

LAW OFFICES
GRIFFIN, MURPHY, MOLDENHAUER & WIGGINS, LLP

MARK G. GRIFFIN (DC, MD)

BRIAN P. MURPHY (DC, MD)

ASHLEY E. WIGGINS (DC, MD, VA)

MERIDITH H. MOLDENHAUER (DC, MD, VA)

KINLEY R. BRAY (DC, MD)

ERIC M. DANIEL (MD, DC)

IRIS E. POSTELNIGU (VA, DC*)

*TOLL FREE DIRECT DIAL: 202-530-1482

DIRECT EMAIL: mmoldenhauer@washlaw.com

September 1, 2015

Lloyd Jordan, Chairperson
Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: BZA Appeal No. 19023 – 924 25th Street NW (Square 16, Lot 884)
Prehearing Statement of the Appellant

Chairperson Jordan and Honorable Members of the Board:

On behalf of ANC 2A please find enclosed the Prehearing Statement for the above-referenced BZA Appeal. The appeal is scheduled to be heard before the Board of Zoning Adjustment on September 15, 2015.

Thank you for your attention to this matter.

Sincerely,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS,
LLP


By: Meredith H. Moldenhauer

Enclosures:

Cc: ALMAC, LLC

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

**Appeal of Advisory Neighborhood
Commission 2A**

*
*
*
*

**BZA Appeal No. 19023
Hearing Date: September 15, 2015**

APPELLANT'S PREHEARING STATEMENT

The Appellant, Advisory Neighborhood Commission 2A, by and through its undersigned counsel, respectfully submits this Prehearing Statement in support of its Appeal of the decision of Matthew LeGrant, Zoning Administrator, dated November 24, 2014 (the "Determination"), which authorized the construction of a sidewalk café expanding the existing hotel at 924 25th Street NW (the "Property"). The Determination erroneously permitted the expansion of an existing hotel in the R-5-E Zone District in violation of 11 DCMR §350.4(e) and §351.2. Therefore, for the reasons set forth below, the Determination should be revoked.

I. JURISDICTION.

The Board of Zoning Adjustment is authorized to hear this appeal pursuant to the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended, D.C. Official Code §§6-641.01 to 6-641.15 (formerly codified at D.C. Code §§5-413 to 5-432 (1994 Repl. & 1999 Supp.))) (the "Zoning Act") and 11 DCMR §3100.2. The Determination evaluated 11 DCMR §350.4(e), which strictly limits the ability of an existing hotel in a Residence District to expand in any way. The effect of the Determination permits the expansion of areas within the hotel, which will be operated and maintained by a separate commercial venture.

The Owner has argued, and the Determination suggests, that the Zoning Administrator has no jurisdiction in this matter. We disagree. 11 DCMR §351.2(a) clearly states that "the total area within the hotel devoted to function rooms, exhibit space and commercial adjuncts *shall not*

be increased.” As argued below, the expansion of the existing restaurant space to include a sidewalk café is an increase of the area within the operation and control of the hotel, despite a portion of the restaurant being located in the Public Space. Moreover, whether the expansion complies with the applicable Zoning Regulations is a question ripe for consideration by the Board of Zoning Adjustment. *Compare* Appeal of Reed Cooke Neighborhood Association, BZA Appeal No. 17746, June 10, 2008 in which the Board found it lacked jurisdiction because the issue did not relate to the underlying zoning in the public space but rather the ability to grant a curb cut. In the present matter, District of Columbia Public Space is, as property of the District of Columbia, subject to the Zoning Regulations. *See* Comprehensive Plan Amendments Act of 1989, D.C. Law 8-129, 37 D.C. Reg 55, 235 (1990) (now codified at D.C. Code §1-306.07) (“Except as provided in paragraphs (2), (3), and (4) of this subsection, the government shall be subject to zoning.”).

The Board and Zoning Commission applies zoning regulations on public space, government owned land, alleys and streets (following a request for alley or street closures). The Board has jurisdiction and this matter is ripe for appeal.

II. STATEMENT OF FACTS.

1. The River Inn is a hotel located in the R-5-E Zone District at 924 25th Street N.W.
2. Hotels in residence zones are strictly regulated, being only permitted if the hotel was first established prior to May 16, 1980 with a valid certificate of occupancy, and restricted further to only the gross floor area approved as of such date. 11 DCMR §350.4(e). Additionally “the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased.” Id.

