

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

APPEAL OF:

Massachusetts Avenue Heights Citizens Association, et al.,	)	Appeal No. 19077
	)	
	)	<u>Hearing: October 6, 2015</u>
From a decision of the Zoning Administrator to issue Building Permit No. B1404954, allowing the renovation of an existing hotel to include a passive recreation area with 136 seats and five staff in the NO/R-1-B District at premises 2505 Wisconsin Avenue N.W. (Square 1935, Lot 45)	)	

PROPERTY OWNER'S PREHEARING STATEMENT

CS Bond St S Properties LLC ("Owner"), owner of the Savoy Suites hotel at 2505 Wisconsin Avenue, N.W. ("Hotel"), hereby opposes Appeal No. 19077 filed by the Massachusetts Avenue Heights Citizens Association ("MAHCA") and fourteen other individuals (collectively, "Appellants"). The Hotel, which Owner seeks to upgrade, was lawfully constructed in the early 1970s, but is now a nonconforming use and structure. Appellants erroneously argue that Building Permit No. 1404954 ("Permit"), which among other things authorizes Owner to renovate the Hotel's rooftop, should be revoked because it permits the expansion of the nonconforming use—the Hotel—in violation of the Zoning Regulations.

But the Zoning Administrator thoroughly reviewed this issue and properly concluded that the proposed renovation conforms to the regulations on nonconforming uses. *See* 11 DCMR § 2002. First, the proposed changes do not expand the hotel use. *Id.* § 2002.3. The Hotel occupies, and has always occupied, the entire building. As such, the building, which includes the roof by definition, has always been devoted to the nonconforming use. Second, the structural alterations to the rooftop space are all required for the Hotel to comply with code and are thus allowed. *Id.* § 2002.4. Third, the changes to the roof structure do not enlarge the Hotel. *Id.* § 2002.5. The Hotel's

gross floor area is not increased because the rooftop changes all fit within the floor-area-ratio bonus for roof structures. *Id.* § 411.7. Further, the passive recreation areas on the Hotel's rooftop will not be covered by a permanent roof structure and thus are not treated as an expansion of the Hotel's floor area. And the activities for which the Hotel's roof will be used—lounging, socializing, sunbathing, eating/drinking—are the exact activities that the Zoning Administrator has previously found to (1) constitute "passive recreation" and (2) be a common use on many hotel rooftops in the District.

Because Owner's proposed changes clearly comply with the Zoning Regulations on nonconforming uses, the Board should summarily deny the Appeal.

I. STATEMENT OF FACTS

A. The Subject Property.

The subject property is the Savoy Suites, a boutique hotel, located in the Massachusetts Avenue Heights neighborhood on the southeast corner of the intersection of Wisconsin Avenue and Davis Place, N.W. It is known as Lot 45 in Square 1953. The property contains approximately 23,158 square feet of land area and is presently zoned R-1-B in the Naval Observatory ("NO") Overlay District. It is located within the boundary of Advisory Neighborhood Commission ("ANC") 3C and one block from ANC 3B.

The Hotel was built in the early 1970s, when the site was zoned R-5-C. *See* ZC Order, Sept. 26, 1967 (File No. 66-115). At that time, a hotel was permitted as a matter of right in a R-5-C district. *See* Zoning Reg. § 3105.34 (1969); *compare also* ZC Order No. 314 at 2-3 (explaining that hotels were permitted as-of-right in the R-5-C district between 1958 and May 8, 1980) *with* 11 DCMR § 350.4(e) (limiting hotels in R-5-C district after May 8, 1980). The Hotel has eight

floors, with a gross floor area of approximately 86,013 square feet, as well as three levels of below-grade parking.

Shortly after construction was complete, the site reverted to its prior R-1-B designation. As a result, the Hotel, which had been lawfully constructed, became a nonconforming use in a nonconforming structure. *See generally* D.C. Land Records Instrument No. 1972026246 at 38-39 (Consent Order dated Oct. 31, 1972, *Embassy Corp. v. District of Columbia*, C.A. No. 2184-71); *see also H. Allen v. District of Columbia Zoning Comm'n*, 449 F.2d 1100 (D.C. Cir. 1971).

The Hotel has operated continuously on the site since approximately November 1971. *See* Instrument No. 1972026246 at 13. It is currently owned by CS Bond St S Properties LLC. Owner acquired the Hotel in December 2012 from Proprio Limited Partnership. Shortly thereafter, the Department of Consumer and Regulatory Affairs ("DCRA") issued two certificates of occupancy, Nos. CO1300426 and CO1300579, authorizing Owner to operate the Hotel as a hotel with 150 rooms, three levels of below-grade parking, an accessory restaurant with 64 seats, and a summer garden with 54 seats and standing room of 150 persons.

