

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

441 4th Street, N.W.
Washington, D.C. 20001

Appeal of 5333 Connecticut Neighborhood
Coalition

Appeal No. 18615

DISTRICT OF COLUMBIA’S PRE-HEARING STATEMENT

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA”), by and through undersigned counsel, respectfully submits its Pre-Hearing Statement in opposition to the appeal filed by 5333 Connecticut Neighborhood Coalition (“5333CNC” or “Appellant”) on May 31, 2013.¹

This appeal concerns the proposed construction of an apartment building at 5333 Connecticut Avenue, NW (Sq. 1873, Lot 128) (the “Property”). Appellant is appealing DCRA’s issuance of Building Permit nos. SH1200128, FD1200052, and B1208792. All three permits were issued to the owner of the Property, CMK Dev, LLC (“Owner”). Permit nos. SH1200128 and FD1200052, both issued on April 3, 2013, provide for sheeting and shoring and foundation to grade work for the apartment building. Permit no. B1208792 was issued on May 28, 2013 and allowed for the construction of the new 263 unit apartment building.

Appellant is an association of neighbors who formed 5333CNC to oppose the proposed development of the Property. Over the course of several months, both before and after the building permits were issued, DCRA has responded to the ANC’s and neighbors’ concerns at

¹ ANC 3/4G has withdrawn as a party to this appeal.

great length and detail. Since January 2013, DCRA officials including the Zoning Administrator, the Chief Building Official, and the Director have had meetings with numerous community members, the ANC, and Councilmember Cheh to discuss this project. Additionally, the Zoning Administrator has responded to numerous email inquiries by community members and Appellant's counsel, Mr. Keys. Accordingly, many of the issues raised in this appeal have been already been addressed at length by DCRA. *See e.g.* Letter of Nicholas Majett attached hereto as Exhibit A.

While, many neighbors undoubtedly have very genuine concerns about excessive development and the aesthetics of their neighborhood, the proposed development meets all of the applicable zoning standards as those standards have been applied and interpreted for many years. Ultimately, DCRA is tasked with administering and enforcing the laws. DCRA cannot deny someone a permit when all of the standards have been met.

DISCUSSION

In the appeal Appellant attempts to attack a few different aspects of the proposed building. First, Appellant argues that current Zoning Map is inaccurate and that the Office of Zoning and DCRA's reliance on that map is in error. Next, Appellant claims that the 17 proposed units in the cellar of the apartment building should be counted towards floor area ratio (FAR) because they do not meet the definition of "cellar" in the Zoning Regulations. Lastly, Appellant alleges that the proposed building violates the 1910 Height of Buildings Act ("Height Act"). All three of these arguments are meritless and should be rejected by the Board.

1) The Property is not split-zoned

First, it is important to make clear that the entire Property is zoned R-5-D. Appellant has made an attempt to confuse this by asserting that a portion of the Property is zoned R-1-B.

Appellant's sole basis for arguing this is based on a typo that has since been corrected. Appellant notes that the 1973 Zoning Map shows the length of the zone boundary line to be 290 feet along Military Rd. from Connecticut Ave. lot line. *See* Appellant's Pre-Hearing Statement at Exhibit 29. Then, as argued by Appellant, the map published in 1975 changed the boundary to only extend 251 feet along Military Rd., thus making a portion of the Property in a different zone. *See* Appellant's Pre-Hearing Statement at Exhibit 30.

This issue has been investigated by the Office of Zoning ("OZ") who unequivocally determined that the entirety of Lot 128, Square 1873 is zoned R-5-D. The OZ issued a certification of this on January 22, 2013 and then on March 29, 2013 issued a memorandum to the Chairman of 5333CNC explaining its findings. *See* Appellant's Pre-Hearing Statement at Exhibit 32. DCRA then relied on OZ's certification of the Property's zone in its review of this project.

