

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 3101¹, from a March 21, 2014 decision of the Department of Consumer and Regulatory Affairs in the issuance of Permit Number SG1400204 to permit the installation of signs at premises 2201-2213 M Street, N.W. (Square 50, Lot 87).²

HEARING DATES: July 22, 2014 and September 30, 2014
DECISION DATE: October 28, 2014

DECISION AND ORDER

PRELIMINARY MATTERS

On April 28, 2014, Appellant 22 West filed an appeal of a Zoning Administrator's determination letter dated February 10, 2014. For the reasons stated in the conclusions of law, the Board of Zoning Adjustment ("Board" or "BZA") determined that this was not an appealable decision. Instead, the Board concluded that the appealable decision was the issuance of Sign Permit No. SG 1400204 permitting the installation of signs on a hotel located at 2201-2213 M Street, N.W.

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."

PerStar M Street Partners LLC, as the owner of the Property ("the Owner") and the Department of Consumer and Regulatory Affairs ("DCRA") as the entity whose administrative decision is the subject of the appeal were automatically parties to this appeal pursuant to 11 DCMR § 3199.1.

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraphs, are to provisions that were in effect on the date this Application was decided by the Board of Zoning Adjustment ("the 1958 Regulations"), but which were repealed as of September 6, 2016 and replaced by new text. The repeal and replacement of the 1958 Regulations has no effect on the validity of the Board's decision or the validity of this order.

² The caption has been modified to reflect the determination of the Board as to what constituted the appealable decision.

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

The Board held the hearing on September 30, 2014. The Appellants, the Owner, and DCRA participated in the hearing. As a preliminary matter, the Board took up the Owner's Motion to Dismiss for lack of timeliness. Upon hearing the argument of the Owner 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.

At its October 28, 2014 public meeting, the Board denied the motion to dismiss and granted the appeal. The factual and legal basis for the Board's decision follows:

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 2201 M Street, N.W., also known as Lot 87 in Square 50.
2. Zoning Commission Order No. 07-21, effective June 20, 2008, approved construction of a hotel on the property as a planned unit development ("PUD").
3. On June 20, 2012, the Owner filed an application to modify the approved PUD, which was assigned Zoning Case No. 07-21B.
4. The Owner's proposed plans (Exhibit 24 in the record of Case No. 07-21B, Sheets A1 and A2), depicted a single sign over the hotel entrance on 22nd Street.
5. During the hearing, the Owner presented a PowerPoint presentation that was entered as Exhibit 36 to the record. Four PowerPoint slides were depicted on each page. A slide at the upper right of page 4 was intended to depict the hotel signage. With the naked eye the existence of any signage is not evident.
6. An enlarged certified copy of the slide, not available to the Zoning Commission when it decided the modification case, but entered into the record of this case as Exhibit 25A shows two building elevations, each with two signs. Two of the signs are at the top of the hotel

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and each is marked with an “A”. As to the other two signs, one is above the hotel entrance, and one above the restaurant entrance. Both are marked with a “B”. At the bottom of the slide is a legend indicating the size of each sign.

7. The signs are depicted as rectangles with no indication as to whether the signs would be backlit.
8. According to the video and transcript of the hearing, this slide as shown during the hearing, though depicting the four signs, appeared on screen for approximately 23 seconds.
9. 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 Owner’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.

10. The Zoning Commission took final action to approve the modification on February 28, 2011, and Zoning Commission Order 07-21B, which gave effect to that decision, became effective on February 3, 2012 (the “Modification Order”).
11. Finding of fact 28 of the Modification Order 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;”
12. Finding of fact 43(b) states in part:

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.

13. In the "Decision" portion of Modification Order, the Commission approved the modification "subject to the following guidelines, conditions, and standards," which replaced those contained in Zoning Commission Order No. 07-21. Condition A.1 stated:

The PUD shall be developed 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 [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.*

(Emphasis added. Footnote omitted but quoted within the bracket.)

14. On October 24th 2012, DCRA issued building permit B120561 to the Owner.
15. Subsection 105.1.1 of Subtitle A of the Construction Codes (Title 12 DCMR) identifies the different classifications of required permits. Building permits and sign permits are separately classified. Pursuant to § 101 of Appendix N of that subtitle a sign may not be erected without a permit issued pursuant to that section.
16. 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 emailed Whayne Quin of the law firm of Holland & Knight. Although Mr. Quin did not handle the modification case, Ms. Blumenthal wrote to him because she did not have the email of Christopher Collins, the attorney who appeared before the Zoning Commission. Ms. Blumenthal indicated that she was "hopeful that there is an explanation for these newly installed elements that is not blatantly in violation of the Commission's Order granting approval to the PUD". (Exhibit 6D.)
17. Mr. Collins responded by email dated February 10, 2014 and indicated that the "brackets in your photo are for a back-lighted sign, as shown on the plans approved by the Zoning Commission." Mr. Collins apologized for not responding earlier but explained that he "was double-checking with the zoning authorities to confirm that this sign is permitted by the Zoning Commission's order before responding to you. The sign is not in violation of the zoning order." (Exhibit 6D.)

