

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

OWNER'S PROPOSED ORDER

Appeal No. 19023 of ANC 2A, pursuant to 11 DCMR §§ 3100 and 3101, from a November 24, 2014 determination by the Zoning Administrator, Department of Consumer and Regulatory Affairs, that a sidewalk café within public space at an existing hotel in the R-5-E District at premises 924 25th Street, NW. (Square 16, Lot 884) did not violate the Zoning Regulations.

HEARING DATE: September 15, 2015

DECISION DATE: September 29, 2015

DECISION AND ORDER

The appeal was filed with the Board of Zoning Adjustment (the "Board" or "BZA") on April 9, 2015, by Advisory Neighborhood Commission 2A ("Appellant" or "ANC 2A"), but the Office of Zoning did not determine it to be complete and thus filed until June 4, 2015. Appellant challenges the determination by the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), that the Zoning Regulations do not govern the use of public space for a sidewalk café outside The River Inn, located at 924 25th Street, NW ("The River Inn"). This decision was issued on November 24, 2014.

Based on the evidence of record, including extensive prehearing submissions and testimony received at the public hearing, and for the reasons set forth below, the Board denies the appeal as without merit.

PRELIMINARY MATTERS

Notice of Public Hearing

On June 19, 2015, the Office of Zoning scheduled a hearing before the BZA on September 15, 2015. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to Appellant, the property owner, and to DCRA.

Parties

Appellant in this case is ANC 2A, which opposes the sidewalk café in the public space outside The River Inn. DCRA is the Appellee, as the "person" whose administrative decision is the subject of the appeal, pursuant to 11 DCMR § 3199.1(a)(2). Appellant challenges DCRA's decision set forth in the Zoning Administrator's November 24, 2014 determination letter. The alleged zoning error was the Zoning Administrator's determination that the Zoning Regulations do not govern the use of public space for a sidewalk café outside The River Inn. ALMAC, LLC, the owner of 924 25th Street, NW ("Owner") is automatically a party to the proceeding under 11 DCMR § 3199.1(a)(3).

The Board received prehearing materials from the Appellant on April 9, 2015 (BZA Exhibits 4-4B) and September 1, 2015 (BZA Exhibits 18-18B.) The Owner submitted prehearing materials for the Board's consideration on September 1, 2015 (BZA Exhibits 17-17H), and DCRA submitted its prehearing statement on September 14, 2015 (BZA Exhibits 19A-19B).

Motion to Dismiss

On September 1, 2015, Owner moved to dismiss the appeal as untimely filed (BZA Exhibit 17). The Board heard arguments and received testimony on the Motion to Dismiss at the beginning of the hearing on September 15, 2015, and deferred ruling on that Motion.

Hearing and Closing of the Record

The Board convened a public hearing on September 15, 2015, during which time Appellant, DCRA and Owner presented their respective cases through legal counsel. The Board received testimony on behalf of Appellant from the chairman of ANC 2A, Patrick Kennedy. The Board received testimony on behalf of Owner from Conrad Cafritz, representative of the Owner. DCRA presented testimony through the Zoning Administrator, Matthew LeGrant.

The Board deferred its decision on the merits of the case and closed the record, except to receive proposed findings of fact and conclusions of law from all parties by September 24, 2015. The Board scheduled the case for decision on September 29, 2015, at which time it considered the merits of the case and voted -- to deny the appeal.

FINDINGS OF FACT

The Property

1. The River Inn is a hotel located 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.

2. The River Inn is currently owned by ALMAC, LLC.

3. The River Inn is located in an R-5-E District. Section 350.4(e) of the Zoning Regulations provide that a hotel can operate as a permitted use in an R-5-E District so long as it was in operation as a hotel as of May 16, 1980, and with a valid Certificate of Occupancy or a valid application for a building permit as of that date. The River Inn is a validly existing hotel pursuant to Section 350.4(e). An existing hotel can be repaired, renovated, remodeled, or structurally altered, as long as the gross floor area of the hotel is not increased and the total area devoted to function rooms, exhibit space and commercial adjuncts is not increased.

