

Exhibit: See Pages 10-15, Yellow Highlights

GOVERNMENT OF THE DISTRICT OF COLUMBIA Board of Zoning Adjustment



Appeal No. 18735 of NH Street Partners Holdings LLC, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made November 27, 2013, to approve Building Permit No. B1310607 for construction of a new 168-room hotel addition in the DC/CR Zone District at premises 2121 M Street, N.W. (Square 70, Lot 880 (part of Record Lot 190)).

Appeal No. 18737 of Chadbourne & Parke, LLP, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made November 27, 2013, to approve Building Permit No. B1310607 for construction of a new 168-room hotel addition in the DC/CR Zone District at premises 2121 M Street, N.W. (Square 70, Lot 880 (part of Record Lot 190)).

HEARING DATES: April 1, 2014 and April 15, 2014

DECISION DATE: May 20, 2014

ORDER DENYING APPEAL

This appeal¹ was submitted to the Board of Zoning Adjustment (“Board” or “BZA”) on January 24 and January 27, 2014 by NH Street Partners Holdings LLC and Chadbourne & Parke LLP (the “Appellants”). The appeal challenges a decision made by the Zoning Administrator (“ZA”) of the Department of Consumer and Regulatory Affairs (“DCRA”) on November 27, 2013 to approve Building Permit No. B1310607 (“Permit”) for construction at 2121 M Street, N.W. (Square 70, Lot 880 (part of Record Lot 190)) (“Property”). The Permit authorized construction of an addition to existing improvements on the Property, which is located in the DC/CR Zone District. The Appellants alleged that the ZA erred in determining that the plans complied with the Zoning Regulations (Title 11 DCMR) because: the proposed construction (i) did not represent an addition to an existing building, but constituted an entirely separate building that violated the lot control provisions of the zoning regulations; (ii) failed to comply with the parking requirements of Chapter 21; (iii) failed to comply with the loading requirements of Chapter 22; (iv) failed to comply with the roof structure requirements of § 411; and (v) failed to comply with the public space at ground level requirement of § 633. In addition, the Appellants

¹ Although the appeals were separately filed, the appellants raised the same issues and jointly prosecuted the case in their pre-hearing submission and testimony at the hearing. Therefore, the Board consolidated the matters and shall refer to the challenges as the “appeal.”

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claimed that the documents submitted by the owner as part of its building permit application did not meet the requirements of § 3202.2.

Based on the evidence of record, including the entire record, including 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

The Office of Zoning scheduled a hearing on April 1, 2014. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellants, Advisory Neighborhood Commission (“ANC”) 2A (the ANC in which the property is located), the property owner, and DCRA. (Exhibits 12-15.²)

Parties

Appellants in this case are NH Street Partners Holdings LLC, the owner of a commercial office building located at 1200 New Hampshire Avenue, N.W., immediately east of the Property, and Chadbourne & Parke LLP, a tenant located within that commercial office building. DCRA is the Appellee, as the “person” whose administrative decision is the subject of the instant appeal, pursuant to 11 DCMR § 3199.1(a)(2). Renaissance Centro M Street LLC, the owner of the property (“Owner”) is automatically a party to the proceeding under 11 DCMR § 3199.1(a)(3). The ANC was also automatically a party in the case. The ANC filed a written report, which will be discussed later in this order.

Rescheduled Hearing Date

Due to lack of quorum, the Board rescheduled the hearing from the originally scheduled April 1, 2014 hearing date. On March 31, 2014, counsel for the Appellants requested the hearing be postponed to June 10, 2014. (Exhibit 26.) On April 1, 2014, counsel for the Owner opposed the request to postpone the hearing for failure to demonstrate good cause, and requested the Board schedule the hearing for either of the next available hearing dates on April 8, 2014 or April 15, 2014. (Exhibit 27.) On April 2, 2014, counsel for Chadbourne & Parke indicated that she was scheduled to be out of the country visiting her young daughter and would not return until April 14th. The letter requested the opportunity to allow her to clear her desk and recover from jet lag. (Exhibit 28 of Appeal No. 18737.) The Board rescheduled the hearing for April 15, 2014.

² Unless otherwise noted, all exhibits reference the record in Appeal No. 18735.

Pre-Hearing Submissions

The Board received joint prehearing materials from the Appellants on March 18, 2014, pursuant to 11 DCMR § 3112.10 (Exhibits 16-17). The Owner submitted prehearing materials for the Board's consideration on March 25, 2014 (Exhibits 20-23), and DCRA submitted its prehearing statement on March 25, 2014 (Exhibit 18-19).

On April 11, 2014, ten days after the originally scheduled public hearing and three days prior to the rescheduled public hearing, counsel for NH Street Partners Holdings LLC filed a motion to waive the 14-day filing deadline for pre-hearing submissions in order to submit a written "rebuttal" to the Owner's and DCRA's pre-hearing submissions. (Exhibit 28.) Owner and DCRA each opposed the motion for failure to demonstrate good cause and because it would be prejudicial to the Owner and DCRA. (Exhibits 29-30.) At the hearing on April 15, 2014, the Board indicated that it denied the Appellant's request and did not accept its late filing into the record. The Board also did not admit Owner and DCRA's filings in response to the late filing into the record.