OZ explained that the dimension on the 1975 Zoning Map was not intended to read "251". Instead it was intended to read "291", but the "9" was obscured by a dashed line on the map. The obscuring of the "9" is obvious to any unbiased eye.

The obscured "9" was then republished in future versions of the map until 2003, when the map was published in a computerized format. In that version, obscured "9" was misread by the author of the map to be a "5". *See* Appellant's Pre-Hearing Statement at Exhibit 32.

Appellant claims that this change was no mistake and instead was done by "deliberate action"; however, Appellant has no explanation as to how the map was changed or record of an action by the Zoning Commission to change the boundary line. *See* Appellant's Pre-Hearing Statement at p.31. Instead of accepting the obvious truth that the character on the 1975 Zoning Map is an obscured "9" and not a "5", Appellant hints towards a conspiracy theory, stating "It is

unclear exactly what occurred, but the paper maps between 1973 and 1975 did not change on their own.” *See* Appellant’s Pre-Hearing Statement at p.33.

The fact of the matter is only the Zoning Commission can amend the Zoning Map. *See* DC Code § 6-641.01. The OZ’s memorandum clearly explains, “There have been no actions since 1965 by the Zoning Commission to change the location of the zone boundary line in Square 1873.” *See* Appellant’s Pre-Hearing Statement at Exhibit 32. Therefore, any change to the map alleged by Appellant has no basis in any action by the Zoning Commission and should be rejected by the Board.

2) The proposed building does not exceed the FAR limitation

The parties agree that maximum allowable FAR for the Property is 4.2. Appellant erroneously claims that DCRA erred by not counting 17 apartment units in the cellar level of the proposed building towards FAR. Specifically, Appellant’s objections pertain to how the adjacent finished grade was measured along the side of the building fronting on Military Road.

FAR is calculated by dividing the gross floor area of the building by the area of the lot. *See* 11 DCMR §199.1 (Definition of “Floor area ratio”). Cellars are excluded from gross floor area, but basements are included. *See* 11 DCMR §199.1 (Definition of “Gross floor area”). The difference between the two is that cellars are less than 4 feet above the adjacent finished grade, while basements are more than 4 feet above the adjacent finished grade.²

First, it’s important to mention that a portion of the ceiling of the proposed building’s cellar level is over 4 feet above grade and that portion has been counted towards FAR. *See* Pre-

² Under 11 DCMR §199.1, “Basement” and “Cellar” are defined as:

Basement - that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade.

Cellar - that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade.

Hearing Statement of CMK DEV, LLC, Owner (“Owner”) at Exhibit P (Cellar Plan). According to the Cellar Plan, by using the perimeter wall method, approximately 12% of the cellar level of the proposed building has been counted towards FAR. *See id.*

Along Military Road and in the interior court yard of the proposed building, Owner has included an areaway along the cellar units. Similar to a window well, this areaway is a narrow space between the grade and the building to provide additional light to the cellar units.

Appellant’s argument that the height of the cellar should be measured from the floor of the areaway to the ceiling of the cellar is without basis in the regulations or the Board’s prior cases. As Owner points out, many buildings have areaways and window wells. The Zoning Administrator has never considered the bottom of a window well or an areaway to be the “adjacent finished grade.”

Appellant also objects to DCRA considering the top of the “berm” along Military Road to be the adjacent finished grade. Appellant calls this an “artificial” adjacent finished grade. First, as shown by Owner’s Exhibit K, the “berm” is little more than a few feet of soil that has been built up along the Military Road side of the building. *See* Pre-Hearing Statement of Owner at Exhibit Q. In fact, the height of the grade at the top of the berm is almost the same as the existing grade of the Property. *See id.* The use of the term “finished grade” in the Zoning Regulations contemplates that a developer will be able to alter the natural grade. There is nothing in the Zoning Regulations that prohibits a developer from adding soil to achieve a desired finished grade and the Zoning Administrator has consistently allowed this.³

³ It is important to note that the recent amendments to the Zoning Regulations enacted by Zoning Commission Order 12-11 (effective June 14, 2013) are not applicable to this project because they became effective after Building Permit no. B1208792 was issued. Secondly, while those amendments do not allow the use of a berm to be included in measuring building height, the

Accordingly, Appellant has not established any error in the calculation of the cellar level's FAR.

