirmation statement from Owner's counsel. On February 15, 2014, ANC 2A passed the first of their several resolutions in opposition to the Sign location. All of the above events occurred more than 60 days prior to the filing date of this appeal. Based on the totality of the evidence, the Board concludes that the Appellants had notice or knowledge of a zoning decision to approve the Sign location, or

reasonably should have had notice or knowledge of a zoning decision to approve the Sign location, more than 60 days prior to the date that this appeal was filed. Regardless of which of the above events triggered the 60-day appeal period, the time expired before this appeal was filed. The appeal was untimely filed, and must be dismissed.

E. The Zoning Administrator's February 28, 2014 Response, Attaching His February 10, 2014 letter

The Zoning Administrator's email of February 28, 2014 to Appellant 22 West, refusing to take enforcement action regarding the Sign, included his February 10, 2014 letter to Owner's counsel confirming that the PUD Order approved the location of the Sign. The Board concludes that neither his February 28 email nor his February 10 letter was a new zoning decision, and therefore neither correspondence provides a new date from which to start the 60-day appeal clock. The Sign was approved by issuance of the PUD Order, and subsequently reaffirmed by the approval of the building permit application plans showing the Sign location, and issuance of the Building Permit. The Zoning Administrator's February 10 letter to Owner's counsel was merely a confirmation of the approval of the Sign in the PUD Order. His February 28 email response to 22 West was simply a refusal to take enforcement action, and an explanation of the approval of the Sign by the Zoning Commission in the PUD Order.

This Board has ruled on this issue on a number of occasions. In BZA Appeal No. 18256 of ANC 1C, dated October 22, 2012, this Board confirmed that the issuance by the Zoning Administrator of an email explaining the validity of a prior zoning action, and refusing to take any enforcement action in response to a request to do so, is not an appealable determination. In that case, the Appellant challenged (1) "the Zoning Administrator's determination rendered via email", that a fast food establishment was a lawful use under the Zoning Regulations"; and (2) his refusal to take enforcement action. Id. at p. 2. The Board found that the Zoning Administrator's email confirming that "a fast-food establishment would be lawful at the subject property, consistent with its certificate of occupancy", "under the circumstances", was

"based on the ZA's review of the specific uses of the property that had been authorized by certificates of occupancy; the designation of those uses as 'delicatessen' and 'carry-out', terms no longer used on certificates of occupancy; subsequent changes to the Zoning Regulations that made fast food establishments subject to special exception approval; and the definition of 'nonconforming use. Based on those factors the ZA reasonably determined that the use of the subject property as a 'fast food establishment' would be a lawful use."

Id. at pp. 7-8. The Board in that case concluded that the Zoning Administrator's email "primarily responded to inquiries about whether use as a fast food establishment...would be consistent with the certificate of occupancy...". Id. at pg. 8. Accordingly, the Board found that the Zoning Administrator's detailed and methodical explanation of the approval was not an appealable determination, and dismissed the appeal.¹

¹ In dismissing the appeal, this Board also 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 ZA (citations omitted)...,to which no individual has a legal right." Id. at pp. 8-9. Similarly, in its email to the Zoning Administrator in this case, 22 West

Moreover, “the clear language of Section 3112.2 speaks to the knowledge of the decision complained of, not to the knowledge of the rationale for the decision. The information provided by the Zoning Administrator...was a ...confirmation and explanation of the official approval...” and was not a zoning decision from which an appeal could be taken. BZA Appeal No. 17513 of ANC 2E, at p. 8 (January 4, 2008), citing BZA Appeal No. 16982 of J. Brendon J. Herron and ANC 3E, (April 7, 2005) (“60-day time frame for bringing the appeal may not be restarted by a subsequent DCRA communication except when DCRA reverses its position. *Id.* at 10”).

In this case, the Appellants initially stated in their appeal application that they were appealing the Zoning Administrator’s February 28, 2014 email (Exhibit 2), but later changed their theory in their Prehearing Statement to be an appeal from the Zoning Administrator’s February 10, 2014 letter (Exhibit 21). However, neither correspondence constitutes the zoning decision to approve the location of the Sign. In his responses to the Appellants and to Owner’s counsel in this case, the Zoning Administrator provided the same type of detailed methodical explanation as that countenanced by the Board in BZA Appeal No. 18256. He issued no new zoning decision. “The 60-day period...starts to run from the date of the original decision complained of, and subsequent decisions reinforcing that original decision...do not change that starting date.” BZA Appeal No. 17966-A of Stephen Bruce (Order Denying Reconsideration), at p. 2 (September 18, 2010).