FINDINGS OF FACT

The Property

1. The property that is the subject of this appeal is known as Lot 880 in Square 70, and it is part of Record Lot 190. Lot 880 fronts on M Street, N.W. Lot 190 fronts on M Street, 22nd Street, and Ward Place, N.W.
2. All of Record Lot 190 is within the DC/CR Zone District meaning that the property is mapped both in the CR Zone District and the Dupont Circle Overlay District. The CR Zone District is a mixed-use "Commercial-Residential" zone district that permits commercial and residential development, including office, retail apartment, hotels, and light industrial uses as a matter of right.
3. Record Lot 190 is improved with a Marriott hotel, which was constructed in the late 1970s and expanded in the late 1980s and again in the mid-2000s, and a Walgreens drug store and Starbucks coffee shop that are located on the ground floor. The hotel currently has 481 guest rooms. ("Existing Improvements".)
4. The primary entrance to the Marriott hotel is located off 22nd Street.
5. Until the mid-2000s, Owner's portion of Lot 190 (that is, Lot 880) was improved with a nightclub, a two-story establishment that occupied all of Lot 880. Lot 880 is currently improved as a surface parking lot.
6. Appellants' property is located immediately to the east of Record Lot 190. Appellants' property is improved with a commercial office building. The building was permitted pursuant to a series of agreements that allocated commercial density from Record Lot 190 to the

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Appellants' property, which therefore restricted the permitted development of Record Lot 190 to residential and hotel uses

7. A former public alley is located on both Record Lot 190 and Appellants' property. The former public alley provides access to the rear of Lot 880 through Record Lot 190.

The Project

8. The Owner seeks to improve Lot 880 with a nine-story Hyatt hotel with 168 rooms, ground floor function room space, and two levels of underground parking.
9. The Hyatt and Marriott Hotels are competing chains.
10. An existing door within the Marriott opens up onto Owner's Property (i.e. Lot 880) and provides egress from a stairway. The owner of the Existing Improvements agreed to allow this door to open onto a shared vestibule to be constructed as part of the project, which would then connect to the Hyatt Hotel through a shared vestibule.
11. Two existing doors within the retail establishments also open up onto Owner's Property (i.e. Lot 880). The owner of the Existing Improvements agreed to allow these doors to open into a service corridor located within the Hyatt hotel. Both the retail establishments within the Marriott hotel and the Hyatt hotel would share use of the service corridor.
12. In connection with the application and review of the Permit, the Owner submitted a series of documents to DCRA which included: a set of plans dated August 28, 2013 that included full architectural drawings of the Project ("Permit Plans") (Exhibit 36, Tab B); a building plat dated November 20, 2013 that depicted all existing and proposed improvements on Record Lot 190 ("Building Plat") (Exhibit 36, Tab F); and miscellaneous documents and plans submitted to the ZA's office in November 2013 that addressed questions regarding the building connection, parking, loading, roof structure, and public space at ground level (Exhibit 36, Tab D) and included, among other documents, a plan highlighting the building connections ("Connection Plan") (Exhibit 36, Tab D, A102) and a plan for attendant-assisted parking within the Project ("Valet Parking Plan") (Exhibit 36, Tab D, A100-101).

Findings Related to Lot Control

13. The Building Plat depicted all existing and proposed improvements to Record Lot 190. Drawing A102 of the Permit Plans, reprinted as the Connection Plan, depicted certain features of the Existing Improvements, including the Marriott egress stair and door and retail tenant doors that are located along the property line of the Project. (See also Exhibit 22, Tab A.)
14. Based upon the Permit Plans and the Connection Plan, the Board makes the following findings:

- a. The Project contains a service corridor that provides access between the Project's lobby and function rooms and the Marriott's retail establishments, as well as access from those areas to the private alley and loading area. The service corridor permits a person to walk between the Existing Improvements and the Project through a door into each retail establishment.
- b. The Project contains a vestibule located on M Street that provides shared access from both the Marriott stair tower and the Project's fire control room to M Street. The vestibule permits a person to walk between the Existing Improvements and the Project through a door.
- c. The service corridor and vestibule are each located at the ground floor of the building, which is the floor at which the principal entrance is located and is therefore the "main floor" of the building under § 199.1 of the Zoning Regulations.

Findings Related to Parking Requirements

15. At the time of the initial construction of the Existing Improvements, no parking was required for a hotel use.
16. The existing hotel was originally constructed with 354 hotel rooms as well as commercial adjuncts, function rooms, and exhibit space, and 89 parking spaces.
17. The Zoning Regulations have since been amended to require one parking space for every four hotel rooms as well as parking for function room and exhibit space.
18. Subsequent additions added 127 rooms, which triggered a requirement for an additional 32 parking spaces. Fifty-one parking spaces were added, in excess of the requirement.
19. Notwithstanding the existence of such surplus parking spaces, the Owner's parking computations only relied upon the parking spaces to be constructed within the Project.
20. The Project will add 168 hotel rooms, which require 42 additional parking spaces, and a 1,750 square foot function room space, which requires six additional parking spaces, for a total requirement of 48 additional parking spaces.
21. According to the Permit Plans, the Project contains two levels of underground parking, containing approximately 18,162 square feet of parking area where the minimum lesser dimension of that parking area is seven feet and the minimum greater dimension of that parking area is 14 feet, or approximately 378 square feet of area per parking space required for the Project, which exceeds the minimum requirement of § 2115.10. (Exhibit 22, Tab B.)
22. As shown on the Permit Plans and the Valet Parking Plan, the rows of permanent striped parking spaces are arranged as 90 degree angled parking and the aisles between such rows of

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permanent striped parking spaces (as well as all columns and other obstructions) have a minimum width of at least 20 feet, which meets the requirement of §§ 2117.6 and 2115.14.

23. As shown on the Permit Plans, the parking garage levels have a minimum vertical clearance of at least 6.5 feet, which meets the requirements of §§ 2115.5 and 2115.15.
24. The Existing Improvements and the Project will have a combined parking requirement of more than 75 parking spaces, and therefore meet the prerequisites of § 2115.9 for the provision of parking in accordance with §§ 2115.10 through 2115.18.
25. Subsection 2115.11 provides that the “parking space dimensional, size, design, and striping requirements stipulated under §§ 2115.1 through 2115.4, 2117.3, 2117.5, and 2117.6 may be waived; provided, that the parking is managed during a specified 12 hour peak period to be determined by the D.C. Department of Transportation by employed attendants who park the vehicles using the parking facility.”
26. The underground parking will be operated as an attendant-assisted parking garage on a full-time, 24 hours a day, basis, which meets the requirements of § 2115.11 for a waiver of the provisions cited therein.
27. At the time of the initial construction of the hotel, the Zoning Regulations loading requirements for that use were based upon 200 room increments, with additional loading facilities required at each 200 room increment (i.e. 200, 400, 600, etc.). Because the original hotel had 354 rooms, it needed to provide a minimum of one loading berth and three delivery spaces for each 200 hotel rooms. The regulations did not specify the width of the facilities.
28. This 200 room increment schedule was amended to provide one set of loading berth requirements for hotels with up to 200 rooms and a second set for hotels with greater than 200 rooms and therefore eliminated the need to provide greater loading facilities at each subsequent 200 room increment. The current schedule is as follows:

