

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

Appeal of ANC 2A
Regarding 924 25th Street, NW

Appeal No. 19023

OWNER'S PRE-HEARING STATEMENT

ALMAC, LLC, ("Owner"), the owner of The River Inn hotel located at 924 25th Street, N.W., submits this pre-hearing statement along with exhibits that Owner may rely upon at the hearing on this matter. Appellant's challenge to the Zoning Administrator's November 24, 2014 determination letter, concerning a planned sidewalk café at The River Inn, is both untimely and meritless.

Pursuant to 11 DCMR Section 3112.2, Appellant was required to file its appeal within 60 days of the date by which it knew, or should have known, of the Zoning Administrator's ruling. Appellant claims that it did not know of the Zoning Administrator's decision until February 13, 2015. However, Appellant knew that Owner was seeking approval for the sidewalk café from the District Department of Transportation ("DDOT") based on an interpretation by the Zoning Administrator on or around January 12, 2015. Therefore, any appeal was required to be filed by March 13, 2015, at the latest. Accordingly, this appeal—which was not filed until April 9, 2015¹—is untimely and the Board should not consider it.

Even if the Board decides to hear this appeal, Appellant's challenge to the Zoning Administrator's decision is baseless. The Zoning Administrator determined that the use of public space for a sidewalk café is not governed by the Zoning Regulations. This decision is well-

¹ The appeal was not complete and accepted for filing until June 4, 2015. At that time, the Appellant completed its application by filing a certificate of service which certified that the appeal was served on March 10, 2015—nearly a month before the appeal was actually filed. See Exhibit A. The Owner was never served with this Appeal.

supported by the Zoning Regulations, and this Board should reject Appellant's arguments which are without merit.

I. STATEMENT OF FACTS

The River Inn is a hotel located in the R-5-E Zone at 924 25th Street, N.W. It has operated as a hotel since prior to May 16, 1980, and has more than 100 rooms. It is subject to certain zoning limitations imposed by 11 DCMR Sections 350 and 351.

Owner has been interested in creating a sidewalk café in the public space adjacent to the hotel for some time. It initially sought to incorporate a sidewalk café at the hotel in 2002. In May 2002, then-Acting Zoning Administrator Denzil Noble issued a letter stating that a sidewalk café was prohibited by the Zoning Regulations, unless it was approved as a special exception by the Board of Zoning Adjustment. A copy of this letter is attached as Exhibit B. Owner did not pursue the sidewalk café approval further at that time.

In May 2014, Owner filed a public space application with DDOT for a sidewalk café. In connection with this application, the Appellant was made aware of the request and reviewed the request at the ANC 2A June 2014 public meeting. The Appellant reviewed the 2002 determination letter and raised the issue with Owner. Owner withdrew its public space application to seek further review of the issue by current Zoning Administrator Matthew LeGrant.

On September 10, 2014, counsel for the Owner met with Zoning Administrator Matthew LeGrant to discuss the Owner's intent to submit a new application for a sidewalk café in the public space adjacent to the hotel. Following these discussions, Mr. LeGrant issued a determination letter on November 24, 2014, which stated that the Zoning Administrator reviews applications "for conformity with the D.C. Zoning Regulations (Title 11 of the DCMR) as it applies to the use and development of private property. Thus, the use of the abutting public space for a sidewalk café

will not be governed by Title 11 of the DCMR." A copy of this determination letter is attached as Exhibit C. Mr. LeGrant's determination letter specifically stated that he considered – and disagreed with – the reasoning of the 2002 determination on the issue. *See* Exhibit C. This letter was published on the Department of Consumer and Regulatory Affairs ("DCRA") website on November 28, 2014.

Based on discussions with Mr. LeGrant and this November 24, 2014 determination letter, Owner sought approval for a sidewalk café in public space at The River Inn as well as a sidewalk café endorsement from the Alcoholic Beverage Regulation Administration ("ABRA"), both in early 2015. Copies of these submissions are attached as Exhibit D and E. Following submission of the application for the sidewalk café endorsement but prior to submission of the public space application, Owner affirmatively reached out via email to some of Appellant's members on January 12, 2015, indicating its intention to resubmit the public space application and stating that the issues relating to the 2002 Zoning Administrator had been resolved. *See* Exhibit F (compiling emails from January 12, 2015 to February 9, 2015).