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18. On that same date Zoning Administrator (“ZA”) Matthew LeGrant issued a letter addressed to Kyrus Freeman, also of Mr. Collins’ law firm (the “Determination Letter”). (Exhibit 6F.) The letter noted that Mr. Freeman had provided him with certified copies of Exhibits 24 and 36 of the case record in Zoning Commission Case No. 07-21B, the previously described certified enlarged copy of page 4 of Exhibit 36, and portions of the hearing and decision meeting transcript pertaining to the hotel signage. Mr. LeGrant’s letter then indicated:

Based upon my review of these materials, I interpret Decision A. 1. to mean that the Applicant is permitted to install up to four signs on the hotel’s façades, and that the signs must be installed in the general locations and consistent with the dimensions as shown in the signage plan included on page 4 of Exhibit 36. I interpret the last sentence of Decision No. A. 1 to only impose a limitation regarding the hotel sign to be located above the hotel’s entrance on 22nd Street, but not as a limitation of on any of the other proposed signs.

19. After receipt of Mr. Collins’ email, Ms. Blumenthal emailed Mr. LeGrant on February 12, 2014. The email included the full email exchange with Mr. Quin and Mr. Collins and concluded by stating Ms. Blumenthal’s belief that the sign was a blatant violation of the Modification Order.
20. Mr. LeGrant responded on February 19, 2014, saying “I have previously discussed this issue with Chris Collins . . . and will re-review Zoning Commission’s Order No. 07-21B. Once I conclude my review, I will let you know how the Order affects the proposed signage. I expect to conclude by review by the middle of next week.” Exhibit 21G. Mr. LeGrant e-mailed again on February 25, 2014 promising that he would come to a decision by the end of that week. (Exhibit 21G.)
21. On February 28, 2014, Mr. LeGrant again emailed Ms. Blumenthal. (Exhibit 21G.) The email included the Determination Letter which the ZA indicated he had “re-reviewed” and concluded “I do not see that there is new information that causes me to change my determination.”
22. Neither the ZA’s Determination Letter nor his February 28th email to Ms. Blumenthal stated an unequivocal decision to allow the issuance of the needed sign permit.
23. On March 21, 2014, the Department of Consumer and Regulatory Affairs issued sign permit SG1400204 which authorized building signs for the development, including the sign that was the subject of Ms. Blumenthal’s emails. (Exhibit 21H.)

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24. The fourth page of the permit contains a list of reviews, with the required reviews checked. Among the reviews checked was “zoning.”
25. On April 28, 2014, 22 West filed this appeal. (Exhibit 2.)

CONCLUSIONS OF LAW

The Appeal was Timely

The Owner moved to dismiss this appeal as untimely. The Board is authorized by § 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 officer 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).) Although this deadline is a “claims processing rule” and therefore not jurisdictional in nature, *see Gatewood v. District of Columbia Water and Sewer Authority*, 82 A.3d 41 (2013) (WASA deadline to file appeal of water bill is non-jurisdictional), the failure to adhere to the rule will result in the dismissal of an appeal unless the 60-day deadline is extended under circumstances stated at 11 DCMR § 3112.2(d).

The threshold issue is what is “the decision complained of.” The Owner identifies three potential candidates: the PUD order, the building permit, and the Determination Letter. The Appellants also claim the Determination Letter is the relevant decision, but assert that their knowledge of the letter came on February 28, 2014 when Mr. LeGrant first shared it. The Owner contends that Appellants should be charged with knowledge as of February 10th when Mr. Collin’s indicated that he had double checked with “zoning authorities” and then stated that the sign was not in violation of the zoning order.

The Board concludes that none of these were appealable decisions, but it was the issuance of the sign permit on March 12, 2014 that started the Appellants’ time for filing this appeal.

As to the PUD order, the Appellants are not claiming that it contains any error, but rather that it has been erroneously interpreted. In any event, this Board has no authority to hear appeals of a PUD order, which by statute must be heard by the District of Columbia Court of Appeals. (DC Official Code § 1-510.)

Nor did the issuance of the building permit start the time for filing this appeal. Although “[o]rdinarily, the building permit is the document that reflects a zoning decision”, *Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008), that is not always the case. In *Basken* the Court of Appeals agreed with the BZA that an ambiguously worded building permit did not start the time for filing an appeal. The issue here is not the ambiguity of the building permit, but the fact that it could not authorize the erection of the signs at issue. Instead, a separate sign permit

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must be obtained, (See 12-A DCMR Appendix N § N101), and a separate zoning approval made. Since the building permit was not appealable, Ms. Blumenthal's subsequent observation of the brackets is not relevant.

The Determination Letter is not appealable because it does not clearly signify a decision to approve the sign permit. This distinguishes the Determination Letter from the letter in the *Basken* decision. In the *Basken* letter, DCRA admitted error in issuing the building permit, but nonetheless stated that a certificate of occupancy would issue. Because that letter "clearly signified a decision not to withhold a certificate of occupancy", 946 A.2d at 370, its issuance started the time for appeal. In contrast the Determination Letter makes no similar commitment as to the sign permit."