USES AND DISTRICTS	MINIMUM NUMBER AND SIZE OF LOADING BERTHS REQUIRED	MINIMUM NUMBER AND SIZE OF LOADING PLATFORMS REQUIRED	MINIMUM NUMBER AND SIZE OF SERVICE/DELIVERY LOADING SPACES REQUIRED
Hotel, For Guest Room Areas, in All Districts: With 30 to 200 rooms Usable for sleeping	1 @ 30 feet deep	1 @ 100 ft. ²	1 @ 20 feet deep
With more than 200			

rooms usable for sleeping	1 @ 30 feet deep 1 @ 55 feet deep	1 @ 100 ft. ² 1 @ 200 ft. ²	1 @ 20 feet deep
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29. Thus, if a hotel is constructed today with 201 rooms and provides the loading facilities set forth above, those facilities would continue to satisfy the Zoning Regulations no matter how many additional rooms are later added.
30. Pursuant to § 2200.8 of the Zoning Regulations, loading facilities for additions to an existing structure do not need to exceed the amount of loading required for the entire structure as proposed if constructed new.
31. If constructed as new, the combined building (that is, the Existing Improvements and Project) would have a total of 649 rooms because the number of rooms is greater than 200. Subsection 2201.1 would require two loading berths, one with a 30-foot width and a second with a 55-foot width and one service delivery space.
32. The loading facilities for the Existing Improvements satisfy this requirement; except that neither of the loading berths is 55 feet wide.
33. As shown on the Building Plat, the Project will provide an additional one 30-foot deep loading berth, one 100 square foot loading platform, and one 20-foot deep delivery space. The loading facilities are located at the end of the private alley. (See also Exhibit 22, Tab C.)
34. The existing loading berths were provided under the old requirements, which did not require a 55-foot loading berth. Therefore, the ZA concluded that the existing loading is grandfathered under the old dimensional requirements.

Findings Related to the Provision of Public Space

35. Subsection 633.1 of the Zoning Regulations requires that in the CR Zone District, an area equivalent to 10% of the total lot area shall be provided for all “new development.”
36. Because the Project is an addition to an existing building, it is not a “new development.”
37. The existing hotel features an arcade adjacent to the main entrance comprising approximately 1,776 square feet, and a lobby also adjacent to the main entrance comprising approximately 6,821 square feet. Together, the lobby and arcade consist of approximately 8,597 square feet, or 13.3% of the area of Record Lot 190, which is over the 10% minimum requirement.
38. In accordance with § 633.2, the arcade and lobby are immediately adjacent to the main entrance of the principal building on Lot 190, and provide a transition from 22nd Street into the interior of the hotel.

39. In accordance with § 633.3, the arcade and lobby have a height of at least one story. The lobby height is also at least 10 feet tall.
40. In accordance with § 633.5, the arcade and lobby are open to the public on a continuous basis, and per § 633.4, they are lighted and furnished with ample space for public seating. (See Exhibit 22, Tab E.)

Findings Related to the Roof Structures

41. As shown on the Permit Plans, the Project will contain its own building core and roof structure, as permitted under § 411.4.
42. As shown on the Permit Plans, the roof structure is set back from the south wall, which faces M Street, and from the northeast wall, which faces an open court. The roof structure is not set back from the eastern wall, which is a shared lot line with Appellants' property.
43. The roof structure is also not set back from the western wall, which faces an interior court created by the Project and the Existing Improvements. (See also Exhibit 22, Tab D.)

CONCLUSIONS OF LAW

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2), to hear and decide appeals when it is alleged by the appellant that there is an error in any decision made by any administrative officer in the administration of the Zoning Regulations. (11 DCMR §§ 3100.2, 3200.2.) In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. (11 DCMR § 3100.4.) In this instance, the decision complained of was the ZA's approval of the Permit.

Based on the findings of fact, the Board is not persuaded by the Appellants that an error occurred in the decision of the ZA as to the adequacy of the plans or the compliance of such plans with the Zoning Regulations governing building and lot control, parking, loading, roof structures, and public space at ground level. The Appellants failed to show that the ZA acted unreasonably or an arbitrary or capricious manner, abused his discretion, or otherwise committed an error in finding that the Project complied with the above-challenged portions of the Zoning Regulations.

Subsection 3202.2 and Adequacy of the Plans

At the public hearing, the Appellants alleged that the documents submitted by the Owner and relied upon by DCRA in reviewing and approving the Permit did not meet the requirements of § 3202.2 of the Zoning Regulations.

Subsection 3202.2 requires that each building permit application include "any of the following [documents] that is deemed necessary" The materials are broken into two categories: "scaled

drawings” and a “building plat” The scaled drawing are to show the “plan, elevation, and location by dimension of all existing and proposed structures, and the proposed use of those structures”; “parking and loading plans and the basis for computation of those plans”; and “other information necessary to determine compliance with this title.” The building plat requirements include “all existing and proposed structures”; “number, size and shape of all open parking spaces, open loading berths, and approaches to all parking and loading facilities”; and “other information necessary to determine compliance with the provisions of this title.”

Following the close of the public hearing and at the request of the Board, DCRA submitted a list of all documents relied upon by DCRA in reviewing the Permit’s compliance with the Zoning Regulations.