B. The Owner's Proposed Renovation.

After Owner acquired the Hotel in December 2012, it began to examine the Hotel's then existing uses with eye towards renovating and modernizing the premises to better serve its guests. The contemplated improvements, as of Spring 2013, included:

(1) Reconfiguring and reallocating the space devoted to service areas, commercial adjuncts, and guestroom areas¹ on the garage level 1 ("G-1") as follows:

¹ Under the Zoning Regulations, all areas within a hotel fall within one of the following five categories: (a) commercial adjuncts; (b) exhibit space; (c) function room; (d) guestroom areas; and (e) service areas. 11 DCMR § 199.1.

Category	Existing Square Footage	Proposed Square Footage
Commercial adjunct (gym)	1,903 sf	1,692 sf
Service areas (storage, employee cafeteria, laundry, etc.)	6,609 sf	6,544 sf
Guestroom areas	1,199 sf	1,475 sf
Total	9,711 sf	9,711 sf

(2) Reconfiguring and reallocating space for food and beverage service on the first floor and relocating the meeting space on the first floor as follows:

Category	Existing Square Footage	Proposed Square Footage
Commercial adjunct (restaurant, bar, kitchen)	4,608 sf	6,223 sf
Function room	2,173 sf	2,063 sf
Guestroom areas (lobby, reception, back-of- house, etc.)	4,427 sf	2,887 sf
Service areas	73 sf	108 sf
Total	11,281 sf	11,281 sf

(3) Modernizing the roof by creating passive recreation areas with elevator access and renovating the roof's existing penthouse to include restrooms, storage, and a second exit stair.

On May 20, 2013, and then again on May 31, 2013, counsel for the Owner met with Zoning Administrator Matthew Le Grant to discuss the proposed renovations and their compliance with the Zoning Regulations. Owner's counsel provided to Mr. Le Grant two sets of drawings by GTM Architects. The first set detailed (1) the Hotel's existing uses (as of June 2013) on the G-1 level and first floor by square footage and (2) the existing rooftop space. The second set showed the proposed reallocation of space on the G-1 level and first floor as well as the proposed changes to

the rooftop, including the creation of passive recreation areas. Counsel made clear that the renovated rooftop would be used for passive activities like lounging, socializing, sunbathing, eating/drinking, and the like.

Following these discussions, Mr. Le Grant issued a determination letter on July 24, 2013, which concluded that Owner's proposed renovation complied with the Zoning Regulations, specifically Section 2002 (nonconforming uses) and Section 411 (roof structures) (the "Determination Letter"). A copy of the Determination Letter is attached as Exhibit A. Specifically, Mr. Le Grant found that the proposed changes to the roof did not impermissibly expand the nonconforming use or enlarge the nonconforming structure and thus complied with Section 2002. Additionally, Mr. Le Grant found that "passive recreation areas" on the rooftop were a permissible part of a hotel's use.

Shortly thereafter, a copy of Mr. Le Grant's letter was made publicly available on DCRA's website. And the decision was also reported on by the media. *E.g.*, Renovations Coming to Carlyle, Savoy Suites?, *Washington Business Journal*, Aug. 5, 2013 (linking to zoning determination letters and detailing plans to reconfigure the Hotel's rooftop space); Carlyle, Savoy Suites request permission for makeovers, *Washington Business Journal*, Aug. 9, 2013 (detailing plans to reconfigure the Hotel's rooftop space).

C. Owner's Permit Application.

On March 7, 2014, Owner filed an application with DCRA seeking a permit to renovate the property. The application included the architectural plans, which made clear that the renovated roof structure would not exceed one-third of the total roof area and that the passive recreation areas would not be covered by a permanent roof structure. After several revisions, the application was

reviewed and approved by DCRA for mechanical and structural engineering, as well as by the Zoning Administrator for compliance with the Zoning Regulations.

On May 7, 2015, DCRA issued Building Permit No. B1404954 authorizing Owner to renovate "[the] existing vacant roof to include [a] passive recreation area with 136 seats and 5 staff; an existing restaurant with 64 seats and 150 occupants [on the] 1st floor; and an existing summer garden with 54 seats and optional standing for 150 persons[.] Roof deck is not an extension of the restaurant use." (the "Permit"). The Permit correctly listed the Hotel's street address. But it mistakenly listed the wrong lot and square numbers. Ex. 5 (Square 0072, Lot 0858). Once the error was identified, DCRA promptly reissued the Permit with the correct lot and square numbers. A copy of the reissued Permit is attached as Exhibit B.