3. In 2002, the owners of the Property sought to establish a sidewalk café in the public space adjacent to the restaurant within the hotel use. At that time, the Zoning Administrator determined that a sidewalk café was not permitted because the establishment of such a commercial adjunct outside the boundaries of the existing hotel was an impermissible expansion of commercial adjuncts under 11 DCMR §350.4(e). To the best of Appellant's information and belief, as well as the publicly available records of the Board of Zoning Adjustment, the May 16, 2002 letter from Zoning Administrator Derrell Noble (attached hereto as Exhibit A) was never appealed.

4. On February 13, 2015, Appellants became aware of the Determination, issued by Zoning Administrator Matthew LeGrant, which determined, without any apparent change in circumstance of the Property or Property owner that the establishment of a sidewalk café was permitted under the very same provisions of the Zoning Regulations. The Determination, although issued in November 2014, was not published in the District of Columbia Department of Consumer and Regulatory Affairs Zoning Determination Letter Archive or otherwise publicly available until on or about February 13, 2015. Upon knowledge of the Determination, the Appellant immediately began investigating the decision and preparing to bring this appeal.

5. This Appeal was filed on April 9, 2015, 55 days after the Appellants had actual notice of the Determination.

III. TIMELINESS.

Section 3112.2 of the Zoning Regulations establishes a filing deadline of 60 days from the date on which an Appellant (1) has actual notice or knowledge of the decision complained of, or (2) reasonably should have had notice or knowledge of the decision complained of, whichever is earlier. The Board's initial inquiry must first be "when the Appellant knew or should have

known of that issue.” BZA Appeal No. 17468. It is undisputed that Appellant first learned of the Zoning Administrator’s decision to modify the Initial Determination from 2002 on February 13, 2015 when notice of an application for a Public Space permit was posted on the Property. The Appellant was, up until that point, aware of previous attempts to obtain a sidewalk café permit, and of the 2002 Initial Determination finding that such a permit was not permissible under 11 DCMR §350.4(e). The decision was not published in the Zoning Determination letter repository on DCRA’s website – the only public repository of such determinations until long after that date. Therefore, Appellant could not have had actual notice of the decision prior to February 13, 2015.

The Board has also 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 Appellant reasonably should have known of the authorization.” Id. In this case, the controlling date is the day the ANC had actual knowledge that the Zoning Administrator issued a revised Determination. Thus, though the ANC was aware of the Owner’s desire to have a sidewalk café, the ANC did not have actual knowledge that a revised Determination had been issued until February 13, 2015. As soon it became apparent that there was a change from the original Determination, the Appellant moved forward to file a timely appeal.

IV. ARGUMENT.

A. Zoning and the Restrictions on Expansion of Existing Hotels Applies to the Property and to the Public Space Adjacent Thereto

The language of 11 DCMR §350.4(e) is clear; there are three restrictions on hotels located in the Residence zones. First, only grandfathered hotels are permitted – the hotel must have been in existence as of May 16, 1980 in order to be permitted. Second, the total gross floor area of the hotel may not be increased. And third, the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased. At no point does

the statute refer to the hotel “building,” nor reference only areas of the hotel that are located within private property.

As discussed *supra*, the District government is bound by the same Zoning Regulations as private property owners; District of Columbia property is subject to Zoning. *See* Comprehensive Plan Amendments Act of 1989, D.C. Law 8-129, 37 D.C. Reg 55, 235 (1990) (now codified at D.C. Code §1-306.07) (“Except as provided in paragraphs (2), (3), and (4) of this subsection, the government shall be subject to zoning.”). The Zoning Boundary extends to the center line of the street; that is, even the Public Space is classified within the R-5-E Zone District. *See* Zoning Map, attached as Exhibit B. Given the clear determination of the District Council to apply the Zoning Regulations to District-owned property, it is clear that regardless of the property boundary line, any use which is not authorized by the Zoning Regulations is impermissible whether it is on private property or within the Public Space. The establishment of a sidewalk café is an expansion of the existing dining facility, which is in fact a restaurant open to the public, and therefore a commercial adjunct. A sidewalk café does not impact the gross floor area of the hotel, but it is an expansion of the existing commercial adjunct and will remain under the operation and control of the hotel; therefore, it is an impermissible expansion of the total area *within the hotel* devoted to a commercial adjunct, and violates 11 DCMR §350.4(e).

