

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001

Appeal of ANC 2A

BZA Appeal 19023

DCRA’S PRE-HEARING STATEMENT

Appellant alleges that the Zoning Administrator (the “**ZA**”) erred in deciding that Sections 350.4(e) and 351.2 of the Zoning Regulations does not apply to the use of Public Space by the adjacent hotel located at 924 25th Street, N.W. in the R-5-E zone district (“**Property**”), as expressed in a letter addressed to the counsel to the owner of the Property (“**Owner**”) dated September 10, 2014 (“**ZA Letter**”¹).

DCRA asserts that the ZA properly determined that the Owner’s proposed use of Public Space for a sidewalk café did not violate Sections 350.4(3) and 351.2 of the Zoning Regulations because those provisions only regulate the commercial adjunct activities within a hotel, not across the property line in Public Space, over which the ZA has no authority. The use of Public Space is governed by separate laws and regulations from those authorizing zoning, and is administered by the Public Space Committee (“**PSC**”) under the authority of the District Department of Transportation (“**DDOT**”). The appropriate forum to challenge a proposed use of Public Space is to the PSC under the Public Space Regulations, which Appellant recognizes, but chose not to do.

Therefore, DCRA respectfully requests the Board of Zoning Adjustment (the “**Board**”) to affirm the ZA’s decision that the Owner’s proposed use of Public Space did not violate the Zoning Regulations was correct and therefore deny this Appeal.

¹ BZA Appeal 19023, Exhibit 4A.

ARGUMENT

The proper forum for challenges to a Public Space Permit is the PSC under the Public Space Regulations (Chapter 24 of the District Code of Municipal Regulations) not to the Board under the Zoning Regulations

The PSC has had jurisdiction over all applications for the use of Public Space since at least 1961, when the District Commissioners also adopted the first regulations of Public Space for sidewalk cafes.² The District Commissioners did not make any reference to zoning in these Orders or regulations. Nor did Congress refer to zoning when it enacted the first law regulating the use of Public Space in 1968.³ This complete separation of regulation of Public Space from the regulation of private property under the Zoning Regulations was reflected in Congress's definition of public space, which remains District law:

“‘Public space’ means all the publicly owned property between the property lines on a street, as such property lines are shown on the records of the District, and includes any roadway, tree space, sidewalk, or parking between such property lines.” (underscore added).⁴

In other words, Public Space is any public street right-of-way. Public Space/public street rights of way were regulated by the Department of Highways and Traffic, which housed the PSC from 1969 until 1975 when it was reorganized into DDOT.⁵ In 1977, the Mayor delegated the authority to make final determinations on the use of Public Space authority to the PSC, without any reference to zoning.⁶

Section 106.5 of the Zoning Regulations echoes this division between Public Space regulation by the PSC and private property regulation under zoning in establishing that as of May 23, 1990, all “properties of the District of Columbia Government shall be subject to

² Attachment A: District Commissioners Orders Nos. 61-904 (May 16, 1961); 61-1206 (July 11, 1961).

³ Attachment B: 82 Stat. 1156, Pub. L. 90-596 (October 17, 1968), codified at D.C. Official Code 10-1101.01, *et seq.*

⁴ Ibid, Section 102; D.C. Official Code 10-1101.01(6). The underlined words are the definition used in the Public Space Regulations governing sidewalk cafes (24 DCMR 399.1, Definitions).

⁵ Reorganization Plan No. 2 of 1975, D.C. Official Code §1-15-1 (iv)(Q) and (U).

⁶ Attachment C: Mayor's Order No. 77-150 (August 31, 1977).

zoning”. The use of the plural - instead of the singular “property” that would have referred to the totality of District owned land - indicates that the Zoning Commission extended zoning regulation to lots and parcels owned by the District, but not to amorphous Public Space/public street rights of way that are not regulated as lots, the basic building block of zoning regulation. Public Space/public street rights of way are included within zone districts, but the use of Public Space/public street rights of way is not administered by the ZA. When the Council extended zoning regulation to District government owned properties, it did not restrict or change the authority of the PSC or DDOT to regulate Public Space – a further indication that Public Space regulation has always been seen as integral to traffic regulation and separate from zoning. This has been most recently expressed in the regulations governing food trucks, which are only permitted in locations approved by DDOT (24 DCMR 501.1(c)) if they are in Public Space/public rights of way and are not subject to any zoning regulation. On the other hand, a proposal to operate one or more food trucks as a “summer garden” or pop up food marketplace on a property outside of a public street right of way/Public Space - whether a private or District government lot - would certainly require ZA approval under the Zoning Regulations.