Appellants allege that the drawings relied upon by DCRA in approving the Permit’s compliance with the Zoning Regulations were incomplete because they did not include full detailed drawings of the Existing Improvements on Record Lot 190 or a full accounting of Record Lot 190’s parking and loading requirements. Appellants also allege that the building plat was insufficient because it did not show the roof structures of the existing and proposed structures.

However, § 3202.2 only requires documents to the extent that they are “deemed necessary” by DCRA to evaluate compliance with the Zoning Regulations. To this end, nothing requires an applicant to submit—or DCRA to require—detailed drawings of an existing building when, as here, the only work that is proposed is an addition to the existing structure. Rather, DCRA reasonably determined that the submitted documents provided enough detail to ascertain compliance with the Zoning Regulations. The regulations leave it to DCRA’s discretion as to what is necessary and the Board has no reason to second guess the agency’s judgment. The Board notes that § A-106.1.12 of the Construction Codes (Title 12 DCMR) provides specific submission requirements for building permit applicant’s to demonstrate compliance with the Zoning Regulations, essentially making § 3202.2 superfluous.

With regard to Appellants’ claim regarding the lack of roof structures on the building plat, the plain language of § 3202.2 makes no mention of roof structures. Furthermore, for the reasons discussed below, once the ZA determined that the Project was authorized to have a separate roof structure under § 411.4, there was no reason for the ZA to evaluate the roof structure on the Existing Improvements.

Based on the Findings of Fact, the Board concludes that DCRA reasonably decided that the Permit Plans, Building Plat, and other drawings provided sufficient information to determine compliance with the Zoning Regulations. Subsection 3202.2 did not require the Owner to submit full detailed plans and elevations of the Existing Improvements, and DCRA was not required to request such plans.

The Project Complies with the Building and Lot Control Requirements

Under the Zoning Regulations, each building is ordinarily required to be located on its own record lot. (11 DCMR § 3202.3.) In a commercial zone district, separate buildings may be located on the same record lot only if each conforms with certain theoretical lot requirements. (11 DCMR § 2517.) Therefore, the key issue in this Appeal is whether the Existing Improvements and the Project constitute a single building under the Zoning Regulations, and may therefore be located on the same record lot, or whether the structures are separate buildings that require either separate record lots under § 3202.3 or conformance with the requirements of § 2517. For the reasons set forth below, the Board concludes that the combined structure meet the definition of “Building” under § 199.1 of the Zoning Regulations and therefore may be located on Lot 190 without any further approval.

The Connections between the Existing Improvements and the Project Allow the Two Portions to be Considered a Single Building

The definition of “building” addresses the circumstances when separate portions of a structure may not be considered a single building and, by extension, identify when such separate portions may be considered as being one.

When separated from the ground up or from the lowest floor up, each portion shall be deemed a separate building, except as provided elsewhere in this title. The existence of communication between separate portions of a structure below the main floor shall not be construed as making the structure one (1) building.

The first sentence addresses the circumstance when portions are separated in their entirety by a common division wall with no open connection between the portions. The exception referred to is contained in § 3202.3 (c), which provides that “[a]ny combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure.”

For the reasons to be explained in greater detail below, this element of the definition does not apply to this appeal because the walls that separate the Existing Improvements from the Project have openings in the form of doors that open onto a shared service corridor and shared vestibule. Although the definition of “building” provides that the existence of a communication below the main floor cannot make the structure one building, it necessarily follows that the existence of such a communication at or above the main floor would. For purposes of this definition, “communication” typically means access between the separate portions of the structure. (See *Application No. 18263-B of 117 C Street SE*, at 11 (2013); *BZA Appeal No. 16646 of Daniel Serwer and James W. McBride*, at 9.).

Here, the Zoning Administrator was presented with three above-grade communications between the Project and the Existing Improvements.

- The first two communications feature a shared service corridor that is located on Owner's Property but permits access from both ground floor retail tenants within the Existing Improvements into the shared service corridor. This shared service corridor also provides egress from the Project's lobby and function room spaces. The shared corridor will be open and available for access on a continuous basis and provide the retail tenants with access to loading and trash facilities at the end of the private alley. The shared service corridor also permits direct communication from the retail tenants' space into the Project's hotel lobby and lounge, and vice versa.
- The third communication features a shared exit vestibule that provides access from an egress stair within the Existing Improvements onto Owner's Property. The vestibule also provides access to the Project's fire control room. The vestibule is enclosed and within the Project.

The Appellants allege the Project lacks a "substantial" and "meaningful" connection to the Existing Improvements on Lot 190 and, as a result, does not meet the definition of "Building" under the Zoning Regulations. The issue of whether a connection is meaningful is only relevant when two building segments are being connected by a horizontal element that is not entirely internal. The issue concerns whether the connection is of sufficient substance to be considered a portion of a building.

Thus, in Z.C. Order 04-36, *Dorchester House Associates LLC and Kalorama West LLC* (2006), the Zoning Commission revisited its decision to hold a hearing on a PUD because it considered the trellis that connected the existing building to the new construction to be insufficient. This Board has held that a trellis establishes a meaningful connection if it has a roof that provides at least 51% coverage and is supported by columns for the shelter, enclosure, or support of persons. *Application No. 18263-B of Stephanie and John Lester* (2011). Similarly the Zoning Commission considered the meaningful connection provided by such horizontal structures as a 12-story glass bridge, Z.C. Order No. 05-36, *200 K Street NE PUD* (2006), and a solid glass and steel canopy connecting entrance lobbies, Z.C. Order No. 08-34, *Center Place Holdings, LLC* (2011).

There is no need for a similar inquiry when, as here, the connections are entirely internal to an enclosed structure. As the Zoning Administrator explained, a communication exists when "a person can walk through one portion of the building through the other through a door or corridor." (Transcript of Apr. 15, 2014 Hearing ("Tr. April 15") at 226.) The ZA concluded that all the connections between the Project and the Existing Improvements provided "communication" between the otherwise separate portions of the structure because, in all cases, the connections "allow passage from one portion of the building to the other." (Tr. April 15 at 224-25.) Even Appellants' expert conceded that a communication could be "as minimum as a door that grants you access into a space that is assumed to be contiguous space." (Tr. April 15 at 131-32.)

