Tab A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 19023 of ANC 2A, pursuant to 11 DCMR §§ 3100 and 3101,[1] from a November 24, 2014 determination by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to allow a sidewalk café within public space at an existing hotel in the R-5-E District at premises 924 25th Street, N.W. (Square 16, Lot 884).

HEARING DATE: September 15, 2015
DECISION DATE: September 29, 2015

ORDER GRANTING APPEAL

This appeal was filed on April 9, 2015, by ANC 2A ("Appellant") to challenge a decision of the Zoning Administrator, at the Department of Consumer and Regulatory Affairs ("DCRA"), made November 24, 2014. Appellant alleges that the Zoning Administrator failed to find that a sidewalk café, as a commercial adjunct to a hotel in a R-5-E residential district, violated 11 DCMR § 350.4(e) and § 351.2. Appellant also alleges that the Zoning Administrator improperly concluded that the Zoning Regulations do not influence the use of public space. The subject property is located at premises 924 25th Street, N.W. (Square 16, Lot 884). The owner of the subject property is ALMAC, LLC ("Owner"). Before addressing the merits of the case, two preliminary matters were raised prior to and during the hearing: (1) Jurisdiction and (2) Motion to Dismiss for Untimeliness. The Board addresses each in turn before addressing the merits of this case.

PRELIMINARY MATTERS

Notice of Public Hearing. The Office of Zoning scheduled a hearing on September 15, 2015. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to Appellant, the property owner, and to DCRA.

[1] All references to Title 11 DCMR within the body of this order are to provisions that were in effect on the date the case was decided by the Board of Zoning Adjustment (the 1958 Zoning Regulations), but which were repealed as of September 6, 2016 and replaced by new text (the 2016 Zoning Regulations). The repeal and adoption of the replacement text has no effect on the validity of the Board's decision in this case or of this Order.

Parties. The Appellant, DCRA and the Owner were automatically parties in this proceeding. There were no other requests for party status.

The Board's Jurisdiction. On September 1, 2015, as part of DCRA's Pre-Hearing Statement, DCRA asserted that the Board does not have jurisdiction over a challenge regarding the use of public space. DCRA argued that the proper forum to challenge the issuance of a Public Space Permit is through the Public Space Committee ("PSC") under the Public Space regulations, not through the Board of Zoning Adjustment under the Zoning Regulations.

The Board heard arguments on the question of jurisdiction at the beginning of the hearing on September 15, 2015. The Appellant noted that it was not challenging the *issuance* of a public space permit, but rather the Zoning Administrator's *decision* finding that a sidewalk café, as a part of a commercial adjunct to a hotel in a residential district, complies with § 350.4(e) and § 351.2. Appellant argued further that the Zoning Regulations govern uses to ensure compatible development and use of land in the District. As such, the Zoning Administrator often has overlapping jurisdiction with different agencies. However, the Zoning Administrator (BZA and Zoning Commission included) is the only law-interpreting body for the Zoning Regulations. Furthermore, the Appellant asserted that the use of the sidewalk by the Hotel for café or restaurant use triggered § 350.4(e) and § 351.2 of the Zoning Regulations, over which the BZA has the jurisdiction to review.

Ultimately, DCRA and the Owner conceded that the determination of whether § 350.4(e) and § 351.2 applied to a sidewalk café is under the purview of the BZA. The Board finds it has jurisdiction on the limited question of whether a sidewalk café not existing in 1980 violates § 350.4(e) and § 351.2.

Motion to Dismiss. On September 1, 2015, as part of the Owner's Pre-Hearing Statement, the Owner filed a Motion to Dismiss the Appeal as untimely filed. BZA Exhibit 17. The Board heard arguments on the Motion to Dismiss at the beginning of the hearing on September 15, 2015, and deferred ruling on that Motion.

Hearing and Closing of the Record. The Board convened a public hearing on September 15, 2015, during which time the Appellant, DCRA and the Owner presented their respective cases through legal counsel. The Board received testimony on behalf of the Appellant from Patrick Kennedy, the Chairman of ANC 2A. The Board received testimony on behalf of the Owner from Conrad Cafrtiz, managing member of ALMAC, LLC. DCRA presented testimony through the Zoning Administrator, Matthew LeGrant.