3) The proposed building is below the maximum height allowed by the Height Act

There was no error by DCRA in approving the building plans with respect to the Height Act. DCRA's application of the Height Act was consistent with how the height of countless buildings has been measured for more than 60 years.

In applying the Height Act, there is a two step process to follow. First, DCRA must determine the maximum permissible height allowed, and then determine the point of measurement. This process is consistent with the Corporation Counsel Opinion of 1950 (the "1950 Opinion"), which explains that Section 5 of the Height Act "establishes the maximum height classifications for all buildings," and that Section 7 "furnishes the rule for determining the permissible height of a particular building within that class." *See Appellant's Pre-Hearing Statement at Exhibit 6.*

Section 5 (codified at DC Code §6-601.05) states in relevant part:

(c) On a residence street, avenue, or highway no building shall be erected, altered, or raised in any manner so as to be over 90 feet in height at the highest part of the roof or parapet, nor shall the highest part of the roof or parapet exceed in height the width of the street, avenue, or highway upon which it abuts, diminished by 10 feet...

(d) The height of a building on a corner lot will be determined by the width of the wider street.

See DC Code §§6-601.05(c)-(d).

Section 7 (codified at DC Code §6-601.07) states in relevant part:

For the purposes of this subchapter the height of buildings shall be measured from the level of the sidewalk opposite the middle of the front of the building to the

Zoning Commission did not exclude a berm from being considered as the adjacent finished grade for purposes of determining if a building story is a cellar or basement.

highest point of the roof. If the building has more than 1 front, the height shall be measured from the elevation of the sidewalk opposite the middle of the front that will permit of the greater height.

See DC Code §§6-601.07.

The Property is a corner lot that fronts on multiple streets (Kanawha St., Military Rd., and Connecticut Ave.). The widest street is Connecticut Ave., which is 130 feet wide. Since the Zoning Administrator has determined this to be a “residence street”, the maximum height allowed under Section 5 of the Height Act is 90 feet. Furthermore, the Zoning Regulations limit the height of a building in the R-5-D zone to 90 feet. *See* 11 DCMR §400.1.

In applying Section 7, the measuring point is chosen from the front that will permit the greater height. Since the Kanawha front of the proposed building has the highest elevation, it was chosen to be the measuring point. Thus, under the Height Act, the proposed building is allowed to be a maximum of 90 feet as measured from the sidewalk opposite the middle of the building fronting Kanawha.

Appellant argues that the measuring point should be located on Connecticut Avenue because that is the front that allowed for the greater height under Section 5, but the Height Act is not so limiting. Instead, the Height Act specifically states in Section 7 that the front allowing for the greatest height “shall” be chosen as the measuring point. It is undisputed that Kanawha allows for the greatest height.

The 1950 Opinion explains:

Sections 5 and 7 are separate and distinct. As before stated the maximum height classification is determined by the widest street. When that has been ascertained the actual height of the building is measured from the middle of the front of the building opposite the sidewalk having the greatest elevation.

See Appellant’s Pre-Hearing Statement at Exhibit 6 (italics added).

DCRA's application of the Height Act in this case is therefore consistent with the 1950 Opinion and the language of the Height Act.