Under Public Space regulations, zoning is only relevant to the extent that a Public Space permit holder is required to have the use of the adjacent property – not the use of the Public Space subject to the Public Space permit – comply with the Zoning Regulations. Indeed Section 301.3 of the Public Space regulations differ substantially from the Zoning Regulations for the Public Space use of a sidewalk café, which require the adjacent property be authorized under zoning for a restaurant or grocery store – whereas outdoor seating on a property (whether privately or District government owned) is permissible for many other uses under the Zoning Regulations.

Appellant recognizes that the Public Space regulations themselves indicate that the use of Public Space is not subject to zoning: “[w]hether a Sidewalk Café permit is issued or denied is clearly within the purview of DDOT [PSC]”.⁷ Yet Appellant chose to not challenge the issuance of the Public Space permit for the Property. DCRA asserts that the ZA correctly determined that the use of Public Space is not subject to regulation by the ZA under the Zoning Regulations, but instead governed by the Public Space regulations as administered by the PSC and DDOT.

⁷ BZA Appeal 19023, Exhibit 18, at 6.

Section 350.4(e) of the Zoning Regulations only addresses activities within a hotel

Section 350.4(e) establishes as a permitted use a

“[h]otel, only in R-5-B, R-5-C, R-5-D, or R-5-E Districts, in existence as of May 16, 1980, with a valid Certificate of Occupancy or a valid application for a building permit; provided, that the gross floor area of the hotel may not be increased and the total area **within the hotel** devoted to function rooms, exhibit space, and commercial adjuncts may not be increased. An existing hotel may be repaired, renovated, remodeled, or structurally altered”.
(underscore and bold added)

This provision clearly limits the restriction on the total area within the hotel allotted to function rooms, exhibit space and commercial adjuncts to the same square footage that was in existence on May 16, 1980. As “within” is not defined in the Zoning Regulations, under Section 199.2(g), the definition in Webster’s Unabridged Dictionary governs: “within: 1) in or into the interior: inside; 2) in one’s inner thought, disposition, or character: inwardly.” Appellant’s assertion that “the total area within the hotel” reaches across the property line to include the proposed use outside of both the hotel building and the Property and on Public Space runs contrary to the plain meaning of “within”.

Section 351.2 of the Zoning Regulations only addresses activities within a hotel

The four provisions of Section 351.2 echo those of Section 350.4(e) in focusing on restricting the expansion of a commercial adjunct within a hotel that was in existence and had a valid Certificate of Occupancy on May 16, 1980. As discussed above, these provisions govern the use of property subject to the ZA’s authority, not to Public Space subject to PSC/DDOT authority.

- Section 351.2(a) mirrors 350.4(e), as discussed above.
- Section 351.2(b) bars any “direct entrance to the function rooms, exhibit space, and commercial adjuncts from the outside of the building.”

As the ZA Letter states, the proposed use of Public Space as a sidewalk café would not change the current entrance to the restaurant which will remain through the lobby of the hotel and without a direct entrance to the outside of the building. To access the café would require entering the restaurant through the lobby first, and so would not violate this provision.

- Section 351.2(c) bars any “part of the adjunct or the entrance to the adjunct [to] be visible from a sidewalk.”

As the ZA Letter stated, the current visibility of the adjunct from the sidewalk complies with this provision, and there will be no change to this on the Property itself. As to the presence of the sidewalk café on the Public Space adjacent to the Property, this was legally permitted through the PSC – Appellant had notice and the opportunity to challenge this issuance under the Public Space regulations, but chose not to. As discussed above, DCRA asserts that the ZA does not have the authority to regulate uses on Public Space.

- Section 351.2(d) bars any “sign or display indicating the existence of the adjuncts [to] be visible from the outside of the building.”