B. Regulation of Public Spaces Requires Conformity with Zoning

To be clear, the Appellant is not asking this Board to opine as to the propriety of the issuance of a Public Space permit associated with the Property; rather, the Appellants challenge the decision of the Zoning Administrator that a sidewalk café could, if approved by Public Space, be allowed under the applicable Zoning Regulations. This is a distinction with an important difference – as the Public Space regulations authorizing the use of District of

Columbia-owned property by private users are predicated upon conformity with Zoning. See 24 DCMR §§112.1 (“The owner or occupant of a store located in a residential-use district (as designated under the zoning regulations) may...use the space outside the front of the store...**provided that the use is conducted in compliance with the zoning regulations...**”), 301.3 (“No applicant shall be issued a Sidewalk Café Permit unless **the adjacent property is zoned for restaurant** or grocery store use or a variance to operate a restaurant or grocery store has been granted to the adjacent property.”) and 315.1 (“Unenclosed sidewalk cafes shall comply with the provisions of this section and §§310, 311, 312, 313, and 314, chapter 2 of this title, the Act, **and all other applicable District laws and regulations.**”). Whether a Sidewalk Café permit is issued or denied is clearly within the purview of DDOT; however, the ability to operate a specific use in the public space is determined by the adjacent property zoning.

Grandfathered hotel uses are only permitted in residential zones subject to specific limitations and restrictions. First, they must have been in existence pursuant to a validly issued Certificate of Occupancy as of May 1980. Second, no expansion of the gross floor area is permitted. And third, in addition to the prohibition on expansion of gross floor area, no enlargement of areas devoted to commercial uses is permitted under any circumstance. In this case, the Property Owner sought to expand an area devoted to commercial use – a dining facility ancillary to the hotel, but which operates as a restaurant open to the general public and advertised as such. This is a violation of §350.4(e). The Appellant strongly believes that but for the location in Public Space, the Zoning Administrator would have determined as such. And yet, there is no reference to private or public property in 11 DCMR §350.4(e), it is clear from the Zoning Map that the public space is subject to the same zoning classification as the private property, and the use of Public Space is predicated on compliance with Zoning.

C. The Zoning Administrator Clearly Erred in the Interpretation of 11 DCMR

§351.2

The clear intent of §350.4(e) is to limit the expansion of non-conforming hotel use within a residential district. In furtherance of that goal, §351.2's conditions reduce the impact of a grandfathered hotel's use on local residential dwellings. Particularly, §351.2 imposes an absolute bar on the *visibility* of adjunct hotel use from public space. The Zoning Administrator's determination that a new sidewalk café (a new adjunct commercial area) is not governed by the Zoning Regulations runs counter to the plain meaning of §350.4(e) and §351.2.

Section 351.2 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*.

For the reasons enumerated below the Zoning Administrator's decision is flawed:

1) The sidewalk café is accessible directly from the outside of the building.

In violation of §351.2(b) the sidewalk café, located completely within the public space, is directly accessible and visible from outside of the hotel. A patron may bypass the hostess and **directly enter the sidewalk café** in direct violation of §351.2(b). Nothing in the proposed sidewalk café's outdoor seating plans or the Determination Letter identifies a physical restriction that would prevent a patron from gaining direct access. The outdoor dining experience is outside of the four walls of the hotel and can be entered directly from the outside of the building.

2) The sidewalk café is visible from the sidewalk

The sidewalk café is a commercial adjunct of the hotel. As a commercial adjunct of a grandfathered hotel, **no part** of it may be visible from the sidewalk. In flagrant violation of the §351.2(c), the commercial adjunct is not only visible from the sidewalk, but located wholly within sidewalk. A resident of this neighborhood will be able to see, smell and hear the sidewalk café-counter to the intention of the Zoning Regulations.¹

3) Section 351.2 provides the Zoning Administrator overlapping jurisdiction with DDOT as indicated by §351.2(d).

Section 351.2(d) prohibits signage that is visible from the outside of a building for a hotel's adjunct uses. Signs and displays may at times project into public space and require approval from DDOT. However, the Zoning Regulations specifically provide the Zoning Administrator with overlapping authority to regulate, in this case prohibit, signs and displays in public space for hotel adjunct uses. Therefore, contrary to the Zoning Administrator's contention that the Zoning Regulations do not enable him to review applications for the use of public space, the Zoning Regulations specifically provide him with such authority.

4) Section 350.4(e) and §351.2 apply to the area within a grandfathered hotel and the area outside of the building.

It is exceedingly apparent that 11 DCMR §350.4(e) and §351.2 were designed to strictly limit and regulate grandfathered hotels in residential districts to ensure that they do not have an adverse impact on the residential community. Section 351.2, like many provisions within the Zoning Regulations concerned with the impact of uses on neighboring property owners, addresses the impact of a hotel from within and from outside the building. To ensure that the amount of people entering the community to visit the hotel does not increase dramatically, the

¹ The only way a sidewalk café, an adjunct commercial use to a hotel, would be permitted in the R-5 Zoning District is if it were grandfathered as existing outdoor space on May 16, 1980.

function space, exhibit space and commercial adjunct space cannot be increased. To ensure that long lines of people or groups do not block the sidewalk or congregate in public space, direct entrance from the outside to function rooms, exhibit space and commercial adjunct space is prohibited. To ensure that hotels do not have an undue visual impact on the residential community, §351.2 places restrictions on grandfathered hotels designed to eliminate the visibility of adjunct uses and their corresponding signage. All of the provisions of §351.2 are designed to protect the community. The provisions address impacts generated inside and outside the hotel by identifying conditions visually seen and experienced from outside the building (thus aka public space / sidewalk) and places restrictions on them for the benefit of the community.