In its pre-hearing statement, the Owner provided examples of communication that include doorways and corridors that only provide limited passage between otherwise separate structures.

One such example is the building connection approved by the Zoning Commission in Z.C. Case No. 06-27, which merely allows passage between separate portions of parts of the mixed-use office, residential, and retail project. (See Z.C. Order No. 06-27, *Square 54 PUD*, at 6 (2007).) Here, the proposed connections not only meet the basic test for passage, but actually will be actively used by the occupants of the existing building to cross over into the Project. Therefore, the connections more than satisfy the requirement for the “existence of communication between separate portions of a structure” at or above the main floor.

Based on the Findings of Fact, the Board concludes that the ZA’s determination regarding the connections was reasonable. Each point of communication permits passage between a portion of the Existing Improvements and a portion of the Project. Each point of communication is located at or above the main floor, and accordingly the Board affirms the ZA’s conclusion based on the plain language of the definition of “Building” under § 199.1.

The Retail Tenants Constitute Part of the Existing Building

At the hearing, Appellants argued that even if the building connections otherwise provide meaningful communication, the connections cannot be recognized as communications because there is no connection between the lobbies of the Existing Improvements and the Project.

This argument is irrelevant because nothing in the definition of “Building” in § 199.1 specifies the extent to which the communication must interconnect the separate portions of the building. As set forth in the Findings of Fact, the retail uses are located on the ground floor of the hotel structure, with hotel rooms located over and above the retail uses starting at the second floor of the building. The connections are therefore clearly “within” the hotel structure and constitute part of the Existing Improvements.³ The Zoning Regulations simply do not require the lobbies to be connected. Instead, any communication between the separate portions of the structure will suffice.

As explained above, the Board concludes that the connections between the Project and the retail establishments, which are located within the existing hotel, provide communication between the Project and the Existing Improvements. The Board notes that this conclusion is consistent with the building connection approved by the Zoning Commission in Z.C. Case No. 06-27, which merely connected individual demised portions of the separate office and residential portions of the project but did not provide for access (open or restricted) directly from the office lobby to the residential lobby. (Exhibit 23, Tab V.)

³ At the hearing, Appellants argued that the Starbucks and Walgreens retail establishments did not constitute “commercial adjuncts” to the Marriott hotel. The Board concludes that it is not necessary to address this assertion because the retail spaces are clearly part of the Existing Improvements, but notes that under the definition of “Hotel” in § 199.1, “Commercial Adjuncts” are simply described as certain retail and service establishments accessory to hotel use, and do not have an internal connection requirement.

The Connected Structures Do Not Need to Share Common Ownership or Purpose

Appellants also argued that the Zoning Regulations require that the connected portions of a building must share common ownership and common purpose. They alleged that, because the Existing Improvements and proposed Project would be owned and operated as competing hotels, they could not constitute a single building. Appellants cited the separate ownership, competing commercial operations, lack of common facilities such as parking, loading, or life safety systems, and individual building addresses, and § 3202.3(c) of the Zoning Regulations in support of this assertion.

Subsection 3202.3(c) Does Not Apply

The Board does not agree with Appellants' interpretation of § 3202.3 of the Zoning Regulations. As noted, § 3203.3 is an exception to the rule stated in the definition of "building" that when "separated from the ground up or from the lowest floor up, each portion shall be deemed a separate building." Under § 3202.3(c), "any combination of commercial occupancies separated in their entirety, erected, or maintained in common ownership shall be considered as one (1) structure" and therefore can be located on a single record lot, even though the separate commercial structures otherwise constitute separate buildings under the Zoning Regulations.

The phrase "separated in their entirety" means that there are no openings whatsoever between the walls that separate the occupancies. That is not the case here. Rather the walls that separate the Existing Improvements from the Project will have doors that open onto shared spaces that connect the two portions. The only question, which the Board has already answered in the affirmative, is whether those connections constitute communications at or above the main floor. Since they do, § 3202.3(c) is irrelevant as to whether a single building has been created.

In Z.C. Case No. 03-05, the Zoning Commission explicitly rejected the notion that § 3202.3(c) applies to multi-story commercial structures. (Z.C. Order No. 03-05, DOT Headquarters PUD, at 1-3 (2004).) The Commission recounted the history of the provision, which was adopted in 1964 to allow for strip malls (i.e. individual commercial stores each separated by common division walls) to locate on single lots of record without a building connection. (*Id.* at 3.)

Furthermore, the Zoning Commission concluded that notwithstanding the language of § 3202.3(c), the definition of "Building" in § 199.1 (and its requirement for above-ground communication) nevertheless controlled the determination of whether a structure is a single building for zoning purposes. (*Id.* at 2.) All that § 3202.3(c) does is allow for those otherwise-separate buildings to be located on a single lot of record.

Based on the foregoing, the Zoning Commission concluded in Z.C. Case No. 03-05 that § 3202.3(c) did not apply to large multi-story commercial improvements. For similar reasons, the BZA concludes that § 3202.3(c) is inapplicable here. The Existing Improvements and Project are not a strip mall; rather, they are multistory commercial structures similar to the office buildings at issue in Z.C. Case No. 03-05.

No Requirement for Common Ownership or Facilities

The Board also does not agree with Appellants' assertion that the Existing Improvements and Project must have common ownership and common facilities to constitute a single building for zoning purposes. There is nothing in the definition of "Building" that imposes the requirement for single ownership or common facilities within a structure that is a single building for zoning purposes. The Board will not read a limitation into the Zoning Regulations that is not there.

