

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

Appeal of Massachusetts Avenue Heights Citizens)
Association, et. al, from issuance of Building Permit)
#B1404954 for construction work at 2505)
Wisconsin Avenue NW to CS Bond St AB-S Holdings)
on May 7, 2015)

BZA Appeal No. 19077

PRE-HEARING STATEMENT OF APPELLANTS

Appellants submit this statement in support of their application for appeal of the issuance of Building Permit #B1404954 (which was taken together with #B1404955) (collectively "Permit") for construction work at 2505 Wisconsin Avenue NW, currently doing business as the Savoy Suites Hotel ("Hotel"). The Savoy Suites Hotel is a nonconforming property and nonconforming use in an R-1-B residential zone and is also subject to the Naval Observatory Overlay. A copy of the zoning map was provided with our original submission.

The Hotel sits adjacent to Georgetown Heights Condominium, a residential building, to the south, and single family residential properties to the north and east for several blocks, many of which are owned by families with school aged children. Appellants are individual residents of the neighborhood adjacent to the hotel, their community association -- the Massachusetts Avenue Heights Citizens Association (MAHCA), and residents of the Georgetown Heights condominium. A list of appellants was provided with our original submission.

Appellees were issued the Permit on May 7, 2015. The Permit was issued as of right on the basis of a Determination Letter issued to counsel for the Hotel by Zoning Administrator Matthew Le Grant on July 24, 2013 (the "Determination Letter"). A copy of this Determination Letter is attached as Exhibit 1.

The Permit authorized the Hotel to construct a roofdeck covering significantly more than half of the 11,000 square feet existing roof, significantly expand an existing rooftop penthouse to add elevator access, restrooms, space for "temporary" kitchen equipment. The Permit also authorizes the addition of a penthouse to house a second stairwell to the roofdeck. The intended use of this roofdeck is as a restaurant, bar and special event space for cocktail hours, weddings, private parties and similar events. The Hotel has applied to expand its ABRA License (090804) to include the roofdeck as "an additional summer garden with 136 seats and entertainment endorsement."

The Department of Consumer and Regulatory Affairs of the District of Columbia (“DCRA”) erred in approving and issuing the Permit and that the construction does not comply with DC Regulations in the following manners:

1. The construction of the roofdeck is an impermissible expansion of a **nonconforming structure** in an R-1-B zone and violates the Naval Observatory overlay restrictions.
2. The construction of the roofdeck for intended **nonconforming use** as a restaurant, bar and special event space is an impermissible expansion of commercial adjunct space in a residential zone.
3. The Permit was issued, and possibly reviewed, based on the incorrect zoning in that the Permit states that the Property is located in Ward 2, at Square 0072, Lot 0858 (a District zoned R-5-E) when it is located in Ward 3, at Square 1935, Lot 0045 (in a District zoned R-1-B and subject to the NO Overlay).

Because the Permit was incorrectly issued, it should be revoked. Appellees should be required to seek a variance in order to perform the scope of work described in the Permit. We address first each of these arguments in turn below and then the remedy sought.

A. The construction of the roofdeck authorized by the Permit is not permitted in an R-1-B zone nor in the Naval Observatory Overlay District.

As noted above, the Hotel is a nonconforming use and nonconforming structure in an R-1-B residential zone. This fact is also acknowledged by Zoning Administrator Matthew Le Grant in his Determination Letter on July 24, 2013 to Norman Glasgow Jr. and Steven Sher, although that letter wrongly states that the Hotel plot was zoned R-5 during construction.¹ Section 11-2000.2 of the DC Zoning Code makes clear that “nonconformities may not be enlarged upon, expanded, nor extended.” Pursuant to

¹ The construction of the Hotel was the subject of significant litigation regarding zoning, as well as the issuance of a liquor license and certificate of occupancy. It was constructed during the pendency of this litigation due to court refusal to issue a preliminary injunction against construction during the litigation. After construction the court ruled that, in fact, the rezoning was illegal and the property was never zoned R-5. A copy of the two relevant court decisions are attached as Exhibits 2 and 3. After this ruling a settlement agreement was reached with the community that permitted the Hotel to remain, but left in place the ruling that the property was always R-1-B. A copy of this settlement, which details the entire history of the Hotel litigation is attached as Exhibit 4. It is not clear from the Determination Letter what role this factual error played in the Zoning Administrator’s decision.

11-2001.3(b), the roofdeck is prohibited because an addition or enlargement to a nonconforming structure shall “(1) [c]onform to use and structure requirements; and (2) [n]either increase or extend any existing, nonconforming aspect of the structure; nor create any new nonconformity of structure and addition combined” and the roofdeck violates both of these requirements.² The roofdeck authorized by the Permit is a dramatic expansion and extension of the nonconforming property. In addition to adding more than 6000 square feet of space on the deck itself for the nonconforming Hotel uses, the proposed roofdeck includes a significant expansion of an existing penthouse on the roof to house restrooms, an elevator, a prep kitchen or temporary kitchen equipment, and storage, as well as a second penthouse to include an additional stairwell. The two penthouses will be connected by a long screen wall.³ On information and belief, the roofdeck will also include the construction of a permanent outdoor bar structure. This expansion is an obvious violation of clear zoning regulations concerning nonconforming structures.