The Board deferred its decision on the merits of the case and closed the record, except to receive proposed findings of fact and conclusions of law from all parties by September 24, 2015. The

Board scheduled the case for decision on September 29, 2015, at which time it considered the merits of the case and voted to grant the appeal.

FINDINGS OF FACT

The Property

1. The subject property (the "Hotel") is located at 924 25th Street, N.W. (Square 16, Lot 884).

2. The Hotel is located in the R-5-E Zoning District, a residential zone.

3. The Hotel, known as The River Inn, has more than 100 rooms.

4. The Hotel is owned by ALMAC, LLC. ALMAC, LLC has been the owner of the Hotel since at least 1980. (Exhibit 17.)

5. The Hotel has a restaurant, DISH Drinks, that is a commercial adjunct to the Hotel.

6. The restaurant increased its total seating capacity by adding approximately 32 seats on the sidewalk adjacent to the Hotel. (*See*, Proposed Outdoor Café Seating Plan at Exhibit 17C.)

7. The outdoor café and the Hotel restaurant, DISH Drinks, are owned, operated, managed and maintained by the same company.

8. The outdoor café is a benefit to the guests of the Hotel. (*See*, January 12, 2015 email from Conrad Cafritz indicating, "The River Inn … will benefit from the provision of some outdoor seating." at Exhibit 17F.)

9. Neighbors have complained about use of the outdoor café to ANC 2A.

Zoning Restrictions on Hotels in Residential Districts

10. A commercial adjunct is defined as retail or service establishments customarily incidental and subordinate to hotel use, such as restaurant, dining room, cocktail lounge, coffee shop, dry cleaning, laundry, pressing or tailoring establishment, florist shop, barber shop, beauty parlor, cigar or news stand, and other similar uses. (*See*, 11 DCMR §199.1.) A sidewalk café is a commercial adjunct.

11. Hotels are not permitted in residential districts as a matter of right; but hotels existing pre-1980 are grandfathered uses in residential districts.

12. Paragraph 350.4(e) states that a hotel in the R-5-E in existence as of May 16, 1980, with a valid Certificate of Occupancy or a valid application for a building permit is permitted provided: (1) the gross floor area of the hotel may not be increased; and (2) the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased.

Zoning Determination Letters

13. There are two zoning determination letters for this Property addressing whether or not a sidewalk café complies with the Zoning Regulations. A 2002 Zoning Determination Letter from then Zoning Administrator Denzil Noble and a 2014 Zoning Determination Letter from current Zoning Administrator Matthew LeGrant.

Noble Zoning Determination Letter

14. In 2002, the Owner of the Hotel sought to obtain a license to operate a sidewalk café as a commercial adjunct to the Hotel.

15. On May 16, 2002, Zoning Administrator Denzil Noble issued a letter finding that a sidewalk café, as a commercial adjunct to a hotel in a residential district does not comply with the Zoning Regulations. The Zoning Administrator found, "11 DCMR, Chapter 3, 351.2(c) states that as a condition for commercial adjuncts as accessory uses to a hotel in an R-5 district that contains 100 or more rooms or suites, [n]o part of the adjunct or the entrance to the adjunct shall be visible from a sidewalk…. Further, pursuant to 350.4(d), in a hotel that was in existence as of May 16, 1980 … commercial adjuncts may not be increased. Therefore, a sidewalk café is prohibited at 924 25th Street NW unless the Board of Zoning Adjustment approves an exception. I have alerted staff of the Public Space Committee regarding the issue." (Exhibit 18A (internal quotations removed).)

LeGrant Zoning Determination Letter

16. In May 2014, the Owner filed an application with the Public Space Committee for a sidewalk café.

17. In June 2014, ANC 2A informed the Owner of the Noble Zoning Determination Letter finding that a sidewalk café as a commercial adjunct to a hotel in a residential district does not comply with the Zoning Regulations. Upon learning of the Noble Zoning Determination Letter, the Owner withdrew the application for a sidewalk café.