It is only logical that the restrictions enumerated in §350.4(e) and §351.2, which place limitations on the building, function rooms, exhibit space, and adjunct commercial uses would apply both inside and to the abutting the property (public space). If the Zoning Regulations restrict the expansion of a commercial use inside the building envelope how could the restricted expansion be permitted in the public space, where the hotel/non-residential use would have even greater exposure, create more noise, create a larger visual intrusion, and cause more of an impact on the residential neighbors. The Determination should be revoked and the expansion should not be permitted as a matter of right.

D. No Change in Fact, Circumstance, or Law Governing Determination

The Determination overruled a decision of a previous Zoning Administrator, dated May 16th 2002, but does not appear to be based on any change in fact or circumstance. Zoning Administrator determination letters (“Determination Letters”) have the force of law, represent appealable decisions, and are relied upon by owners, the public, ANC’s and community organizations for planning purposes. Consistency by the Zoning Administrator in issuance of

Determination Letters is critical to zoning transparency and reliability. Citizens must be able to consistently rely upon Determination Letters, subject to the facts and law applied therein.

The owner of the River Inn did not appeal the original Zoning Determination letter issued in 2002. Absent a change in fact, circumstance, or the law being applied, the decision should stand. The appeal process exists to allow property owners to allege error in such decisions; failure of the property owner to appeal should end the inquiry.

Indeed, the Court of Appeals has recognized the principles of *stare decisis* ought to apply in the context of administrative determinations. “Agencies, like courts, must and do favor a policy of *stare decisis*² unless unusual circumstances intervene...nonetheless, *stare decisis* has traditionally been thought to be a principle of palpably less rigorous applicability in the field of administrative law than elsewhere. But when an agency departs from its prior practice or rule, it must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” *Springer v. District of Columbia Dep’t of Empl. Servs.*, 743 A2d 1213, 1221 (1999)(internal quotations and citations omitted). Unlike *Springer*, where the Director explicitly noted that a contrary case existed and had precedential value, and the court found that “the Director did not ignore past decisions, but chose to change the DOES interpretation of the statute in a manner entirely consistent with controlling case law,” in the present case, the Zoning Administrator’s Determination simply noted that “I disagree” with the Initial Determination. This is not sufficient to warrant a reverse in policy and interpretation of long-standing restrictions on the development and expansion of hotels in residence zones.

It is important for the community to be able to rely on the decisions of the Zoning Administrator, in an administrative capacity, and the Board of Zoning Adjustment, as a quasi-

² Latin for “to stand by things decided.” Courts cite to *stare decisis* when an issue has been previously brought to the court and a ruling already issued. Generally, courts will adhere to the previous ruling and create a consistent precedent to follow.

judicial body interpreting those decisions. Faced with two contradictory letters from two different Zoning Administrators with no change in fact or circumstance, the ANC consulted first with the Zoning Administrator, and then with outside counsel to determine whether the second letter was an attempt to correct a clear cut mistake in the first. Due to the absence of any new facts or change of law, the Appellant submits that this issue has the potential for wide-ranging community impact and determined that it was in the community interest to seek clarity in the procedure of consistent and reliable Determination Letters.

V. WITNESSES.

Florence Harmon and/or Patrick Kennedy will testify on behalf of Advisory Neighborhood Commission 2A. We reserve the right to call such other witnesses as are reasonably necessary to present this Appeal.

VI. EXHIBITS.

Exhibit A: May 16, 2002 letter from Zoning Administrator Derrell Noble

Exhibit B: Zoning Map

VII. CONCLUSION.

For the reasons stated above, and for the reasons enumerated in the Applicant's prior filings in this case, we hereby submit that the Zoning Administrator erroneously permitted the expansion of an existing hotel in the R-5-E Zone District in violation of 11 DCMR §§350.4(e) and 351.2, and that the Determination should be revoked. We look forward to presenting our case to the Board on September 15, 2015.

Respectfully submitted,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS,
LLP

A handwritten signature in black ink, appearing to read 'M. Moldenhauer', with a long horizontal flourish extending to the right.

Meridith H. Moldenhauer
1912 Sunderland Place, N.W.
Washington, D.C. 20036
(202) 429-9000