D. The Current Appeal.

Appellants filed this appeal on July 6, 2015. They allege that the Permit is "unlawful because it purports to authorize one or more change [sic] in or expansion of the existing structure or use which is prohibited by the Zoning Regulations[.]" Ex. 3. Appellants further allege that the Permit "mischaracterizes the use to which Property Owners intend to put the roof[.] On information and belief, the renovated roof will be used to offer food, beverage, entertainment and Special Events services, not 'passive recreation.'" *Id.* Lastly Appellants allege that the Permit is "unlawful because it was *reviewed and granted* as if the Property were located in Ward 2, Square 0072, Lot 0858 (in a District Zoned R-5-E) when it is located in Ward 3, Square 1935, Lot 0045 (in a District zoned R-1-B and subject to the NO overlay)." *Id.* (emphasis added). On July 20, 2015, ANC 3C voted to join this appeal. Ex. 15.

II. THE ZONING ADMINISTRATOR CORRECTLY CONCLUDED THAT THE PROPOSED CHANGES DO NOT EXPAND THE HOTEL'S EXISTING STRUCTURE OR USES.

Appellants erroneously argue that the Permit must be revoked because it impermissibly authorizes an expansion of the Hotel's existing structure or use. Ex. 3. The Permit does no such thing. The Zoning Administrator examined this issue and rightly concluded that, under the Zoning Regulations, the proposed changes do not constitute an expansion of the Hotel.

A. The Hotel is a Nonconforming Use and Structure, Thus Section 2002 of the Zoning Regulations Controls.

Appellants concede that the Hotel, which was lawfully constructed, is a nonconforming use and structure under the current NO/R-1-B District.² Ex. 3. This means that the use was established when the Zoning Regulations permitted a hotel at the property, but that the use subsequently became prohibited as a consequence of a change in zoning. *See* 11 DCMR § 199.1 (defining "nonconforming use"); 4 *Rathkopf's The Law of Zoning and Planning* § 72:1 (4th ed. 2014). It is well established that the "government recognizes nonconforming uses in derogation of the general zoning scheme in order to protect the interests of property owners." *George Washington Univ. v. District of Columbia Bd. of Zoning Adjustment*, 429 A.2d 1342, 1345 (D.C. 1981).

Notwithstanding that, because nonconforming uses are inconsistent with current zoning, Section 2002 of the Zoning Regulations has four restrictions that apply when renovating a nonconforming structure with a nonconforming use. First, a nonconforming use cannot be "extended to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of this title." 11 DCMR § 2002.3. A "structure" is defined as "anything constructed,

² Appellants have not suggested, and indeed cannot suggest, that Section 350.4(e), which places limitations on hotels in R-5 Districts, applies here because the Hotel is located in a R-1-B District.

including a building, the use of which requires permanent location on the ground." 11 DCMR § 199.1. A "building," in turn, is defined as "a structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals or chattel." *Id.*

Second, while "ordinary repairs, alterations, or modernizations may be made to a structure or portion of a structure devoted to a nonconforming use[.]" Section 2002 does not permit structural alterations, except those required by other municipal law or regulation. *Id.* § 2002.4. A structural alteration is defined as "any change in the permanent, physical members of a building or other structure, such as bearing walls or partitions, columns, joists, rafters, beams or girders." *Id.* § 199.1.

Third, Section 2002 further provides that a structure "devoted to a nonconforming use shall not be enlarged, except if the enlargement is to be devoted to a conforming use." *Id.* § 2002.5. And finally, Section 2002 provides that a "new structure shall not be erected to house a nonconforming use." *Id.* § 2002.6.

B. The Proposed Changes Are Permissible Under Section 2002 Because They Do Not Expand or Enlarge the Hotel's Use or Structure.

Here, the Zoning Administrator properly determined that the proposed changes to the Hotel comply with Section 2002. Regarding Section 2002.3, the Hotel occupies, and has always occupied, the entire building. This is not a situation where, for example, the Hotel had only ever occupied five floors of the building and was now seeking to expand the nonconforming use to the remaining three floors. The entire building, which includes the roof by definition, has always been devoted to the nonconforming use. *See* 11 DCMR § 199.1.