18. On November 24, 2014, Zoning Administrator Matthew LeGrant issued a Zoning Determination Letter finding that a sidewalk café, as a commercial adjunct to a hotel in a residential district, complied with the provisions of § 350.4(e) and § 351.2. The Zoning Administrator found further that the Zoning Regulations did not apply to public space.

Timely Filing of Appeal

19. In January 2015, the Owner submitted a new Public Space Application. Notice of the Public Space Application was sent to the ANC on January 21, 2015.

20. By email dated January 12, 2015, the Owner informed a newly-elected ANC 2A Commissioner, who does not represent the district in which the subject property is located, that the zoning issues regarding the outdoor seating had been "resolved."

21. The January 12, 2015 email did not indicate what the zoning issues were or how they were resolved. Also, the email did not attach or reference a new zoning determination.

22. At the hearing, Patrick Kennedy, Chair of ANC 2A and factual witness for the Appellant, testified that on February 12, 2015, the Appellant was informed for the first time by the Owner at a political function that a new zoning determination letter had been issued. Mr. Kennedy noted that the Appellant was always aware of the Owner's intent to establish a sidewalk café but was not aware that the Owner would be able to obtain a sidewalk café without a variance or special exception from the BZA. The Appellant, relying on the 2002 Zoning Determination letter, did not know, and had no reason to know, that the 2002 Zoning Determination letter could be, and had in fact been reversed until the February 12th discussion with Conrad Cafritz.

23. The Owner's witness, Conrad Cafritz, corroborated the Appellant's witness' testimony. He noted that he informed an ANC Commissioner that the zoning issues had been resolved in January 2015, but did not elaborate on how. Mr. Cafritz testified that he told ANC Chair Patrick Kennedy that he had obtained a new zoning determination letter on February 12, 2015, at a political function.

24. On February 13, 2015, an Alcoholic Beverage Regulation Administration ("ABRA") notice was posted to the Hotel. Members of the community informed the ANC of the ABRA posting upon seeing it on February 13, 2015. ANC Commissioners checked but were unable to locate the new Zoning Determination Letter on DCRA's website.

25. On February 18, 2015, the Appellant, after searching and being unable to locate the 2014 Zoning Determination Letter on DCRA's online repository, obtained a copy of the November 2014 Zoning Determination Letter via email from Durrell Mack, an employee with DCRA.

26. On the evening of February 18, 2015, the Owner attended an ANC 2A meeting, at which the Appellant by resolution voted to appeal the LeGrant Zoning Determination Letter.

27. The Appellant filed this appeal on April 9, 2015; which was within 57 days from when the Appellant knew or should have known of the LeGrant Zoning Determination Letter.

CONCLUSIONS OF LAW AND OPINION

The Board of Zoning Adjustment ("Board" or "BZA") is authorized by § 8 of the Zoning Act to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative office in administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2012 Repl). *See* also 11 DCMR § 3100.2). Appeals to the Board of Zoning Adjustment "may be taken by any person aggrieved, or organization authorized to represent that person … affected by any decision of an administrative office … based in whole or part upon any zoning regulations or map" adopted pursuant to the Zoning Act. D.C. Office Code § 6-641.07(f) (2008 Repl.) (*See* also 11 DCMR § 3100.2.) In an appeal, the Board may "reverse or affirm, wholly or partly; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the office or body from whom the appeal is taken." (11 DCMR § 3100.4.)

The decision at issue in this case is whether the LeGrant Zoning Determination Letter certifying that the expansion of the Hotel's commercial adjunct into public space via an outdoor café, in the R-5 zoning district, complied with the Zoning Regulations. For the reasons below, we conclude that the Zoning Administrator erred in that determination. Section 350.4(e) and § 351.2 of the Zoning Regulations place restrictions on hotels in residential districts to protect the residential nature of the community and the expansion of a commercial adjunct onto the sidewalk violates the plain reading of the text and intent of those provisions. Before addressing the merits of the appeal, the Board also concludes that the Appeal was timely filed.