4. Hotels located in an R-5 District with more than 100 rooms are permitted, under certain circumstances, to have commercial adjunct spaces, which are defined as "retail and service establishments customarily incidental and subordinate to hotel use, such as restaurant, dining room, cocktail lounge, coffee shop, dry cleaning, laundry, pressing or tailoring establishment, florist shop, barber shop, beauty parlor, cigar or news stand, and other similar uses." 11 DCMR § 351.2.

5. 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 Proposed Sidewalk Café

6. In the summer of 2014, Owner applied for a public space permit for a sidewalk café. Shortly thereafter, ANC 2A provided Owner with a copy of a 2002 letter from the then-acting Zoning Administrator, which suggested that a sidewalk café would not be allowed under the zoning regulations (the "2002 Letter"). *See* Exhibit 17B.¹

7. 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 and whether the 2002 Letter was legally correct.

8. Following these discussions, Mr. LeGrant issued a letter decision on November 24, 2014 ("2014 Determination Letter"), 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." *See* Exhibit 17C.

9. Mr. LeGrant's 2014 Determination Letter specifically stated that he considered—and disagreed with—the 2002 Letter concerning the applicability of the Zoning Regulations to a sidewalk café outside the property line and in the abutting public space. *See* Exhibits 17B and 17C.

10. Mr. LeGrant's 2014 Determination Letter was published on the DCRA website on November 28, 2014.

11. Based on discussions with Mr. LeGrant and the 2014 Determination Letter, Owner sought approval for a sidewalk café in public space at The River Inn, as well as a sidewalk café

¹ This letter was addressed to ANC 2A, rather than to the Owner.

endorsement from the Alcoholic Beverage Regulation Administration ("ABRA"), both in early 2015. See Exhibits 17D and 17E.

12. 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 Letter had been resolved. See Exhibit 17F (compiling emails from January 12, 2015 to February 9, 2015).

13. Appellant was given notice of the Zoning Administrator's decision in a number of ways between November 2014 and January 2015. The 2014 Determination Letter was published on DCRA's website on November 28, 2014. 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. Owner affirmatively notified members of Appellant via email on January 12, 2015, stating that the zoning issues had been resolved. Owner's public space application for the sidewalk café was referred to Appellant after it was re-submitted to DDOT on January 21, 2015. See 24 DCMR § 304.6.

14. Appellant did not participate in the Public Space Committee hearing on the sidewalk café, which was held on April 23, 2015, nor did it file a resolution or letter with the Public Space Committee.

15. On April 9, 2014, Appellant filed this appeal of Mr. LeGrant's 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 Exhibits 4 and 18.

16. More specifically, Appellant contends that the proposed sidewalk café is impermissible under the Zoning Regulations because it would increase the total area of the hotel devoted to commercial adjunct space and it would be visible from the sidewalk and accessible directly from outside the hotel. See Exhibit 18.

Evidence Supplied at Hearing

17. At the hearing, Patrick Kennedy, chairman of ANC 2A, testified on behalf of Appellant. Mr. Kennedy testified that he learned of the 2014 Determination Letter on February 13, 2015. Mr. Kennedy acknowledged that members of the Appellant communicated via email with Mr. Cafritz in January, 2015.

18. Conrad Cafritz testified on behalf of the Owner. Mr. Cafritz testified that he had email communications about the sidewalk café and related zoning issues with Dr. William K. Smith and Mr. John Williams, both members of ANC 2A, beginning on January 20, 2015 and continuing over the course of the month, as reflected in Exhibit 17F. Mr. Cafritz also testified that the property line stops at the face of the Hotel.

19. The Zoning Administrator testified in support of his November 24, 2014 letter decision. The Zoning Administrator testified that he considered whether the proposed sidewalk café complied with the applicable Zoning Regulations, set forth in Section 350.4(e) and 351.2(a).

Specifically, he determined that (1) the total area within the hotel building devoted to the commercial adjunct would be maintained at its current size; (2) the commercial adjunct is currently accessed from lobby of the hotel and does not have a direct entrance from outside of the building; (3) no change is planned to the current visibility of the commercial adjunct within the building from the sidewalk; and (4) there would be no sign or display indicating the existence of the commercial adjunct from the outside of the building. Therefore, he found that the proposed sidewalk café was permissible under the Zoning Regulations.