In fact, this reasoning was previously applied when the Hotel added its existing summer garden more than ten years ago. The garden, which seats 54 and can accommodate 150 persons standing, was not viewed as an expansion of the hotel use, since the whole property had always

been devoted to that use. Thus, because the proposed changes do not extend, and indeed cannot extend, the hotel use into other portions of the building not devoted to the Hotel, Owner's proposed changes are permissible under Section 2002.3.

Regarding Section 2002.4, with the exception of the roof structure, the permitted alterations are all internal to the building and do not constitute structural alterations—*i.e.*, a "change in the permanent physical members of a building or other structure, such as bearing walls or partitions, columns, joists, rafters, beams or girders." 11 DCMR § 199.1. The structural alterations being made to the roof are necessary to comply with code requirements.

And on Section 2002.5, the reallocation of space within the existing Hotel does not constitute an enlargement of the nonconforming use. The space devoted to guest room areas and the function room goes down slightly and the commercial adjunct space and service areas go up slightly. But the overall structure is not being enlarged. The total gross floor area upon completion will be exactly the same as the existing gross floor area—*i.e.*, approximately 86,013 square feet.

The changes to the roof structure do not enlarge the overall structure. The rooftop changes do not increase the Hotel's gross floor area because they fit within the increased floor-area-ratio for roof structures. 11 DCMR § 400.7 ("Solely for the uses designated in this section, an increase of allowable floor area ratio of not more than thirty-seven hundredths (0.37) shall be permitted."). And the passive recreation areas on the Hotel's rooftop will not be covered by a permanent roof structure and thus are not treated as an expansion of the Hotel's floor area. *Id.* § 199.1

Finally, with respect to Section 2002.6, the record is clear that no new structure is being erected for hotel use.

Because the testimony at the hearing and the documentary evidence will decisively show that the Hotel is not expanding or enlarging the nonconforming use, and that any structural

alterations are required in order to comply with code, Owner did not need to apply for a special exception or variance from the Zoning Regulations. Accordingly, the Board should vote to deny the Appeal and uphold the Zoning Administrator's decision that the proposed changes comply with Section 2002.

III. THE PROPOSED PASSIVE RECREATION AREAS DO NOT EXPAND FLOOR AREA AND ARE A TYPICAL FEATURE OF DISTRICT HOTELS.

Next Appellants colorfully imply that Owner "mischaracterized" its plans for the renovated roof during the permitting process. Ex. 3. They claim that Owner will not use the renovated roof for "passive recreation," as specified in the Permit, but instead as space for its guests to enjoy "food, beverage, entertainment, and Special Events services."³ *Id.* These proposed uses, however, are entirely consistent with how the Zoning Administrator has previously defined passive recreation areas on hotel rooftops.

For example, in a determination letter finding that the proposed renovation of the Carlyle Suites rooftop was compliant with the Zoning Regulations, the Zoning Administrator used the term "passive recreation area." (*See* Appeal No. 19027 of Rima Calderon and William Sawicki, *et al.*). ANC 2B, the affected ANC in that case, requested clarification on the definition of that term. On March 14, 2014, the Zoning Administrator provided the following response:

You asked about a clarification of the definition of "passive recreation area" in my July 24, 2013 determination letter regarding the Carlyle Suites hotel [attached]. Although that term is not defined in the zoning regulations, I have taken it to mean outdoor areas used for sitting, standing and lounging as opposed to an 'active recreation area' that would be designed for organized recreational activities such as

³ Appellants' real concerns with passive recreation on the rooftop are the potential for noise and after-hours operation. But the proper forum to raise these issues is with the Alcoholic Beverage Control ("ABC") Board—which Appellants already know since some of them filed a petition with the ABC Board protesting changes to the Hotel's liquor license. (Case No. 15-PRO-00080, CS Bond St AB-S Holdings, LLC t/a The Savoy Suites Hotel, 2505 Wisconsin Avenue, N.W., License No. ABRA-090804.) This Board has no jurisdiction to address Appellants' real concerns. *See* D.C. Code § 6-641.07; 11 DCMR § 3100 *et seq.* This zoning challenge is nothing more than a misplaced attempt to relitigate issues properly left to the ABC Board.

football or soccer. In this circumstance the rooftop area referred to as an outdoor deck in which patrons and guests of the hotel will sit, read, sunbathe, and socialize. As I understand the hotel's plans, they will also be to, as an accessory use of the hotel, purchase and consume beverages and prepared food items.

Although this may be a new use of the subject hotel's rooftop, I have found this to be a common feature of other hotels in the District. As long as the rooftop area is not covered by a permanent rooftop structure, it would not be treated as an expansion of the hotel's floor area.