As the ZA Letter states, the Property currently does not have any sign outside the hotel, and this will not change with the sidewalk café use in the adjacent Public Space.

ZA not bound by prior ZA’s 2002 Determination Letter

Contrary to Appellant’s allegation, the ZA is not bound by the 2002 letter of a prior ZA (“**2002 Letter**”⁸). The ZA Letter specifically analyzed each of the relevant provisions of the Zoning Regulations that applied and determined that the 2002 Letter had been erroneously issued. The 2002 Letter failed to analyze the specifics of the proposed use of Public Space at the time, instead just issuing a blanket statement. The 2002 Letter was clearly wrong in at least one instance when it failed to correctly summarize Section 350.4(e) (at that point Section 350.4(d)), leaving out the fact that the limitation on the expansion of commercial adjuncts applied only to “the total area within the hotel”. Thus the ZA Letter did provide the “reasoned analysis” that justified and explained the ZA’s reversal of the 2002 Letter, contrary to Appellant’s assertion.

CONCLUSION

For the reasons stated above, DCRA asserts that the allegations stated in the Appeal are without merit and so the Appeal does not establish a valid reason to overrule the ZA’s decision that Sections 350.4(e) and 351.2 do not apply to a permit for use of Public Space. DCRA

⁸ BZA Appeal 19023, Exhibit 4B.

therefore respectfully requests that the Board affirm that the Zoning Administrator correctly applied the Zoning Regulations and so deny the Appeal.

Respectfully submitted,

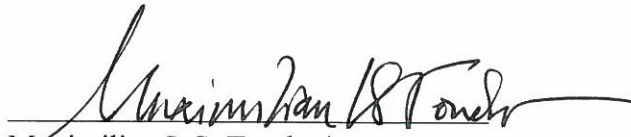
CHARLES THOMAS

General Counsel

Department of Consumer and Regulatory Affairs

Date:

9/4/15



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Attachment A

District Commissioners Orders Nos. 61-904 (May 16, 1961); 61-1206 (July 11, 1961)

G. F. 2-060

Order No. 61-904

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
WASHINGTON 4, D.C.

May 16, 1961

SUBJECT: Applications for Use of Public Space
Commissioners, D. C.

ORDERED:

That all applications for the use of public space shall be referred to the Public Space Committee for coordination with the interested departments and report and recommendation to the Commissioners.

By order of the Board of Commissioners, D. C.



Secretary to the Board

Official copy furnished:
Bureau of Departments and Agencies
Public Space Committee

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
WASHINGTON 4, D.C.

July 11, 1961

SUBJECT: Police Regulations (1955 ed.) - Amended by adding a new Article 43, Denomination of Business Streets and Use of Sidewalk Space Thereon ("Sidewalk Cafes"), Department of Licenses and Inspections

ORDERED:

That the Police Regulations (1955 ed.) are amended by adding a new Article 43 as follows:

ARTICLE 43
DENOMINATION OF BUSINESS
STREETS AND USE OF SIDEWALK
SPACE THEREON.

Sec. 1. As used in this Article --

"Business street" means a portion of a street denominated by the Commissioners of the District of Columbia as a business street in accordance with the authority contained in the last proviso of the Act of July 1, 1898 (30 Stat. 570), as amended, (sections 7-1205 and 8-108, D. C. Code, 1951 ed.)

"Commissioners" means the Commissioners of the District of Columbia.

"Director" means the Director, Department of Licenses and Inspections, D. C., or his designated agent, unless otherwise specified herein.

"District" means the District of Columbia.

"Sidewalk space" means all that space between the building line and the curb on that portion of a street denominated as a business street, regardless of whether such space is paved or unpaved.

"Street" means a public way, other than an alley, as shown on the records of the Surveyor of the District, whether designated as a street, avenue, road, drive, lane, place, boulevard, parkway, circle, or by some other term.