Timeliness of Appeal

Before ruling on the merits of an appeal, the Board must first consider the motion to dismiss the appeal on timeliness grounds. *See Basken v District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008). An appeal to the BZA must be filed with 60 days from the date the appellant (1) had notice of knowledge of the decision complained of, or (2) reasonably should have had notice or knowledge of the decision complained of, whichever is earlier. (11 DCMR § 3112.2(a).)

There is no dispute that the decision complained of is the LeGrant Zoning Determination Letter and the Board is required to determine when Appellants knew or should have known of the decision that gave rise to the instant appeal. (*See BZA Appeal No. 17468* at page 4 (2007) (when an appellant asserts a certain date as the basis of its zoning appeal, "the regulations require that the Board determine if there is an earlier date when the Appellant reasonably should have known of" the decision complained of.)) On the record presented, the Board concludes the Appellant first knew about the LeGrant Zoning Determination Letter on February 12, 2015, and consequently the appeal was timely filed.

The Owner, without conceding that the Appellant did not have notice of the LeGrant Zoning Determination Letter, argued that the January emails sent by Mr. Cafritz to ANC 2A Commissioner Smith noting that the zoning issues had been "resolved" should have provided notice to the Appellant that a new zoning determination letter had been issued. The Board disagrees. The statement that the zoning issues had been "resolved" is so vague that it cannot be interpreted to provide actual or constructive notice of a new zoning determination letter. Also, the Board notes that the email did not attach or reference a new zoning determination nor reference that such a letter had been issued.

The issue of notice is a fact-driven analysis. The Appellant testified that the ANC was aware of the Owner's desire to establish a sidewalk café. Indeed, the record reflects the Owner's desire to expand the Hotel since at least 2002. However, the testimony presented notes that ANC 2A was unware and had no reason to believe that the Owner had or could obtain a new zoning determination letter reversing the Nobel Zoning Determination until February 12, 2015.

The Owner also suggested that the filing of the PSC application and the ABRA application should have put the Appellant on notice that a new zoning determination letter had been issued. The filing of ABRA and PSC applications provides no notice of an applicant's standing with zoning, whether matter of right or through a variance. Consequently, the Board concludes that the January filing of ABRA and PSC applications did not provide notice to Appellant that a new zoning determination letter had been issued.

The record demonstrates, and the witnesses for both the Appellant and the Owner testified that the first time the Appellant was verbally informed of the issuance of a new zoning determination letter was on the evening of February 12, 2015, at a political function. (BZA Public Hearing Transcript

for September 15, 2015 at 38 and 43.) The Appellant filed an Appeal on April 9, 2015 -- 57 days after obtaining constructive knowledge that a new zoning determination letter had been issued.

Merits of Appeal

Pursuant to 11 DCMR § 3119.2, in all appeals and applications, the burden of proof shall rest with the appellant or applicant. In the instant appeal, the Appellant contends that the Zoning Administrator failed to find that the expansion of this hotel's commercial adjunct into public space via an outdoor café, in the R-5 zoning district, violates § 350.4(e) and § 351.2 (a) and (b) of the Zoning Regulations.

A. The outdoor café violates § 350.4(e).

As noted, § 350.4(e) states that a hotel in the R-5-E in existence as of May 16, 1980, with a valid Certificate of Occupancy or a valid application for a building permit is permitted provided: (1) the gross floor area of the hotel may not be increased; and (2) the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased.

The Board agrees with the owner that the area outside the lot line of the property does not add to the building's gross floor area, and therefore § 350.1 has not been violated. However, the Board finds that the outdoor café is "within the hotel" and is a commercial adjunct. Therefore, the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts is being increased in contravention of § 350.4(e). Owner's and DCRA's contention that the outdoor café is not within the Hotel is inconsistent with facts presented. As the Appellant noted, the café is a physical extension of the Hotel's existing commercial adjunct, Dish Drinks. The café seating plan indicates that the café will increase the restaurant's seating capacity by approximately 32 seats. The café expands and increases the total area the restaurant staff and kitchen will service. Moreover, as the Owner indicated in his email communications with ANC Commissioner Smith, the outdoor café is for the benefit of the Hotel's guests and patrons. The financial gain from the increased visibility of the restaurant is a benefit to the Hotel. Furthermore, the Owner asserts that you can only access the outdoor café from *within* the Hotel. Based on the shared ownership and management, the financial benefit and mutual exclusivity of the Hotel and cafe, the Appellant urges an inclusive interpretation of the word "within."