Appellant was given notice of the Zoning Administrator's decision in the following ways:

- o The determination letter was published on DCRA's website on November 28, 2014.
- o Owner's application for the sidewalk café endorsement was referred to Appellant following submission of the application to the Alcoholic Beverage Control Board on January 9, 2015. *See* D.C. Code. § 25-421. Appellant filed a protest to the application, and later entered into a settlement agreement concerning the sale of alcohol at the proposed sidewalk café.
- o Owner's public space application for the sidewalk café was referred to Appellant following it being re-submitted to DDOT on January 21, 2015. *See* 24 DCMR § 304.6.

Comments on the application from the reviewing agencies were filed beginning on January 29, 2015. *See* Exhibit G.

- o Owner corresponded with some of Appellant's members as early as January 12, 2012, indicating its intention to resubmit the public space application and affirmatively stating that the issues relating to the 2002 Zoning Administrator letter had been resolved.

Despite Appellant's awareness of the planned sidewalk café, its knowledge that Owner was applying for a public space permit through DDOT, and its ability to participate in the permitting process run by DDOT, Appellant did not participate in the Public Space Committee hearing, which was held on April 23, 2015, nor did it file a resolution or letter with the Public Space Committee. Instead, it chose to file an untimely appeal of Mr. LeGrant's November 24, 2014 determination letter, which concluded that the Zoning Regulations do not apply to a sidewalk café in public space. The appeal argues that the Zoning Administrator should have exercised authority over the sidewalk café as commercial adjunct space. *See* Statement of Appeal.

II. THIS APPEAL IS UNTIMELY.

This appeal was initially filed on April 9, 2015, but not considered complete by the Office of Zoning until June 4, 2015, both of which are after the 60-day period for filing an appeal had lapsed. Accordingly, under the Zoning Regulations, the appeal is untimely and the Board should dismiss it.

A. THE DISTRICT'S ZONING REGULATIONS ESTABLISH A FIRM DEADLINE FOR FILING AN APPEAL.

An administrative appeal is subject to dismissal for late filing. *See Gatewood v. District of Columbia Water and Sewer Auth.*, 82 A.3d 41, 46-48 (D.C. 2013). Appellant filed this appeal more than five months after the Zoning Administrator issued his decision in this matter and more than

60 days after it knew or should have known about the decision. This appeal is therefore untimely and must be dismissed.

The District's Zoning Regulations provide that an appeal of a zoning decision must be filed "within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR § 3112.2 (a). *See also* Order No. 02-01 at p. 1-2 (noting that this regulation codified the principle that all appeals to the Board must be filed within 60 days of the appellant's actual or constructive knowledge of the decision complained of); *Waste Mgmt. of Md., Inc. v. DC Board of Zoning Adjustment*, 775 A.2d 1117, 1121-22 (D.C. 2001). The 60-day appeal period begins when an appellant has actual or constructive notice or knowledge that a decision. Once an individual has actual or constructive notice or knowledge of a zoning decision, he or she is obligated to undertake due diligence to determine the nature of the decision in order to timely appeal. *See Diamond v. Davis*, 680 A.2d 364, 372 (D.C. 1996) (the period for filing a claim is triggered by inquiry notice, which is the knowledge which "a plaintiff would have possessed after due investigation").

The Board is required to determine when Appellant knew or should have known of the decision which gives rise to the instant appeal. *See BZA Appeal No. 17468 of ANC 6A* at p. 4 (February 16, 2007) (when an appellant asserts a certain date as the basis of 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 provided by the building permit.")

B. THIS APPEAL WAS UNTIMELY FILED AND MUST BE DISMISSED.

Appellant alleges that it was not aware of the Zoning Administrator's decision in this matter until February 13, 2014. *See* Statement of Appeal, p. 2. This representation is inconsistent with the record. In fact, there is substantial evidence that Appellant knew or should have known of the opinion earlier:

- o Mr. LeGrant's determination letter was publicly available on DCRA's website beginning on November 28, 2015.

- o Owner's application for the sidewalk café endorsement was referred to Appellant after it was submitted to the Alcoholic Beverage Control Board on January 9, 2015. *See* D.C. Code. § 25-421.

- o Owner affirmatively informed some of Appellant's members on January 12, 2015, that it intended to resubmit the public space application and that the issues relating to the 2002 Zoning Administrator had been resolved. Owner had a variety of email correspondence with Appellant's members between January 12, 2015, and February 9, 2015, relating to the application and work with the community. *See* Exhibit F.