Sec. 2. (a) The following portions of streets are denominated as business streets:

E Street, N.W., both sides between 6th Street and 14th Street;

F Street, N.W., both sides between 6th Street and 15th Street;
G Street, N.W., both sides between 6th Street and 15th Street;
H Street, N.E., both sides between 4th Street and 13th Street;
K Street, N.W., both sides between 14th Street and 22nd Street;
M Street, N.W., both sides between 18th Street and 22nd Street;
M Street, N.W., both sides between 29th Street and 34th Street;
U Street, N.W., both sides between 13th Street and 16th Street;
Connecticut Avenue, N.W., both sides between H Street and Florida Avenue;
New York Avenue, N.W., both sides between 3rd Street and 7th Street;
New York Avenue, N.W., both sides between 9th Street and 15th Street;
Pennsylvania Avenue, N.W., north side between 6th Street and 22nd Street;
Pennsylvania Avenue, N.W., south side between 17th Street and 22nd Street;
Vermont Avenue, N.W., west side between H Street and Thomas Circle;
8th Street, N.W., both sides between Pennsylvania Avenue and F Street;
8th Street, S.E., both sides between Pennsylvania Avenue and M Street;
11th Street, N.W., both sides between Pennsylvania Avenue and K Street;
13th Street, N.W., both sides between Pennsylvania Avenue and Eye Street;
14th Street, N.W., both sides between Pennsylvania Avenue and Thomas Circle;
17th Street, N.W., west side between F Street and M Street.

(b) Streets or portions of streets in addition to those denominated in the preceding subsection may be denominated by the Commissioners as business streets upon a showing satisfactory to them that in any such street or portion of street a majority of a frontage of not less than three blocks in length is occupied and used for business purposes, or that, with respect to a portion of a street denominated a business street by subsection (a) of this section, there exists adjoining such portion a block or more having a majority of its frontage occupied and used for business purposes.

Sec. 3. (a) The operators of businesses abutting a business street may, subject to the provisions of this Article, utilize so much of the sidewalk space on which their places of business

abut as the Commissioners determine is not needed for the use of the general public during specified times on specified days.

(b) In addition to any authorization granted the operator of a place of business to use the sidewalk space abutting his place of business, any such operator who desires to use the sidewalk space abutting one or both of the adjoining places of business may, with the written permission of the operator of any such adjoining place of business, be issued a permit to use part or all of the sidewalk space abutting such adjoining place of business under the same conditions as relate to the use of the sidewalk space abutting his place of business. In any such case, the permittee will be responsible for full compliance with these regulations, both as to the sidewalk space abutting his place of business and so much of any sidewalk space abutting the adjoining places of business as he may be authorized by permit to use. No permit shall be issued to the operator of a place of business for the use of the sidewalk space abutting an adjoining place of business unless he first secures from the operator of the adjoining place of business written permission to use such sidewalk space and submits the same with his application. Such written permission shall, unless it states otherwise, be considered by the Commissioners to be revocable at the option of the person giving such permission, and shall be considered as expiring with any change in ownership of the adjoining business, thereby subjecting the permit issued for the use of such sidewalk space to possible revocation, upon written application to the Commissioners by the operator of the adjoining place of business.

Sec. 4. Application for the use of sidewalk space on a business street shall be made to the Director in duplicate, on the form prescribed by him for such purpose, shall be filed with the Permit Branch, Department of Licenses and Inspections, D.C., and shall be accompanied by 6 copies of a plat or drawing indicating, to scale, the amount of sidewalk space the applicant is seeking permission to use. Such application shall state with particularity the nature of the proposed use, the type of equipment to be used, and the days of the week and hours of each day the applicant desires to use such sidewalk space. Such application shall also contain a statement by the applicant that he will, in consideration of being issued a permit for the use of sidewalk space, agree to hold harmless the United States and the District, and the officers and employees of each of them, for any loss or damage arising out of such use, or the discontinuance of any such use; that he understands that his use of sidewalk space is to be temporary, on a day-to-day basis; that he shall not acquire any right, title, or interest in such space; that the Commissioners may by written notice, require him at any time to vacate all or any part of the sidewalk space he has been given permission to use; that upon demand to vacate such space he will promptly remove any

personal property placed thereon by him, or reimburse the District for the cost of moving such property; and that he shall have no recourse against either the United States, the District, or the officers or agents of either for any loss or damage occasioned by his being required to vacate all or any part of the sidewalk space which he has been granted permission to use.