CONCLUSIONS OF LAW AND OPINION

The Board of Zoning Adjustment is authorized by Section 8 of the Zoning Act of 1938 to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.)) (*See also* 11 DCMR § 3100.2.) The decision or determination in this case is DCRA's issuance of the 2014 Determination Letter.

The alleged zoning error was the Zoning Administrator's decision that the Zoning Regulations do not prohibit the proposed sidewalk café in the public space next to The River Inn. As explained below, the Board concludes that Appeal is untimely and would dismiss on that basis alone. Further, as to the merits of the appeal, the Board concludes that the Zoning Administrator did not err with respect to determinations made regarding the applicability of Sections 350 and 351 of the Zoning Regulations.

Timeliness of Appeal

Before ruling on the merits of an appeal, the Board is bound to consider a motion to dismiss an appeal on timeliness grounds. *See Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008). It is well settled that failure to timely file an appeal may result in its dismissal.

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Subsection (a) provides that an appeal must be filed within 60 days from the date the person filing the appeal first had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision, whichever is earlier.

The 60-day appeal period begins when an appellant has actual or constructive notice or knowledge of a zoning decision. *Waste Mgmt. of Md., Inc. v. DC Board of Zoning Adjustment*, 775 A.2d 1117, 1121-22 (D.C. 2001). 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 "a plaintiff would have possessed after due investigation"); *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 Appellant contended that it was unaware that permits had been issued but where record showed that ANC and the larger community had knowledge of the issuance of the permit and the developer of the project had engaged with the ANC and community concerning the decision). *See also U.S. ex rel. Purcell v. MWI Corp.*, 520 F. Supp. 2d 158, 170 (D.D.C. 2007)

(applying an inquiry notice standard and holding that "the limitations period starts to run on 'the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress.'")

Here, the Zoning Administrator's decision was made on November 24, 2014 and was posted publicly on the DCRA website on November 28, 2014. In addition, Appellant was provided with notice of the decision in a variety of ways, including through a January 12, 2015 email from Owner to some of Appellant's members, indicating Owner's intention to resubmit the public space application and stating that the issues relating to the 2002 Letter had been resolved. See Exhibit 17F (compiling emails from January 12, 2015 to February 9, 2015).

Specifically, on January 12, 2015, Mr. Cafritz wrote to ANC 2A Member William Smith:

Dish is popular with the neighborhood and its outdoor seating will cater to its patrons. Moreover, The River Inn...will benefit as will its guests from the provision of some outdoor seating. There were issues with the Zoning Administrator but those have been resolved.

Exhibit 17F.

Following this initial correspondence, Mr. Cafritz and members of Appellant exchanged at least seven emails regarding the café and discussions relating to it between January 12, 2015 and February 9, 2015, all of which pre-dated the date on which Mr. Kennedy claims that Appellant had knowledge of the 2014 Determination Letter.

Appellant does not dispute that its members received this email, but it claims that it nonetheless did not know of the Zoning Administrator's decision at this time because the email stated only that the zoning issue was resolved, not that the Zoning Administrator had made a decision. The January 12, 2015 email provided Appellant with sufficient facts to put it on notice that the Zoning Administrator had made a decision regarding the sidewalk café. Once Appellant received this email, it was obligated to undertake due diligence to determine how the zoning issue had been resolved. Appellant did not undertake such an investigation, and its failure to do so renders this appeal untimely.

Therefore, the appeal period began to run on January 12, 2015, and this appeal, filed more than 60 days after Appellant received this constructive notice of the Zoning Administrator's decision—is untimely and will be dismissed.

Merits of Appeal

Pursuant to 11 DCMR Section 3119.2, in all appeals and applications, the burden of proof shall rest with the appellant or applicant. In the instant appeal, Appellant argues that the Zoning Administrator erred when he concluded that the Zoning Regulations do not apply to a sidewalk café in public space and that such decision was precluded based on the 2002 Letter. In addition, Appellant argues that the proposed sidewalk café is impermissible under the Zoning Regulations because it would increase the total area of the hotel devoted to commercial adjunct space and it would be visible from the sidewalk and accessible directly from outside the hotel. The Board addresses each of these issues in turn, based upon the record and testimony presented in this case.