Conversely, the Owner and DCRA assert the term "within" strictly applies to areas within a hotel building or property lines. The Board notes that the second clause of § 350.4(e) does not limit the area devoted to function rooms, exhibit space and commercial adjuncts to "within the *building*" as the Owner and DCRA claim. Moreover, the second clause does not state "gross floor area" which would have clearly limited the consideration to the area within the building, but rather uses the more general term of "area".

In light of the facts presented, the Board concludes that § 350.4 applies to area within the control and management of the Hotel, not just its property line. Therefore, we conclude based on the

evidence provided by the Appellant and the Owner, there is sufficient evidence to conclude that an outdoor café which expands the serviceable area of a commercial adjunct of a hotel in a residential district, does not comply with the requirements of § 350.4(e).

A. The outdoor café violates § 351.2(a) and (b).

The Owner and DCRA support the Zoning Administrator's November 24, 2014 decision. The Zoning Administrator advised the Owner that a proposed outdoor café complied with § 351.2. Specifically concluding that:

a. The total area within the hotel building devoted to the commercial adjuncts will not be increased;

b. The current commercial adjunct space will remain accessible from the lobby of the building and there will be no direct entrance from outside the building;

c. No part of the commercial adjunct space inside the hotel will be visible from a sidewalk; and

d. No sign or display will indicate the existence of commercial adjunct space from the outside of the building.

The Appellant argues that the outdoor café is a commercial adjunct to the Hotel which contains 100 or more rooms that violates subsections (a) through (d) of § 351.2 because the café is within the control of the Hotel, is directly accessible from the outside, is visible from the sidewalk, and displays the existence of the restaurant from outside the building. The Board in its deliberation only addressed (a) and (b). The Board has already explained by outdoor café illegally increases the area within the hotel devoted to commercial adjuncts.

Subsection (b) requires that there be no direct entrance from outside of the building. From the plans for the outdoor café, it is apparent that a person could enter the outdoor café from outside without first entering the Hotel. (Exhibit 17C.)

B. Section 351.2 is not subservient to § 350.4(e).

DCRA challenged the Appellant's interpretation of the § 351.2 by asserting that § 351.2 is subservient to § 350.4(e). Since the four provisions of § 351.2 were simply an elucidation of § 350.4, the focus of those restricting provision applied to commercial adjuncts within a hotel only. The Board disagrees. Subsection 351.2 stands on its own. There is nothing in the regulations that indicate § 350.4(e) and § 351.2 must be read together. While it is true that § 351.2(a) mirrors § 350.4(e), the remaining provisions of § 351.2 do not mirror any provision or segment of § 350.4(e). Rather, § 351.2 provides additional restrictions on hotels with 100 or more rooms in a residential district. We decline to read into the regulations conditions that are not there. If the Zoning Commission wanted § 351.2 to be subservient to § 350.4(e), it would have indicated so.

C. The Zoning Regulations consider the impact of use on public space.

The Owner and DCRA have argued that this Board never has the authority to regulate uses in public space, and that such actions are entirely within the scope of DDOT's Public Space Committee. However, as noted the Zoning Regulations at issue are not regulating the public space, but the extent to which a hotel use may be expanded.

DECISION

For all the reasons above, the Board concludes that the Zoning Administrator erred in his determination that a hotel's commercial adjunct, located in public space in the R-5 zoning district, complied with the § 350.4(e) and § 351.2(a) and (b) of the Zoning Regulations.

Based on the foregoing, it is therefore **ORDERED** that the Appeal is **GRANTED** and that the Zoning Administrator's determination is **REVERSED**.

VOTE: 3-1-1 (Frederick L. Hill, Jeffrey L. Hinkle, and Anthony J. Hood to GRANT the Appeal and REVERSE the determination of the ZA; Lloyd J. Jordan to Deny; Marnique Y. Heath not participating).

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: March 6, 2019

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.