Sec. 5. (a) Application for a permit to use sidewalk space shall be subject to the approval of the Commissioners, on consideration of a recommendation by the Public Space Committee, which shall report whether the sidewalk space for the use of which application is being made is required for the use of the general public on the days and at the times covered by such application. The Public Space Committee shall investigate and report as to those days, and as to those times during each such day when such space may not be wholly or partly required for the use of the general public, and, subject to such investigation, recommend to the Commissioners whether such application should be approved by them, and any qualifications which should be attached to such approval.

(b) Each applicant for a permit to use sidewalk space shall demonstrate to the satisfaction of the Commissioners that the use to be made of such space will include provision for the maintenance of a clear, unobstructed passageway not less than ten feet in width at all points, entirely across the sidewalk space on which the property occupied by the applicant abuts, parallel to the line of the street and generally in the line of pedestrian traffic: Provided, That if the Commissioners shall find that usually, or at certain periods during the day or evening, the flow of pedestrian traffic at such location is sufficiently light to permit a passageway narrower than ten feet, a passageway as narrow as six feet may be approved by the Commissioners, either at all times when such use of sidewalk space is permitted, or for certain specified periods during the time when such use is permitted. The width of the passageway or passageways approved by the Commissioners shall be indicated on the permit issued for the use of the sidewalk space, and the space itself shall be so marked as to define such passageway or passageways, such marking to be by one or more painted white lines, each not less than four inches in width, extending across so much of such sidewalk space as the permittee is authorized to use. Such marking shall be done by the permittee in accordance with the directions of the Director of the Department of Highways and Traffic.

(c) Applications for permits to use sidewalk space abutting real property subject to the provisions of the Act approved May 16, 1930 (46 Stat. 366), as amended (sections 5-410 and 5-411, D. C. Code, 1951 ed.), known as the "Shipstead-Luce

Act'', and the Act approved September 22, 1950 (64 Stat. 903; sections 5-801 through 5-805, D. C. Code, 1951 ed.), known as the "Old Georgetown Act'', shall be submitted by the Director to the National Commission of Fine Arts for its advice as to whether the proposed use of such sidewalk space is in conformity with the intent and purposes of the applicable Act: Provided, That if the said Commission of Fine Arts fails to advise the Director of its determination within fifteen days, the Director may assume that the proposed use is in conformity with the applicable Act. An applicant for permission to use sidewalk space in an area subject to the provisions of either of the aforesaid Acts shall submit with his application a full description, including one or more sketches in color and to scale, of the use proposed to be made of such sidewalk space, in order to permit the National Commission of Fine Arts to determine whether such use will be in conformity with the applicable Act.

(d) Each public utility company which, according to the records of the District, operates or maintains any equipment or service in the area beneath the sidewalk space for the use of which application is made shall be given an opportunity by the Director to inform the Commissioners concerning its objections, if any, to the proposed use to be made of such space: Provided, That if any such company fails within fifteen days after request for its recommendation to notify the Commissioners of any objection it may have to such use, the Commissioners may assume that it has no objection to the proposed use.

Sec. 6. The applicant for a permit to use sidewalk space under the authority of this Article shall, as a condition precedent to the issuance of and as a condition to the continuance in effect of a permit for the use of such space, furnish the Director with a copy of a policy of public liability and property damage insurance, naming the District of Columbia and its officers and employees as parties insured. The limits of liability of such policy shall be in amounts of \$100,000 for one person in any one accident, \$500,000 for the aggregate of all persons in any one accident, and \$10,000 property damage in any one accident. Such policy of insurance shall be cancellable only by written notice to the Commissioners, addressed to the Secretary, Board of Commissioners, D.C., District Building, 14th and E Streets, N.W., Washington 4, D.C., stating the date on which the proposed cancellation of the policy is to become effective, but such date shall be not less than thirty days after the date on which the Commissioners receive such notice.