"There is also consistent precedent of this Board that once a building permit is issued, no subsequent communication from DCRA may be appealed unless it contains a new decision. (citations omitted)". See BZA Appeal No. 17966 of Stephen Bruce, dated March 30, 2010, at p. 4. That case involved an appeal of construction by a neighbor, which construction was in full view of that neighbor. The neighbor contacted the Office of the Zoning Administrator to complain about the construction, alleging that it was in violation of zoning. The Office of the Zoning Administrator responded, stating that there was no zoning violation. Citing the two "no zoning violation" emails from the Office of the Zoning Administrator that were the basis of the appeal, this Board dismissed that appeal as untimely, concluding that:

"those 'decisions', however, were not really decisions but reaffirmations of the decision made by the issuance of building permit....The real decision on appeal is the decision to issue the building permit.... That decision was made on February 11, 2009 with the issuance of the permit. The Board concludes that the Appellant knew or should have known of the permit issuance between February 13, when the permit was posted on the property, and February 18, when actual ...work began there. The Appellant lives immediately next door to the subject property, sees it daily, and should have been aware of these activities during this period."

Id. at p. 4.

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. Based upon prior rulings by this Board, the Appellants have no legal right to enforcement in this case.

Similarly, in this case, the Appellants participated in the PUD application process where the Sign location was presented and discussed; the Building Permit was posted on the property; the Appellants watched the construction progress on the Hotel. But rather than undertake their obligation to pursue due diligence to determine the facts, and file a timely appeal to this Board within 60 days of any of the events noted above, 22 West engaged in a series of emails to the Owner's counsel and to the Zoning Administrator, and the ANC passed several resolutions in support of 22 West's position in this matter.

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).

The 60-day deadline for an appeal begins to run when the Appellant is charged with notice or knowledge of the zoning decision complained of, or reasonably should have had notice or knowledge of the zoning decision complained of, "whichever is earlier." In this case, actual or constructive knowledge occurred upon the issuance of the PUD Order, and again upon issuance of the Building Permit and commencement of construction, or viewed in the light most favorable to the Appellants, the date when 22 West first saw the brackets and wiring for the Sign a "few days" before December 31, 2013. Appellant 22 West first contacted Owner's counsel about the matter, and upon receiving confirmation six weeks later that the zoning authorities had approved the Sign location, they then wrote to the Zoning Administrator, and copied the ANC, which then passed a resolution in opposition to the Sign location. During that period, "Appellant pursued other avenues to resolve its dispute and engaged in ...communication with the Zoning Administrator...However, a party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal". See BZA Appeal No. 17391 of de Brito and Gottlieb, dated October 2, 2006, at p. 7; BZA Appeal No. 17329 of Georgetown Residence Alliance, dated July 12, 2006, at p. 5 (citations omitted). Both the DC Court of Appeals and this Board have held that "the Board need 'not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision.'" BZA Appeal No. 17411 of Basken and Meyer, supra at p. 6; BZA Appeal No. 17391 of de Brito and Gottlieb, supra, at p. 7, citing Waste Management, supra. The "fact that the Appellant 'chose to concentrate on avenues that reasonably may have appeared more promising than an appeal does not excuse its delay in noting an appeal.'" BZA Appeal No. 17915 of Jonathon Bolduc, at p. 3 (December 17, 2009), citing Waste Management, supra. The Appellants had a duty to undertake due diligence in order to be able to file a timely appeal. See BZA Appeal No. 17468 of ANC 6A, supra. Knowledge of a zoning decision, even if there was no knowledge of the rationale for the decision, is what triggers the 60-day appeal period. See BZA Appeal No. 18469 of Susan L. Lynch, supra; BZA Appeal No. 17513 of ANC 2E, supra.