The roofdeck authorized by the Permit also does not comport with Naval Observatory Overlay District regulations in which the property resides. The Naval Observatory Overlay District was created to ensure respect for the security needs and concerns of the Vice Presidential Residence. *See* DC Zoning Code Section 11-1531. Properties within the Naval Observatory Overlay are restricted to 40 feet in height. *See* DC Zoning Code Section 11-1534. The Permit allows the Hotel, which already does not conform to Overlay requirements, to expand its nonconforming height through the expansion and addition of roof penthouses, and the use of the roof as a roofdeck would violate the purpose of the Naval Observatory Overlay District by creating areas of increased visibility into, increased exposure to, and increased risk of threat to the Observatory itself.

B. The issuance of the Permit for the intended commercial use violates the rules regarding expansion of a nonconforming use.

As detailed above, the intended use of the roofdeck is as a commercial space – a restaurant, bar and special event space. These uses are not core to the use as a hotel (itself a nonconforming use in an R-1-B district), but rather commercial adjuncts and additional nonconforming uses within the Hotel’s R-1-B district. Currently, the use of the Hotel roof is solely for mechanicals. There is no existing roofdeck and the

² Issues regarding use will be discussed further in Section B below.

³ Zoning Code provision 11-411.3 requires that all penthouses and structures on roofdecks “shall be placed in one enclosure.” The plan approved for this roofdeck violates this requirement by calling for the construction of a second enclosure, as well as the dramatic expansion of an existing enclosure, with the two enclosures connected by a screen wall. While the screen wall is intended to link the enclosures into some facsimile of construction in compliance with this requirement, the proposed plan clearly violates the literal terms and the intent of this provision as well.

eastern side of the roof lacks any parapet or safety wall. On information and belief, access is prohibited by guests of the Hotel and confined currently to maintenance purposes.

DC Zoning Code Section 11-2002.3 states “[a] nonconforming use shall not be extended to portions of a structure not devoted to that nonconforming use.” As the roof is not currently being used as a commercial space, the expansion into that space for the proposed nonconforming use violates the Code. Section 11-2002.5 states unequivocally that a “structure devoted to a nonconforming use shall not be enlarged, except if the enlargement is to be devoted to a conforming use.” “In this jurisdiction, non-conforming uses are strictly construed strictly against the property owner.” *Benin v. DC Board of Zoning Adjustment*, 534 A.2d 310, 323 (1987)(citations omitted).

It is possible that, in granting the original authorization for the Permit, the Zoning Administrator failed to realize that the intended use of the roofdeck was commercial. As noted above, the Permit was granted as of right on the basis of a Determination Letter by the Zoning Administrator, which covered not only the proposed addition of a roofdeck, but also the renovation of the existing restaurant and ballroom. The Determination Letter talks extensively about the proposed reallocation of space in the interior of the hotel, noting carefully that the reallocation does not result in any expansion of the commercial space in the hotel, something that would be an impermissible expansion of a nonconforming use. By contrast, the roofdeck is not described as a commercial space, restaurant, bar or even special event space, but as a “passive recreation space.”⁴ Recognizing the careful consideration given to any possible expansion of commercial space in the interior, it may be that the commercial use of the roofdeck was not contemplated by the Zoning Administrator at the time of the Determination Letter. This error may have contributed to the unlawful issuance of the permit.

C. The Permit is invalid because it was 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).

The Building Permit lists the incorrect Ward and Square for the Hotel.⁵ It states that the Permit is for Ward 2, Square 0072, which is a different hotel property, which is zoned R-5-E. The Savoy Suites Hotel at 2505 Wisconsin Avenue is, in fact, located in Ward 3, Square 1935, Lot 0045. As noted above, the Zoning Administrator also

⁴ The construction of a roofdeck, even for passive use by Hotel patrons, is prohibited under DC Zoning Code Section 11-2002.3 because the Hotel use of the property is a nonconforming use.

⁵ A copy of the building permit showing this error was included in Appellant’s initial submission.

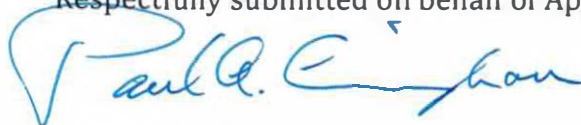
incorrectly noted that the property had been zoned R-5 at the time of construction.⁶ To the extent that any evaluation of the property or permit issuance could have been based on this error, the permit should be invalidated and reevaluated under the appropriate R-1-B standards.

REMEDY SOUGHT BY APPELLANTS

For all the reasons stated above, this Board should revoke the Permit on the grounds it was issued illegally. If a nonconforming structure with a nonconforming use can be authorized at all, it may only be authorized through the issuance of a variance. A variance, rather than a special exception, would be the only available process because the Hotel is seeking relief not from a conditionally permitted use, but from a use prohibited in its R-1-B zone and NO Overlay District. Pursuant to DC Zoning Code Section 11-3103.5(e), an area variance is the only way to request relief from a "prohibition against certain enlargements and additions to nonconforming structures," and thus would be required to permit building of the proposed roofdeck and attendant penthouses. A use variance would also be required to permit the proposed roofdeck to expand the nonconforming hotel and commercial adjunct use of the space. See DC Zoning Code Section 11-3103.6(c).

The Board should revoke the Permit authorizing the construction of a roofdeck on the Savoy Suites Hotel at 2505 Wisconsin Avenue and direct the owners of said hotel that a variance must be sought if they wish to continue to pursue any such permit.

Respectfully submitted on behalf of Appellants,



Paul A. Cunningham
202 973 7601
pac@harkinscunningham.com
Malia M. Brink
202 253 4171
maliabrink@yahoo.com

⁶ See footnote 1 and accompanying text, *supra*.