- o Owner's public space application for the sidewalk café was referred to Appellant following re-submission to DDOT on January 21, 2015. *See* 24 DCMR § 304.6.

These communications demonstrate that Appellant knew or should have known of the decision no later than January 12, 2015, well before the February 13, 2015, date identified by Appellant. At this point, Appellant was aware that Owner was seeking approval for the sidewalk café from DDOT and that the zoning issue had been resolved. With this knowledge and some minimal due diligence, it should have known of the Zoning Administrator's publicly available

determination letter. Accordingly, mid-January is the latest that Appellant should have known of the Zoning Administrator's decision, and therefore, Appellant had until March 13, 2015, at the latest, to submit its appeal. *See Georgetown Residents Alliance v. D.C. Bd. of Zoning Adjustment*, 816 A.2d 41, 49-50 (D.C. 2003) (upholding Board's decision that appeal was untimely where record was clear that ANC had knowledge of the issuance of the permit, the community generally was aware of it, and the developer of the project had engaged with the ANC and community concerning the permit).

This appeal was filed on April 9, 2015, and therefore it is untimely and should be dismissed.

C. THERE IS NO BASIS FOR AN EXTENSION OF THE 60-DAY TIME PERIOD FOR FILING THIS APPEAL.

Because this appeal is untimely, the D.C. Zoning Regulations allow this Board to hear the appeal only if both (1) there are exceptional circumstances outside the Appellant's control, which could not have been reasonably anticipated, and that substantially impaired the Appellant's ability to file this appeal to the Board; and (2) the extension of time will not prejudice the Owner. 11 DCMR § 3112.2 (d). Even assuming that this inquiry is justified, this appeal could be heard only if Appellant satisfied both tests. It cannot satisfy either test; therefore, this appeal must be dismissed.

1. There Are No Exceptional Circumstances Outside of Appellant's Control That Substantially Impaired Its Ability To File A Timely Appeal.

As set forth above, Appellant knew of the Zoning Administrator's decision with sufficient time to file a timely appeal. It has no reason to justify its delay in filing the appeal.

It is clear 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*, at p. 6. Moreover, the Board has concluded in a number of cases that an Appellant who engages in discussions, emails, and other activity to attempt to resolve a dispute does not by that action extend its time for filing an appeal to this Board. *See BZA Appeal No. 17915 of Jonathon Boduc* (December 17, 2009); *BZA Appeal No. 17391 of de Brito and Gottlieb* (October 2, 2006).

2. Allowing This Appeal to Proceed Will Prejudice The Owner.

Allowing this appeal to proceed will cause substantial prejudice to the Owner.

Owner has been diligently working to receive approval for a sidewalk café for more than a year. During that time, Owner has worked closely with Appellant as well as with the Zoning Administrator, DDOT, and ABRA. Owner has now secured all necessary approvals to operate its sidewalk café, including the public space permit and the Certificate of Use for a sidewalk café, and the sidewalk café is operating. Appellant did not participate in the public space process, despite the fact that the municipal regulations contemplate a role for Appellant in the sidewalk café approval process. *See* 24 DCMR § 304.6.² This untimely appeal should not be permitted as it will prejudice the Owner.

Accordingly, the appeal should be dismissed as untimely.

² Appellant took a more active role in opposing Owner's application for a sidewalk café endorsement filed with ABRA. Appellant filed a protest to the application, and later entered into a settlement agreement concerning the sale of alcohol at the proposed sidewalk café. That involvement does not justify its untimely appeal of the Zoning Administrator's decision.

III. THE ZONING ADMINISTRATOR CORRECTLY DETERMINED THAT A SIDEWALK CAFÉ IS OUTSIDE THE ZONING REGULATIONS.

The Zoning Administrator correctly determined that a sidewalk café in public space is not subject to the Zoning Regulations for hotels in residential areas. Section 351.2 of the Zoning Regulations is applicable to commercial adjunct space in residential hotels. It states:

Commercial adjuncts as accessory uses to a hotel containing one hundred (100) or more rooms or suites shall be permitted in an R-5 District; provided:

- (a) The total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts shall not be increased;
- (b) There shall be no direct entrance to the function rooms, exhibit space, and commercial adjuncts from the outside of the building;
- (c) No part of the adjunct or the entrance to the adjunct shall be visible from a sidewalk; and
- (d) No sign or display indicating the existence of the adjuncts shall be visible from the outside of the building.