F. The Sign Permit

The Board concludes that the Sign Permit issued on March 21, 2014 for installation of the approved Sign did not constitute a new appealable zoning decision to approve the Sign location. Rather, like the subsequent zoning approval of the Certificates of Occupancy following the zoning approval of the building permits in Appeal No. 17411 of Basken and Meyer, dated March 23, 2006, aff'd, Basken v. DC BZA, supra, and BZA Appeal No. 17830 of Cooper, supra, the subsequent zoning approval of the Sign Permit following the zoning approval of the Sign location in the PUD Order and in the building permit plans does not constitute a new appealable zoning decision. Moreover, the issuance of the Sign Permit “contained no new information” about the Sign location “and did not constitute the ‘first notice’ to the Appellant” of the zoning approval of the Sign location. BZA Appeal No. 17830 of Cooper, supra at p. 4, citing Basken v. BZA, supra, at 367-68. The “first notice” of the zoning approval of the Sign location occurred more than 60 days prior to the appeal date.

The Board concludes that based upon the totality of the evidence, even considering the facts in the light most favorable to the Appellants, this appeal was filed more than 60 days after Appellants had notice or knowledge, or reasonably should have had notice or knowledge, of a zoning decision to approve the Sign location, and more than 10 days after the Hotel was under roof.

The Zoning Administrator's February 10, 2014 letter to Owner's counsel, which he sent to Appellants on February 28, 2014, was not a separate new zoning decision to approve the Sign, but rather an explanation of why the Sign is permitted. His February 28, 2014 email was nothing more than a refusal to take enforcement action. Because the Zoning Administrator's February 10 letter and February 28 email represent no new zoning decision, neither one could therefore start a new 60 day appeal period. Similarly, the subsequent issuance of the Sign Permit is not a new appealable zoning decision that begins a new 60-day appeal period.

G. Bannum, Basken, and Economides are Distinguishable.

The Appellants assert that the decisions in Bannum, Basken, and Economides require a different result. The Board disagrees.

Bannum, Inc. v. DC Board of Zoning Adjustment, No. 04-AA-345 (DC Court of Appeals, March 16, 2006) (BZA Order No. 16998) was an appeal of the revocation of two building permits for a community correctional center. The appeal in that case was filed within 60 days of the issuance date of both the original building permit (October 9, 2002) and the revised building permit (1/17/03). The proposed operator of the correctional center claimed that the appeal was untimely because it was filed more than 60 days after two concurrence letters were signed by the Office of the Zoning Administrator, on December 11, 2000 and again on November 28, 2001. Both of those concurrence letters sought confirmation that the proposed use was permitted in the C-M-2 zone, with no other details about the proposed use. Those letters were signed almost one year before the first building permit application was filed. The Court held that “we need not decide whether the concurrence letters were separately appealable...because the issuance of a building

permit requires the DCRA to comply with the public notice and other requirements set forth in the zoning regulations,...[A] party such as ANC 5B may wait to appeal until the DCRA takes official action by issuing the permit...". Id. at 13-14.

Accordingly, the most that can be said of Bannum is that the ANC need not appeal preliminary concurrence letters but instead can wait until the issuance of the building permit with its notice requirements.² This rule does not assist Appellants because they did not appeal the issuance of the building permit. Moreover, the Zoning Commission's issuance of the PUD Order in this case (which included approval of the Sign location) was itself an appealable action, and Appellants did not avail themselves of that opportunity either. Bannum did not involve any regulatory agency approval process prior to issuance of the building permit. In the present case, the building permit for the Hotel was issued in 2012, and the Sign location was included on the approved building permit plans. Notice of the permit was sent to the ANC but Appellants did not appeal within 60 days of issuance of the building permit. Thus, this case is not comparable to Bannum and so Appellants' reliance on that case is misplaced.

Basken v. DC Board of Zoning Adjustment, No. 06-AA-379 (DC Court of Appeals, April 18, 2008) (BZA Order No. 17411) was an appeal of a DCRA decision to allow an enlargement of an apartment building and to convert it to a seven unit building. The first building permit was issued on September 9, 2004, and the subsequent permit was issued on December 17, 2004. The Appellants in that case filed an appeal within 60 days after the issuance of the Certificate of Occupancy for the apartment house, but "not until almost 8 months after the issuance of the ...building permit and 70 days after appellants had notice and knowledge about DCRA's decision...". Id. at 8. The Court found the appeal untimely. It held "that a certificate of occupancy is separately appealable where it provides the first notice from which an aggrieved person knew or 'reasonably should have known' of the resolution or decision that a certificate or occupancy represents...A certificate of occupancy does not, however, start another sixty-day appeal period as to any and all DCRA zoning decisions affecting a project that preceded issuance of the certificate. If that were so, every zoning determination that preceded issuance of a building permit would effectively be subject to review again at the certificate of occupancy stage, and no property owner could ever have assurance that a building project would not be stopped in its tracks at the last minute." Id. at 22-23.