It is well established that separate portions of a single record lot may be owned by separate property owners because the system of lots that govern ownership (the assessment and taxation lot system) allows for the creation of multiple A&T lots on a single record lot. *Application No. 14261 of Portsmouth Construction Company*, at 2-3 (1987). Furthermore, the Zoning Regulations also anticipate that structures that are a single building for zoning purposes may otherwise have separate building systems for individual components of that building. For example, the definition of "Building" itself presupposes that there are "separate portions" connected by the above-ground communication. And as discussed below, § 411.4 contemplates, as one example, that the separate portions of the structure may have separate elevator cores, and therefore allows for separate roof structures.

The only relevant fact to the determination of what constitutes a Building under § 199.1 is the presence or absence of above-ground communication between otherwise separate portions of the structure.

No Prohibition on Competing Uses

Finally, the Appellants argued that the Existing Improvements and Project cannot constitute a single building under the Zoning Regulations because it will be occupied by separate and competing hotels.

The use of property within the Building is solely governed by the provisions of the applicable zone district. Again, nothing in the definition of "Building" states or even hints that the separate portions of the building must be composed of similar or compatible uses. For similar reasons, the Zoning Regulations do not preclude other competing uses within a building or structure. To find otherwise would preclude an office building owner from subleasing different spaces within the building to competing law firms, and preclude a retail developer from leasing different spaces to competing restaurants or fast food chains.

Moreover, zoning governs use and not ownership of property. There is no zoning regulation that requires the Owner to identify the type of hotel that it intends to construct on its property. The Zoning Regulations are only concerned with the number of rooms, number of parking and loading spaces, and other dimensional constraints. If Appellants' assertion is taken to its logical conclusion, it would mean that the Existing Improvements and the Project would constitute a single building if, say, the Project were proposed as a Courtyard by Marriott, but does not constitute a single building because the Owner has elected to partner with Hyatt Place. That is

not a logical result.

Conclusion

For all of the reasons above, the Board reiterates that the definition of “building” under § 199.1 controls whether otherwise-separate structures constitute a single building for zoning purposes. Subsection 3202.3(c) is inapplicable here because the two portions will not be separated from the ground up or from the lowest floor; that provision only applies to strip malls. And nothing in the definition of “Building” of § 199.1 requires common ownership and shared building facilities or prohibits competing uses within a structure that is a single building for zoning purposes.

Therefore, because the Existing Improvements and the Project meet the definition of “Building” under § 199.1, the two constitute a single building for zoning purposes that is permitted on Record Lot 190. The Project does not require either a separate lot of record or conformance with § 2517 in order to be located on Record Lot 190 as an addition to the Existing Improvements.

The Project Complies with the Parking Requirements

Under §§ 2100.6 and 2100.7 of the Zoning Regulations, each addition to an existing non-historic building that increases the building’s intensity by more than 25% must include additional parking based on the Schedule of Parking requirements in § 2101. Here, the Project is required to provide 48 parking spaces, and it proposes to provide all 48 spaces within its garage.

Appellants also allege that the Project does not comply with certain dimensional and arrangement requirements of the Zoning Regulations, including the minimum required width of standard parking spaces under § 2115.1 and the amount and grouping requirements for compact spaces under §§ 2115.3 and 2115.4. However, under the plain language of §§ 2115.9 and 2115.11, those requirements may be waived when, as here, attendant-assisted parking is employed.

Those provisions provide in relevant part:

- 2115.9 In a commercial building or structure located in a . . . CR District where at least seventy-five (75) parking spaces are required according to the schedule of parking requirements under § 2101.1 and where parking spaces are provided within a parking garage, parking may be provided as set forth in §§ 2115.10 through 2115.18.

- 2115.11 Parking space dimensional, size, design, and striping requirements stipulated under §§ 2115.1 through 2115.4, 2117.3, 2117.5, and 2117.6 may be waived; provided, that the parking is managed during a specified twelve (12) hour peak period to be determined by the D.C. Department of Transportation by employed attendants who park the vehicles using the parking facility.

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Subsection 2115.18 states that, for the purpose of § 2115.9, hotels and retail uses are commercial.

The Property Meets the Prerequisites of § 2115.9

The Property is a “commercial building” that is located within the CR Zone District. As set forth in the findings of fact and conceded by all of the parties, the Existing Improvements are required to provide at least 32 parking spaces, and the Project is required to provide 48 additional parking spaces, for a total requirement of at least 80 parking spaces for the combined building. Therefore, based on the plain language of § 2115.9, the building is eligible to utilize the provisions of § 2115.9 of the Zoning Regulations and provide some parking through attendant-assisted parking.

Appellants argue that § 2115.9 does not apply here because the Project’s parking requirement is only 48 parking spaces. However, the trigger in § 2115.9 is based on the total parking requirement for the building, and as established above, the building is both the Existing Improvements and the Project. Accordingly, the building has a total requirement of at least 80 parking spaces, which exceeds the minimum requirement of 75 spaces.

The attendant-assisted parking plan meets the requirements of § 2515.11

Appellants claim that the waiver available under § 2115.11 is unavailable because the Zoning Administrator did not refer the attendant-assisted parking plan to DDOT for review and approval of its design and operation. However, § 2115.11 imposes no such requirement for 24-hour valet parking. The subsection calls for DDOT to determine the 12-hour peak period of operation for a facility, during which time attendant-assisted parking must be in operation. In this case, the Owner will provide 24-hour attendant parking. The referral provided for in § 2115.11 is only needed when less than a 24 hour period will be utilized.

Furthermore, nothing in the Regulations obligated the ZA to seek such determination from DDOT prior to the issuance of the building permit. The use of the parking facility, including any attendant-assisted parking, will not take effect until the structure is constructed and a certificate of occupancy is issued. Therefore, even if a DDOT determination was needed, the ZA could have reasonably concluded that a determination of the peak period by DDOT should wait until the issuance of the certificate of occupancy, so that current parking and traffic patterns can be considered, and at that time the ZA could also affirm compliance with the other provisions of attendant-assisted parking, such as the sign required under § 2115.12.