The Zoning Administrator correctly concluded that the planned sidewalk café would not violate any of these four restrictions. Specifically, the Zoning Administrator concluded that:

- o The total area within the hotel building devoted to the commercial adjuncts will not be increased.
- o The current commercial adjunct space will remain accessible from the lobby of the building, and there will be no direct entrance from outside the building.
- o No part of the commercial adjunct space inside the hotel will be visible from a sidewalk.
- o No sign or display will indicate the existence of commercial adjunct space from the outside of the building.

Based on these findings, the Zoning Administrator concluded that Title 11 of the D.C. Municipal Regulations does not govern the use of adjacent public space for a sidewalk café. This interpretation is entirely consistent with the municipal regulations.

Indeed, the Zoning Commission and Board of Zoning Adjustment only have jurisdiction over matters delegated to them by statute. *See President & Directors of Georgetown Coll. v. D.C. Bd. of Zoning Adjustment*, 837 A.2d 58, 68 (D.C. 2003). The Zoning Act empowers them to regulate the location, height, bulk, number of stories, and size of the buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes. D.C. Code §6-641.01; D.C. Code §6-641.07. It does not give them jurisdiction over public space, like the sidewalk at issue here. Section 50-921.04(4) of the D.C. Code specifically authorizes the Rights-of-Way Management Administration of DDOT to "[r]eview, approve and issue public space permit requests for occupancy, work within, or other use of public space. . . ". Public Space is defined as "all of the publicly owned property between property lines shown on the records of the District, and includes any roadway, tree space, sidewalk, or parking between such property lines." D.C. Code §50-921.01a(4). Furthermore, Section 301.1 of Title 24 of the D.C. Municipal Regulations states that no person shall construct or operate a sidewalk café except when authorized by the Public Space Committee. *See* 24 DCMR § 301.1; *see also* Exhibit H (District Department of Transportation, Sidewalk Cafés Pamphlet).³ Despite the fact that Section 304.7 of Title 24 provided the Appellant an opportunity to provide comment regarding the sidewalk café application, the Appellant did not

³ Available at http://ddot.dc.gov/sites/default/files/dc/sites/ddot/publication/attachments/sidewalk_cafes_pamphlet_web.pdf.

provide comment to the Public Space Committee at the public hearing or in a written submission to the Committee.

Ignoring this opportunity, Appellant instead rests its appeal on its unsupported assertion that the Zoning Administrator cannot interpret the Zoning Regulations differently from a prior zoning administrator. This is not the law. In fact, an agency is permitted to change its course or its interpretation of law, so long as it supplies a reasoned analysis for its change. *See Draude v. D.C. Bd. of Zoning Adjustment*, 527 A.2d 1242, 1253 (D.C. 1987).

In this case, the Zoning Administrator provided a reasoned analysis for its change in interpretation. The November 24, 2014 determination letter indicated that he had reviewed the decision of the prior Zoning Administrator and that he disagreed with the interpretation included in that decision.⁴ He stated that the regulations only address the total area within the hotel devoted to commercial adjunct space. *See* Section 351.2(a). As the sidewalk area at issue is adjacent to the hotel (not within the hotel) and is within public space (not within private property), the Zoning Administrator correctly determined that the Zoning Regulations would not govern the proposed sidewalk café. Instead, jurisdiction over public space belongs to DDOT and is subject to DDOT's regulatory requirements, which has been the consistent interpretation regarding the use of public space.

This reasoned analysis justifies the change in the Zoning Administrator's interpretation, and Appellant's principal argument is without merit.

Therefore, Owner requests that this Board affirm the decision of the Zoning Administrator and deny this appeal.

⁴ As a factual matter, the 2002 determination letter does not provide any specific information about the sidewalk café. Therefore, it offers little support for Appellant's conclusion that this same issue has been raised previously.

CONCLUSION

For the reasons stated above, Owner asserts that this Appeal is untimely, and the allegations contained in the Appeal are without merit. Appellant has failed to establish a valid reason to overrule the Zoning Administrator's decision. Owner therefore respectfully requests that the Board affirm the Zoning Administrator's decision and deny the Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September 2015, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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I hereby certify that on this 1st day of September 2015, a copy of the foregoing Pre-Hearing Statement was served via U.S. mail to:

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