Sec. 7. (a) Each permit to use sidewalk space under the authority of these regulations shall be issued subject to the

following conditions:

- (1) That such space will only be used for the activity or activities specified on the permit, in accordance with the requirements of these and any other applicable regulations;
- (2) That such use is to be considered temporary, and that the user acquires no right, title, or interest in the space he is permitted to use;
- (3) That the United States and the District, and the officers and employees of each of them, will be held harmless for any loss or damage arising out of such use, whether such loss or damage be suffered by the permittee, the United States, the District, or by some third person;
- (4) That any personal property placed on such space by the permittee will be readily movable, will be maintained in a good, clean condition, and will not be allowed to deteriorate or become unsightly, or become dangerous to passers-by;
- (5) That any awning or umbrella extending over or used on such sidewalk space shall be flame-proofed, and the arrangement of any tables, chairs, or other property placed thereon shall be in accordance with a plan recommended by the Public Space Committee and approved by the Commissioners.
- (6) That the permittee will not use such sidewalk space for the display of merchandise: Provided, That nothing herein contained shall be applicable to the display of merchandise in existing enclosed show windows encroaching on public space as authorized by law: Provided further, That nothing herein contained shall be construed as prohibiting the use of such sidewalk space for the consummation of transactions between an operator of a business in the abutting property and persons with whom such operator may have dealings.
- (7) That such space will not be used in a manner or for a purpose which the Commissioners find is deleterious to the general character of the neighborhood, or is not in the best interests of the general public.
- (8) That the permittee will promptly remove any litter deposited on or in the vicinity of the sidewalk space used by him, resulting from the activity or activities conducted by him on such space;

(9) That the permittee will at all times conduct such activity or activities in an orderly fashion;

(10) That the permittee will, under permit duly issued by the District, provide lighting facilities adequate to light the activity or activities conducted by him on such sidewalk space during the evening or night.

(11) That such space will be used for business purposes only during the hours specified on the permit authorizing such use, and neither before nor after such hours;

(12) That no entertainment or music shall be provided or permitted for the enjoyment of the patrons of the establishment operated by the permittee other than such music as may be furnished by not to exceed three musicians playing such stringed instruments as the violin, the viola, the cello, the double-bass, and the guitar, and not more than one accordion or concertina: Provided, That such music shall not disturb the peace or quiet of the neighborhood, or the comfort or repose of any inhabitant thereof: Provided further, That no music shall be played: (1) in violation of section 2a of Article 6 of the Police Regulations of the District; (2) before or after the hours within which such music may be played as specified on the face of the permit issued for the use of such space; or (3) later than 12:00 midnight: And provided further, That there shall be no amplification or production of music by any electronic or mechanical means, nor shall there be any electronic or mechanical reproduction of music and its dissemination by means of loudspeakers, whether by coin-operated or non-coin-operated phonographs or music boxes, by a background music service, or by any radio or television set.

(13) That the government of the District and the several public utility companies operating in the District will be permitted to have immediate access to manholes located in such space; that no objects or structures shall be placed on ventilation gratings over transformer manholes; that the said utility companies shall have the right, under permit, to have access to such space for the purpose of reinforcing existing facilities and to build new facilities, and the government of the District shall have like right; and that the government of the District and the said utility companies, their officers and employees, shall be held harmless for any loss or damage arising out of their use of said space or any part thereof, or for the interruption or discontinuance of any use which may have been made of such space by the permittee, where such loss, damage, or interruption or discontinuance of use results from the per-

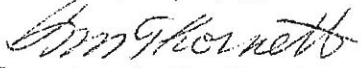
formance of work under, on, or above such space by the government of the District or by any of the said utility companies.

(14) That the permittee will post the permit issued him for the use of sidewalk space in a conspicuous location on the front of the premises occupied by the permittee, either on the exterior of such premises or in a location where it may be seen from the exterior of the premises, and so located and lighted as to be readily legible to a person on the sidewalk space in front of such premises.

(b) Permits for the use of sidewalk space shall be subject to suspension or revocation for failure of the permittee to comply with these regulations.

Sec. 8. The provisions of this Article relating to the extent to which sidewalk space on business streets may be occupied by the operators of businesses in property abutting such space shall supersede such other provisions of these regulations as may control the extent to which such space may be occupied.

By order of the Board of Commissioners, D. C.


Secretary to the Board

Official copy furnished:

Acct.
Disb.
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Int. Audit
Dept. of Lic. & Insp. (200)
Police
Fire
Dept. of Pub. Health
Judges (20)
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