The Appellants allege that the proposed parking does not comply with the minimum aisle width requirement of § 2115.14, which provides that “[w]here aisles are provided, the aisles shall meet the design requirements stipulated in §§ 2117.5 and 2117.6.” The Appellant claim noncompliance because the valet parking plan showed cars parked within the aisles. However, the § 2115.11 states that the aisle width requirements of §§ 2117.5 and 2117.6 may be waived when attendant-assisted parking is present. Therefore, cars may be parked in the drive aisles

when attendants are managing the parking garage. All § 2115.14 does is ensure that when attendant-assisted parking is not in operation, the drive aisles meet the minimum aisle width requirement. Here, that requirement has been met.

For the reasons set forth above, the Board concludes that the Project complies with the dimensional requirements of the Zoning Regulations.

The Project Complies with the Loading Requirements

Under the Zoning Regulations, additions to existing buildings require the provision of additional loading facilities under certain conditions. Appellants argue that (1) the Project failed to provide additional required loading facilities for the increase in rooms; and (2) the Project's additional loading was improperly located.

The Project Does Not Require Any Additional Loading Facilities

Appellants argue that the Project should have been required to provide additional berths, including a 55-foot deep berth, because the cumulative addition of hotel rooms to the original structure (including the 1980s and 2000s additions) exceeds 200 rooms. However, the loading requirements applicable to additions to hotels are not dependent on the number of rooms added by the addition, but whether those additional rooms would increase the existing hotel's rooms to over 200, thereby triggering additional loading facilities. As noted in the findings of facts, the hotel when constructed already had more than 200 rooms. And although constructed under different loading requirements, its present loading facilities provide the same number as would be required had the combined number of existing and proposed rooms (649) been constructed today. As such, the facilities satisfy § 2200.8, which provides that "[l]oading berths, loading platforms, and service/delivery loading spaces for the addition of additions need not exceed the amount of loading berths, loading platforms, and service/delivery loading spaces that would be required for the entire structure as proposed if constructed new." The addition will actually add more loading facilities than are required.

It is true that neither the existing nor new loading facilities include a 55-foot loading berth as is currently required for hotels with more 200 rooms, but this sized berth does not need to be provided. The existing loading berths were provided under the old requirements, which did not require a 55-foot loading berth. Therefore, the Zoning Administrator concluded that the existing loading is grandfathered under the old dimensional requirements. (Tr. April 15 at 240.) The Board concurs with the ZA's determination, and notes that the Zoning Commission specifically acknowledged grandfathering of older loading facilities would take place when it amended the loading requirements for hotels. (Z.C. Order No. 314, *Hotels Text Amendment—Statement of Reasons*, at 14: "The Zoning Regulations cannot be made to apply retroactively.")

For the above reasons, the Board concludes that the Project does not require any additional loading facilities.

The Location of the Project's Loading Facilities Does Not Violate the Zoning Regulations

Notwithstanding the fact that no loading is required, as noted the Project does include an additional loading berth, loading platform, and service/delivery space to accommodate its proposed use. As set forth in the Findings of Fact, these loading facilities are located in the private alley, which is an open court. Appellants allege that § 2203.1 prohibits the location of loading in this open court.

Appellants' arguments fail because § 2203.1 only governs the location of *required* loading berths and spaces. Here, the spaces are not required for the reasons set forth above, and therefore may be located anywhere on the lot.

The Project Complies with the Roof Structure Requirements

The Zoning Regulations govern the number and location of roof structures. Appellants alleged that the Project's roof structure violated both the single enclosure requirement of § 411.3 and the setback requirements of § 630.4(b).

The Project is permitted to have a separate roof structure. Subsection 411.4 explicitly states that when separate elevator cores are required, a separate enclosure is permitted to correspond to each elevator core. Here, the separate uses within the building require separate elevator cores, thus authorizing separate roof structures under § 411.4. Accordingly, the Board concludes that multiple roof structures are permitted.

The Project's roof structure fully complies with the setback requirements. Subsection 630.4(b) requires the setback of roof structures from all exterior walls of a building. By definition, then, some walls of a building are exterior walls and other walls are interior walls. As the Zoning Administrator explained, under the Zoning Regulations, exterior walls are those walls that face streets, alleys, yards, and open courts. (See Tr. April 15 at 234-35; *Appeal No. 17109 of Kalorama Citizens Association*, at 11-13 (2005).) By contrast, walls that face the interior of the building, such as a closed court, are interior walls. Subsection 630.4(b) does not require a setback from those interior walls.

Here, as set forth in the Findings of Fact, the Project's roof structure complies with the setback requirement from all exterior walls (that is, the north and south walls). The Project's west wall is not an exterior wall because it faces a closed courtyard within the interior of the combined building. Therefore, the Zoning Administrator concluded that no setback is required from that west interior wall. For the foregoing reasons, the Board agrees with the ZA and concludes that no setback is required from the Project's west interior wall.

The Project Does Not Violate the Public Space at Ground Level Requirements

Section 633 of the Zoning Regulation requires that any "new development" in the CR Zone District devote a portion of the building as public space. The area of such public space is based

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on the area of the record lot and the space must satisfy certain requirements of the Zoning Regulations. The Appellants allege that the Project should not have been approved because Record Lot 190 does not provide the required public space at ground level. As explained below, the Board concludes the requirement is inapplicable because the Project is not a new development and that even if the requirement applied, the record lot already provides the required public space.

The Project is Not “New Development” on Record Lot 190 and Therefore Does Not Trigger the Public Space Requirement

Appellant’s claim of noncompliance is principally premised upon their belief that the Project is not an addition to the Existing Improvements and is therefore a new project which must separately satisfy the § 633 requirements. For the reasons stated above, the Board has already concluded that the Project is an addition to the Existing Improvements that form a single building. Therefore the requirements of § 633 are inapplicable.

“New development” is not defined in the Zoning Regulations, which means the phrase has the meaning given by *Webster’s Unabridged Dictionary*. *Webster’s Third Unabridged Dictionary* defines “new” as “1: having existed or having been made but a short time” and “development” as: “8: a developed tract of land; esp. a subdivision having necessary utilities (as water, gas, electricity, and roads”. Based on the foregoing definitions, the “new development” clearly took place in the late 1970s, when Record Lot 190 was created by subdivision. The Project is not “new development” but rather an addition to an existing development on land that has and continues to be improved with structures and uses that are part of the same common development scheme for Record Lot 190.