The Board finds no reason why the Zoning Administrator should have based his decision upon anything other than the clear language of Condition 1.A.

Even if the Determination Letter started the 60-day clock, this appeal would remain timely filed. The Board rejects the Owner's contention that Appellants were made aware of the Determination Letter through Mr. Collins' February 10th email, which makes no reference to a written determination. In *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917 (D.C. 1980), the Court of Appeals confirmed the BZA's view that only written decisions by District officials are appealable. Rather, that notice of the Determination Letter came in Mr. LeGrant's February 28th email. Indeed, Mr. LeGrant's February 19th email merely indicated that he had "previously discussed the issue with Chris Collins" and his February 25th email indicated that he would come to a decision by the end of the week. Appellants therefore had no basis to conclude that any decision had been made.

The motion to dismiss is therefore denied.

Merits of the Appeal

Included within Condition A.1 of the Modification Order was the following unequivocal directive:

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

The Board finds nothing ambiguous about this statement. There is to be a single hotel sign that may only be above the hotel's entrance on 22nd Street and at no other location. The sign may not be vertically mounted on the façade of the hotel or illuminated from within. From this clear and

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unambiguous limitation, the Zoning Administrator nevertheless found permission to erect additional signs, all of which could be backlit.

In support of this conclusion, the Zoning Administrator relied upon an enlarged copy of Exhibit 36 that was not available to the Zoning Commission in the modification proceeding. The Board finds no basis for the Zoning Administrator's resort to anything other than the clear language of Condition 1.A. And even when there may be an inconsistency between the text of a condition and what is illustrated in an exhibit, the text of a condition should control unless there is compelling evidence of a contrary intent. No such evidence exists here,

Exhibit 36 was a PowerPoint presentation presented to the Zoning Commission at its October 27, 2011 hearing. As contained in the record, the slide on page 4 does not clearly depict the signage. As noted by the ZA:

[M]y first look at that ..., was boy, it's a difficult graphic to read. However, if you look, and we had to I think actually get a real clean copy of that to see exactly what was entailed, that exhibit clearly showed a sign at the top of the hotel.

(Transcript of Board of Zoning Adjustment Hearing, September 30, 2014, p. 114.) Further, the slide as shown to the Zoning Commission was visible for little more than 23 seconds.

The Board does not find that a fleeting depiction of additional hotel signs during a PowerPoint presentation and an undecipherable rendering of those same signs are sufficient to counter the Zoning Commission's unequivocal statement that no more than one hotel sign is allowed.

Instead, the Board finds it compelling that at every instance in the Order where signage was discussed, the Zoning 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 Zoning 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 the ANC's response referenced in its request that the Order limit signage, which the Zoning Commission recognized in Finding 28. In fact, the Zoning Commission's Order used language almost identical to that language in Finding 28 from the ANC's response.

The Applicant also argued that because Appellants do not challenge the sign over the restaurant, as also shown in Exhibit 36, the Commission intended there to be more hotel signs than the one permitted in the Order. The fact that the Appellants chose to limit the scope of their appeal to the additional hotel signage does not counter the Board's conclusion that the signage appealed violates the Modification Order. The issue here is whether there can be more than one hotel sign, not to whether a restaurant sign was also permitted.

Finally, the Board notes that this is not an appeal of the ZA's interpretation of a Zoning Regulation, but of a Zoning Commission Order. The Chairman of the Zoning Commission participated in

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these deliberations and voted to reverse the ZA's interpretation. While the Board could disagree with even the Chairman's interpretation, his view and vote corroborates the Board's unanimous view that the ZA's interpretation was erroneous.³

Based on the findings of fact and conclusion of law, the Board finds that Permit Number SG1400204 was issued in error and therefore **REVERSES** the determination of the Zoning Administrator to approve its issuance.

Vote on the Motion to Dismiss taken on October 28, 2014:

VOTE: 4-0-1 (Lloyd J. Jordan, Anthony J. Hood, S. Kathryn Allen (by absentee vote), and Marnique Y. Heath to DENY the Motion to Dismiss the Appeal, and Jeffrey L. Hinkle recused).

Vote on the Merits of the Appeal taken on October 28, 2014:

VOTE: 4-0-1 (Lloyd J. Jordan, Marnique Y. Heath, S. Kathryn Allen (by absentee vote), and Anthony J. Hood to GRANT the Appeal; Jeffrey L. Hinkle recused).

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

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

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: November 14, 2016

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

³ Chairman Hood was unequivocal in stating his view:

MR. HOOD: I would just say, I just want to give another board member a chance. But I would just say that the way I see it, and if you look at the commission's original order, it specifically says -- and I think we're saying the same thing -- that the hotel sign shall be above the hotel's entrance. And it talks about one sign.

CHAIRPERSON JORDAN: That's right.

MR. HOOD: Okay. I think we're saying the same thing. So I think that's clear.

(Transcript of Board of Zoning Adjustment Meeting, October 28, 2014, pp. 21-22.)