Appellant contends that the Zoning Administrator erred when he concluded that the Zoning Regulations do not apply to sidewalk cafes in public space. However, as set forth in the 2014 Determination Letter, Mr. LeGrant considered each of the applicable zoning regulations governing hotels in residential districts and concluded that the sidewalk café was permissible under these regulations. See Exhibit 17C. Specifically, he determined that (1) the total area within the hotel building devoted to the commercial adjunct would be maintained at its current size; (2) the commercial adjunct is currently accessed from lobby of the hotel and does not have a direct entrance from outside of the building; (3) no change is planned to the current visibility of the commercial adjunct within the building from the sidewalk; and (4) there would be no sign or display indicating the existence of the commercial adjunct from the outside of the building. See *id.* Because zoning applies to private property, Mr. LeGrant determined that the analysis of these standards applies to the commercial adjunct within the hotel.

The Zoning Administrator's interpretation and construction of the Zoning Regulations is accorded great deference "unless clearly erroneous or inconsistent with the regulations." See *Sisson v. D.C. Bd. of Zoning Adjustment*, 805 A.2d 964, 968 (D.C. 2002); *Ass'n For Pres. of 1700 Block of N St., N.W. & Vicinity v. D.C. Bd. of Zoning Adjustment*, 384 A.2d 668, 671 (D.C. 1978). In this case, as discussed below, the Zoning Administrator's interpretation of the zoning requirements is entirely consistent with the plain text of the regulations. His determination was, therefore, proper, and Appellant's appeal should be denied.

Appellant's argument that this Board is bound by the 2002 determination by then-acting Zoning Administrator Denzil Noble is incorrect. 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). The Board finds that Mr. LeGrant's letter decision supplied a reasoned analysis that justified the change in the Zoning Administrator's interpretation.

In addition, Appellant argues that a sidewalk café is an impermissible expansion of commercial adjunct space and is otherwise contrary to the restrictions placed on hotels in residential districts under sections 350 and 351 of the Zoning Regulations. Appellant's argument is not supported by a plain reading of the regulations at issue.

Appellant's argument is predicated on the mischaracterization that a sidewalk café is a commercial adjunct space. The sidewalk café cannot constitute commercial adjunct space under the Zoning Regulations for two reasons.

First, the sidewalk café is not located within the hotel and therefore does not fall under the definition of commercial adjunct space. See 11 DCMR § 199 (defining commercial adjuncts as space "within a hotel" used for "retail and service establishments customarily incidental and subordinate to hotel use."); Section 350.4(e) and 351.2(a) of the Zoning Regulations (prohibiting an increase of the total area within the hotel devoted to commercial adjunct space).² In fact, Mr. Cafritz testified that the property line stops at the face of Hotel.

² It was suggested at the hearing that the Board may need to resolve a conflict between Section 350.4(e) and Section 351.2. There is no conflict between those provisions. As to total area devoted to commercial adjunct space, Section 351.2(a) is simply duplicative of Section 350.4(e). Sections 351.2(b), (c) and (d) are further limitations on commercial adjunct space, but in no way conflict with 350.4(e).

Second, not only is the sidewalk café not within the hotel, it also sits beyond the property line in public space. The Zoning Regulations do not apply to public space, which has been the consistent interpretation in the District (e.g., square footage within a projection over public space does not count within the calculation for FAR for zoning purposes). Instead, public space is regulated by the Rights-of-Way Management Administration of the District Department of Transportation ("DDOT"), which is authorized to "[r]eview, approve and issue public space permit requests for occupancy, work within, or other use of public space. See D.C. Code §50-921.01a(4) [emphasis added] ("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."); 24 DCMR § 301.1 ("No person shall construct or operate a sidewalk café except when authorized by the Public Space Committee.")