Furthermore, the Project does not seek to build on area that constitutes the record lot’s public space. The site of the Project never served as the required public space because it is not adjacent to the main entrance of the hotel and it was otherwise occupied by structure from the late 1970s through the mid-2000s that did not serve as a transition between the right-of-way and the Existing Improvements. And the current parking lot located on the site of the Project similarly does not serve as the required public space because it does not meet the requirements of § 633 (it is not adjacent to the main entrance of the Existing Improvements nor does it provide a transition from the street to the building, it is not landscaped, and it is not open to the public on a continuous basis).

Even if § 633 Applied, its Requirements are Satisfied by the Existing Improvements.

Section 633 of the Zoning Regulations sets forth specific requirements for public space at ground level. The public space at ground level requirement is unique to the CR Zone District. The Zoning Regulations require that new development set aside at least 10% of the lot area as public space that provides a transitional space between the street and the building. The space must be adjacent to the main entrance of the principal building or structure on the lot. The space must be either open to the sky or have a height of one story or 10 feet. The space must be lighted and

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landscaped for public use, and may be used for temporary commercial displays. The space must be open and available to the general public on a continuous basis.

For the reasons discussed above, the Project is part of a single building on a single lot of record. Per § 3202.3 of the Zoning Regulations, compliance with yard, court, and other requirements of the Zoning Regulations is evaluated based on the structure's record lot, not any assessment and taxation lots. Therefore, the public space requirement is based on the lot area of that lot of record (Record Lot 190).

The Zoning Administrator concluded that the Marriott's lobby, combined with the arcade immediately outside the lobby, satisfies the requirement for "public space at ground level" for Record Lot 190. As set forth in the Findings of Fact, the hotel lobby and arcade:

- Meet the minimum area requirement of § 633.1;
- Per § 633.2, are located immediately adjacent to the main entrance and serve as a transitional space between the right-of-way and the building;
- Per § 633.3, has a minimum clearance of one story or 10 feet;
- Per § 633.4, is lighted and furnished with ample space for public seating; and
- Per § 633.5, is open to the public on a continuous basis.

Based on a plain reading of § 633, the Board concurs with the ZA's conclusion.

Appellants argue that the lobby cannot count as public space because it is not open to the sky. Nothing in the language of § 633 requires that the public space be open to the sky. Indeed, § 633.3 makes it clear that the public space does not need to be open to the sky, so long as it has a height of one story or 10 feet.

Appellants also argue that the lobby cannot count toward the public space requirement because it is located behind the building line (meaning the façade of the building). However, nothing in § 633 indicates that the space must be behind the building line. Again, § 633.3 permits the space to be enclosed and covered which, by definition, constitutes "Building" under § 199.1. Therefore, any enclosed space is automatically behind the building line. Moreover, even the Appellants conceded that the arcade met the public space requirement, even though the arcade also fell behind the façade line of the building. Finally, all that § 633.2 requires is that the space is located immediately adjacent to the main entrance, and that it serves as a transitional space between the right-of-way and the building. The Regulations do not state that the transitional space must be located on one particular side of the building entrance.

Appellants also argue that the lobby is not sufficiently public because it is not open 24 hours a day. However, Appellants provided no evidence to support their claim that the lobby was

unavailable at any particular time. Moreover, § 633.5 merely requires that the space be open and available on a “continuous” basis. Since the space is required to be located on private property, it is reasonable to conclude that the property owner may impose reasonable restrictions on the use of the space for maintenance and security reasons.

For all of the above reasons, the Board concurs with the Zoning Administrator’s determination that the existing arcade and lobby satisfy the public space at ground level requirements for Record Lot 190. Because the Project does not increase the size of Record Lot 190—and therefore does not increase the amount of public space required under § 633—the Zoning Administrator reasonably concluded that no additional public space is required for the Project.

Advisory Neighborhood Commission 2A

The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. (D.C. Official Code § 1-309.10(d).) In this case, ANC 2A is not one of the Appellants, but ANC 2A filed a resolution regarding the Project. (Exhibit 25.) The resolution made no mention of the issues raised by the Appellants, but expressed concerns about signage-related lighting issues. The Zoning Regulations do not govern lighting and signage. The Court of Appeals has held that the “great weight” requirement “extends only to those issues and concerns that are ‘legally relevant.’ *Wheeler v. Board of Zoning Adjustment*, D.C. App., 395 A.2d 85, 91 n.10 (1978).” *Bakers Local Union No. 118 v. District of Columbia Bd. of Zoning Adjustment*, 437 A.2d 176, 179 (1981). *Accord Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C.1993) (ANC’s views on whether variance should be granted not relevant to the BZA’s decision as to whether a variance was needed). Here, the ANC concerns over the Project’s impact were not legally relevant to the Board’s determination as to whether an error was committed in the administration of the Zoning Regulations and therefore may not be given great weight.

DECISION

Based on the findings of fact and conclusions of law, the Board concludes that the Appellants have not satisfied their burden of proof with respect to the various claims of error regarding the Zoning Administrator’s approval of Building Permit No. 1310607, issued on November 27, 2013, to approve construction of a new 168-room hotel addition in the DC/CR Zone District at premises 2121 M Street, N.W. (Square 70, Lot 880 (part of Record Lot 190)). Accordingly, it is therefore **ORDERED** that the decision of the Zoning Administrator is **AFFIRMED** and the appeal is therefore **DENIED**.

VOTE: **3-0-2** (Peter G. May, Jeffrey L. Hinkle and Lloyd J. Jordan to Affirm the decision of the Zoning Administrator; Marnique Y. Heath abstaining; S. Kathryn Allen not participating, not voting.)

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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: April 6, 2015

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.