In determining the exact point of measurement along Kanawha, the Zoning Administrator uses middle point of the full length of the exterior walls of the building that run along Kanawha. This calculation was made by drawing lines out perpendicular to Kanawha from both ends of the building. In this case, a portion of the proposed building front is set back 10 feet from the lot line and another portion is set back 65 feet the lot line. Appellant argues that only the portion of the building that is set back 10 feet should be used to calculate the middle of the front, but there's no basis for this interpretation in the Height Act or the Zoning Regulations. As Owner correctly points out, using Appellant's interpretation could lead to inconsistent results and developers manipulating the rule. *See Pre-Hearing Statement of Owner at p.8.*

As shown on the building plans, the height of the building from the center of building along Kanawha to the top of the parapet wall is within the maximum allowable height of 90 feet. *See Pre-Hearing Statement of Owner at Exhibit H.*⁴

4) The Roof Structures Are Compliant

The roof of the proposed building will have a roof deck, a pool, and a penthouse. All of these structures are compliant with the Zoning Regulations and Height Act.

The roof deck is complaint as it only 86.5 feet above the measuring point along Kanawha. *See Pre-Hearing Statement Owner at Exhibit H.* The top of the 'pool deck' is less than 4 feet above the parapet wall and is therefore permitted under 11 DCMR §411.17. The penthouse contains elevators, mechanical equipment, a stairway, and space that is accessory to the rooftop

⁴ As Owner points out, Exhibit H shows the height of the building to be 90 feet to the top of the parapet wall; however, this measurement was made the top of the guardrail. The top of the parapet wall is only 87.83 feet above the measuring point on Kanawha. *See Pre-Hearing Statement of Owner at p.9.*

swimming pool and rooftop recreation space. All of these uses have been specifically allowed in rooftop penthouses under §411.1 of the Zoning Regulations.

Contrary to Appellant's contention, Section 5(h) of the Height Act does not limit the height of the proposed rooftop penthouse. That section states that "spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, chimneys, smokestacks and fire sprinkler tanks" may be constructed in excess of the limits of the Height Act provided they are 1) fire proof, 2) not used for human occupancy, and 3) setback from exterior walls (1:1 setback). *See* DC Code §6-601.05(h).

The 1953 Corporation Counsel Opinion (the "1953 Opinion") makes clear that the list set forth in Section 5(h) has never been viewed as an exhaustive list of elements that may exceed the limits of the Height Act. *See* Pre-Hearing Statement of Owner at Exhibit J. Specifically, the 1953 Opinion references stairway penthouses, penthouses for air-conditioning equipment, condensers, water towers, heating equipment and boilers. *Id.* at p. 2. As Owner notes, there are numerous other roof structures that are commonly approved above the Height Act, including pools and their accessory penthouses. *See* Pre-Hearing Statement of Owner at p.11.

The 1953 Opinion explained the intent of Congress in enacting the Height Act:

[Congress] was not concerned so much with the use to which such penthouses would be put as with the fireproofing of such penthouses, and it would seem there was no objection on the part of Congress to the construction of fireproof penthouses above the height limit, just so such penthouses were (1) set back from the exterior walls, apparently for reasons of light and ventilation, and (2) were not constructed or used for human occupancy.

...
[T]he term 'human occupancy' as it is used in such paragraph should be construed to preclude the construction or use of penthouses for residential, office or business purposes[.]

See Pre-Hearing Statement of Owner at Exhibit J at p.3-4 (italics added).

The penthouse is not approved for use for human occupancy. There is no residential, office or business use occurring there. Instead, it is used for elevators, stairs, and as space that is accessory to the rooftop pool and recreation space (such as the pool pump room, restrooms, and storage). These uses are not residential as they are not part of a dwelling unit, but are accessible to all tenants for the purposes of utilizing the rooftop pool and recreation space. As stated above, all of those uses have been allowed by the Zoning Commission in rooftop penthouses per §411.1. Accordingly, the rooftop penthouse meets the intent and requirements of the Height Act and Zoning Regulations.

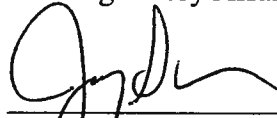
For these reasons, the appeal should be denied.