Appellant has argued that there is overlapping authority over the public space at issue here—with the Public Space Committee having jurisdiction to permit sidewalk cafes and the Zoning Administrator and BZA having jurisdiction over the use of the public space. In support of that argument, Appellant has submitted more than 120 pages of other regulations that provide for overlapping authority. See Exhibit 21. For example, Appellant highlights that DCRA is authorized to issue public space rental permits, while the Department of Public Works is authorized to inspect permitted space. See 24 DCMR § 200. Appellant also notes that the Public Space Committee is authorized to issue public space permits for enclosed sidewalk cafes, and DCRA is authorized to issue building permits for the space. See 24 DCMR § 210.

These regulations show that overlapping authority can be established by statutory and regulatory schemes. But, they also demonstrate that such overlapping authority is not contemplated for here, where the regulations authorize only the Rights-of-Way Management Administration of DDOT to regulate the use of public space. See 24 DCMR § 304; *Compare with* D.C. Code §6-641.01 (The Zoning Act empowers the Zoning Commission to create regulation to regulate buildings on lots.)

Moreover, in the two examples cited by Appellant above (public space rentals under 24 DCMR § 200 and enclosed sidewalk cafes under 24 DCMR §210), DCRA's authority to act derives from the Building Code, not the Zoning Regulations. Similarly, while DCRA licenses food trucks, 24 DCMR § 501.1(c) specifies that DDOT regulates their location in public space—the Zoning Administrator does not review food truck locations unless they are proposed to be located on a lot outside of public space.

Indeed, adding a role for the Zoning Administrator and this Board in the permitting process for public space—a role that is clearly not contemplated by the regulations—would create unnecessary and unwarranted confusion.

Notwithstanding this, Appellant asks this Board to expand the reach of Sections 350.4 and 351.2 to block the sidewalk café. To do this, Appellant ignores the plain text of the Zoning Regulations and argues instead that the legislative history of the applicable regulations leads to this conclusion. Specifically, Appellant argues that since the Zoning Commission acted in 1980 to prohibit the expansion of existing hotels and commercial adjuncts, the Zoning Regulations should be read to extend to public space.

The role of this Board is to interpret and enforce the zoning laws, not to rewrite them. See *Keefe Co. v. D.C. Bd. of Zoning Adjustment*, 409 A.2d 624, 625 (D.C. 1979) ("In this jurisdiction the Zoning Commission promulgates the regulations, but it is the responsibility of the BZA to interpret the regulations adopted by the Commission.") Under basic rules of statutory construction, legislative history is not to be considered when a statute's language is clear. See *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *Duvall v. United States*, 676 A.2d 448, 452 (D.C. 1996) ("It is elementary in the law of statutory construction that, absent ambiguity or an absurd or unreasonable result, the literal language of a statute controls and resort to legislative history is not only unnecessary but improper.")

The text of the Zoning Regulations in Sections 350.4 and 351 is clear. The Zoning Regulations allow for hotels that existed in residential districts in 1980 to continue operating with certain specific, limited restrictions. Specifically, the existing hotel cannot expand its total gross floor area which is within the building or increase the square footage available for commercial adjunct use, function space, or exhibit space within the building.

Because there is no expansion of the hotel or commercial adjunct within the building, the Board must decline Appellant's request that we conclude that the sidewalk café is prohibited by Sections 350.4 and 351.2. The only way we could do so is to interpret the requirements to include additional requirements not found in or otherwise supported by the express language of the regulations. This exceeds our authority. Therefore, we find this appeal without merit.

We also note that Appellant was not without a remedy here. Appellant could have raised its concern relating to the commercial nature of this use within a residential area before the Public Space Committee public hearing, but it chose not to participate in that hearing or provide a resolution or letter to the Committee. Its decision not to participate in that process does not justify an expansion of the Zoning Regulations to public space, which could have far reaching impacts to the current approval structure between private property and public space.

DECISION

For all these reasons, the Board concludes that the Zoning Administrator did not err in his determination that the Zoning Regulations do not apply to a sidewalk café in public space.

Based on the foregoing, the Board finds the appeal without merit. It is therefore **ORDERED** that the appeal is **DENIED**.

Vote taken on September 29, 2015.

VOTE: _____ (Lloyd J. Jordan, Frederick L. Hill, Jeffrey L. Hinkle, and Anthony J. Hood to deny the appeal; Marnique Y. Heath not participating and not voting).

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: _____

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.