A copy of the Zoning Administrator's response is attached as Exhibit C (the "Carlyle Suites Response").

There are three critical take-aways from the Carlyle Suites Response. First, passive recreation areas are devoted to socializing, lounging, sunbathing, and eating/drinking. This is precisely what Owner proposes to do here. Owner has no intention of permitting active recreation on the rooftop, such as by installing a basketball or tennis court. And the service and consumption of food and beverages on the rooftop will be accessory use of the Hotel. 11 DCMR § 199.1 (defining "accessory use" as "a use customarily incidental and subordinate to the principal use, and located in the same lot with the principal use."). And because it is an accessory use, it cannot be deemed an extension of the nonconforming use.

Second, only passive recreation areas covered by a roof structure expand the hotel's floor area. As evidenced in the architectural drawings submitted with the Application, the proposed passive recreations areas here are not covered by a structure. As such, they do not expand the Hotel's floor area and thus do not enlarge the nonconforming structure.

Third, passive recreation areas are common features on hotel rooftops in the District. Contrary to Appellants' characterization, there is nothing novel about what Owner has proposed to do here and, in fact, Owner was fully transparent with the Zoning Administrator about what its proposed uses were for the passive recreation space.

Because Owner's proposed use of the rooftop is fully consistent with how the Zoning Administrator has interpreted the term "passive recreation," and because that proposed use does not expand the Hotel in violation of the Zoning Regulations, the Board should deny the Appeal.

IV. THE MISTAKEN LOT AND SQUARE ON THE PERMIT HAS BEEN CORRECTED AND APPELLANTS' ARGUMENT IS THUS MOOT.

Finally Appellants allege that the Permit must be revoked because it was "reviewed and granted" as if the Hotel was located in Ward 2, Square 0072, Lot 0858. Ex. 3. This is untrue. The hearing testimony and documentary evidence will establish that this project was reviewed and approved based on the Hotel's correct lot and square.

First, regarding DCRA's permit-review procedures, Owner expects the Zoning Administrator or other DCRA official to testify that DCRA does not rely on the lot and square listed on an application. Rather, DCRA relies on the official building plat issued by the Office of the Surveyor and further relies on the property's street address to track the permit application.

Second, concerning Owner's application, it would appear that that the application-intake form had the incorrect lot/square on it. But that error was irrelevant to DCRA's review. Importantly, Owner had included the proper plat in its application package and that plat correctly identified the property as being in Square 1953, Lot 0045. Moreover, the architectural plans in the application packet specified that the Hotel is (1) located at 2505 Wisconsin Avenue, N.W.; (2) located in a R-1-B district (but built during a time at which the property was zoned R-5-C); (3) a nonconforming use in a nonconforming structure; and (4) located in the NO Overlay District.

Third, Appellants have not identified, and cannot identify, anything in the permit review process even remotely suggesting that the Office of Zoning thought the Hotel was located anywhere but at 2505 Wisconsin Avenue, N.W. in Square 1953, Lot 0045. *See, e.g.*, Ex. 3. Finally,

after DCRA's permit staff was told that the intake-form error had inexplicably carried over to the Permit, DCRA reissued the Permit with the correct numbers, thus rendering moot any claim of error.

It is well established that a case is "moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome The central question is . . . whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." Appeal No. 18249 of Larry Heyman at 4, Oct. 18, 2011 (dismissing appeal challenging permit with the wrong lot number (*citing N St. Follies, Ltd v. District of Columbia Bd. of Zoning*, 949 A.2d 584, 588-89 (D.C. 2008) (internal citations omitted))). Here the reissued Permit, which has the correct lot and square, is the operative permit, having superseded the original one. As such, Appellants' erroneous lot-and-square argument has been rendered moot. Because the Board's own regulations prohibit it from considering moot questions, this portion of the Appeal must be summarily dismissed. 11 DCMR § 3100.7 ("The Board shall not consider Informal requests for advice or moot questions.").

CONCLUSION

The Zoning Administrator correctly concluded that Owner's proposed renovations do not expand the nonconforming use or enlarge the nonconforming structure. Appellants have not established, and indeed cannot establish, a valid basis for overturning the Zoning Administrator's decision. Accordingly, Owner requests that the Board affirm the Zoning Administrator's decision and deny this Appeal.

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Dated: September 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September 2015, a copy of the foregoing
Prehearing Statement was served via electronic mail to:

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I hereby certify that on this 22nd day of September 2015, a copy of the foregoing
Prehearing Statement was served via U.S. mail to:

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/s/ Philip T. Evans
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