Respectfully Submitted,

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September 20, 2013



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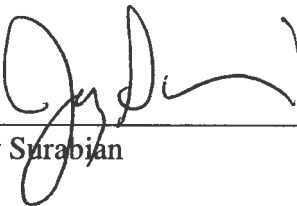
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by email, this 26 day of September 2013, on the following:

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Jay Surabian

Exhibit A

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS**



Office of the Director

May 21, 2013

VIA EMAIL

Jim McCarthy
Chair, ANC 3G
3835 Livingston Street, N.W.
Washington, D.C. 20015

Dear Commissioner McCarthy:

In response to your letter dated April 24, 2013 regarding Permit Applications for 5333 Connecticut Avenue, N.W.

DCRA has met on multiple occasions with ANC commissioners, community members and their legal and architectural experts, and Councilmember Cheh and her staff.

We have made the proposed project's building plans available for review and Zoning Administrator Matt LeGrant has discussed the zoning aspects of the building plans with several community members.

DCRA's position is that the proposed project at 5333 Connecticut Avenue, NW is a matter-of-right development, requiring no relief from the District's zoning regulations. As a matter-of-right project, there is no statutory requirement for either ANC or community review or approval of the proposed building plans.

As of May 20, DCRA has issued the following construction permits to the property:

- A soil boring permit (SB1200400) issued July 25, 2012;
- A foundation permit (FD1200052) issued April 3, 2013; and
- A sheeting & shoring permit (SH1200128) issued April 3, 2013.

We are currently reviewing the building permit application (B1208792) for the construction of the new residential building at the site.

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May 21, 2013

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Please note that because Mr. Peter Gosselin has publicly stated that he and others will be initiating litigation on the proposed building plans (<http://www.dcwatch.com/themail/2013/13-04-07.htm>), our General Counsel has advised me that we are limited in the responses we will be able to provide outside the scope of any litigation.

ANC 3/4G's April 24 letter regarding the building permit application contained arguments regarding the accuracy of the Office of Zoning's map of the property; compliance with the Height Act; the allowable Floor Area Ratio (FAR); and the building's projections.

First, both DCRA and the Office of Planning conducted extensive research of the Office of Zoning's maps. The Office of Zoning issued a notarized certification on January 22, 2013 attesting to the zoning and boundary lines of the property. We believe the entire property is zoned as R-5-D and we found no evidence that would contradict the Office of Zoning's map or its certification.

Second, the arguments regarding compliance with the Height Act don't raise legal assertions, but rather seek to have a review of the District Government's longstanding interpretation of the appropriate calculations for determining a building's maximum height. As the ANC's letter concedes, the District Government's interpretation on this issue has been consistent since the issuance of a legal opinion by the District's Corporation Counsel on May 11, 1950. We found no compelling justification to overturn more than 60 years of legal precedent that has been consistently relied upon by the Zoning Administrator, the Zoning Commission and the Board of Zoning Adjustment.

Third, we believe the FAR calculation is fully consistent with the zoning regulations. The ANC's letter argues that it should receive great weight regarding the FAR calculation, but cites no legal arguments in support of that position. As such, we have no grounds to provide to the ANC that which the relevant statute on great weight does not allow.

Fourth, the building's projections are allowable as Building Code modifications under the District's Construction Codes. Although the ANC letter appears to believe all building projections would project onto public space, that is incorrect. The actual projections into public space are relatively minor, do not interfere with public transit along that space, and can be approved by the Code Official under the Construction Codes.

While we appreciate the ANC's concern about this project, we have not been presented with any evidence that would authorize DCRA to treat this project as anything other than matter of right. As such, we do not believe the relevant statutes authorize DCRA to allow the ANC great weight on this proposed project.

Respectfully,

Nicholas A. Majett
Director

Cc: Rabbiah Sabbakhan, Chief Building Official
Matthew LeGrant, Zoning Administrator