The facts of this case have much in common with those present in Basken. As in that case, the appeal in this case was not filed within 60 days of the first document recognizing the zoning decision at issue. Rather, the appeal was filed after a later event which simply reaffirmed the earlier zoning decision. In Basken the decision appealed was the issuance of a certificate of occupancy. Here, the Appellants attempt to appeal the February 28, 2014 email from the Zoning Administrator and/or the February 10, 2014 letter from the Zoning Administrator and/or the March 14, 2014 Sign Permit. In Basken, the Court decided that the certificate of occupancy was not a separately appealable event, because notice and knowledge of the zoning decision to approve occurred earlier. The same reasoning indicates that the email, the letter, and the Sign

² And even this rule appears to have been undermined by the Court of Appeals decision in Basken, which is discussed below. However, as explained, even giving Bannum a generous reading, it does not support Appellants' position.

Permit are not separately appealable either since they simply reaffirmed the earlier zoning decision approving the Sign location at issue.

Finally, Economides v. DC Board of Zoning Adjustment, No. 06-AA-1381 (DC Court of Appeals, August 14, 2008) (BZA Order No. 17285) involved the appeal of a building permit for a retaining wall, more than eight months after issuance of the building permit. In that case, the appeal was allowed to proceed more than 60 days after permit issuance, because the appellants asserted that they did not actually see the construction in question. The Court upheld the Board's determination on the timeliness issue that the information about the construction was not in the public domain, and that the appellant's view of the construction was shielded by dense foliage, and the construction was not visible from the street. The Economides decision is of no assistance to Appellants because, in this case, both Appellants were participants in the PUD process, including the public hearing where the Sign location was reviewed and discussed.

Thus, unlike the appellant in Economides, Appellants knew or should have known of the plans to construct the Sign at issue. In addition, there is no dispute that Appellant 22 West actually saw the Sign brackets more than 60 days before they filed the appeal, and Appellant ANC 2A was notified of the Sign brackets and took official action to oppose the Sign installation more than 60 days prior to the appeal.

Based upon the foregoing, the Board concludes that. this appeal was filed 1) more than 60 days after the issuance of the PUD Order approving the Sign location; and 2) more than 60 days after the issuance of the Building Permit (the location of approved Sign was shown on approved permit drawings); and 3) more than 10 days after the date that the Hotel was under roof; and 4) more than 60 days after the date the Appellant 22 West saw the brackets and wiring for the Sign; and 5) more than 60 days after the date that Owners' counsel informed Appellant 22 West that the brackets and wiring were for the approved Sign, and that the zoning authorities confirmed that the Sign is permitted by the PUD approval; and (6) more than 60 days after Appellant 22 West shared with the ANC 2A06 Commissioner the information about the brackets and wiring, and the confirmation by Owner's counsel that the Sign was approved for zoning; and 7) more than 60 days after ANC 2A passed the first of its several resolutions in opposition to the installation of the Sign, after a full presentation of the issue by 22 West at the ANC's February 15, 2014 public meeting. Appellants had actual notice and knowledge of the zoning decision to approve the Sign, or reasonably should have had actual notice or knowledge of the zoning decision to approve the Sign, and were therefore under an obligation to undertake due diligence in order to be able to file a timely appeal. Based upon consistent decisions by this Board, neither the Zoning Administrator's February 10, 2014 letter and February 28, 2014 email, explaining the basis for the Sign approval, and refusing to take enforcement action, nor the issuance of the Sign Permit, were new zoning approval decisions from which a timely appeal may be taken. The Appellants have not requested, nor have they asserted a basis for, an extension of the 60-day deadline for filing this appeal pursuant to Section 3112.(d), so this Board need not address that issue. For these reasons, this appeal is untimely per 11 DCMR, Section 3112.2(a) and must be dismissed.

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 appeal filed by 22 West and ANC 2A does not satisfy the requirements of timeliness set forth in § 3112.2. The Board must therefore find the filing of the appeal untimely. Accordingly, it is therefore **ORDERED** that the appeal is **DISMISSED**.

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.

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