

Holland & Knight

800 17th Street, NW, Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Whayne S. Quin
202-663-7274
whayne.quin@hklaw.com

October 22, 2013

BY IZIS AND HAND DELIVERY

District of Columbia Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: BZA Appeal No. 18615 - 5333 Connecticut Avenue, NW

Dear Members of the Board:

Pursuant to 11 DCMR § 3121, on behalf of CMK DEV, LLC, the owner of the property that is subject of the above-reference appeal, we submit the enclosed Proposed Findings of Fact, Conclusions of Law and Opinion, and Decision for the Board's consideration in advance of its October 29, 2013, public meeting. These materials are being submitted through IZIS and by hand-delivery pursuant to the rules of the Office of Zoning.

Thank you for your consideration of these materials.

Respectfully submitted,

HOLLAND & KNIGHT LLP


Whayne S. Quin

CERTIFICATE OF SERVICE

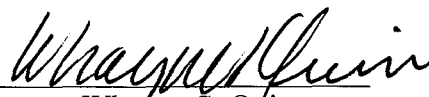
I hereby certify that on October 23, 2013, I served a copy of the foregoing by hand-delivery, on the following:

Andrea Ferster
2121 Ward Court, NW - 5th Floor
Washington, DC 20037

George Keys
Jordan and Keys, PLLC
910 17th Street, NW - Suite 317
Washington, DC 20036

Jim McCarthy
ANC 3/4G Chairman
3835 Livingston Street, NW
Washington, DC 20015

Irvin B. Nathan
Attorney General
Office of the Attorney General
One Judiciary Square
441 4th Street, NW, Suite 1145S
Washington, DC 20001


Wayne S. Quin

OWNER'S PROPOSED ORDER

Appeal No. 18615 of 5333 Connecticut Neighborhood Coalition, et al., pursuant to 11 DCMR §§ 3100 and 3101, from April 3, 2013 and May 28, 2013, decisions by the Department of Consumer and Regulatory Affairs to issue building permits (FD1200052, SH1200128 and B1208792,) authorizing the construction of an apartment building in the R-5-D District at premises 5333 Connecticut Avenue, NW (Square 1873, Lot 128).

HEARING DATE: September 24, 2013

DECISION DATE: October 29, 2013

DECISION AND ORDER

The instant appeal was filed with the Board of Zoning Adjustment (the "Board" or "BZA") on May 31, 2013, by 5333 Connecticut Neighborhood Coalition along with 32 individuals who are members of said organization (collectively, "5333 CNC" or "Appellant") and Advisory Neighborhood Commission ("ANC") 3/4 G. The ANC subsequently withdrew from the Appeal on September 13, 2013. Appellant challenged the administrative decision of the Department of Consumer and Regulatory Affairs ("DCRA") to approve the issuance of Building Permit Nos. B1208792, FD1200052, and SH120012, which authorized construction at premises 5333 Connecticut Avenue, NW. The "FD" and "SH" permits were issued on April 3, 2013, and authorized the foundation to grade and sheeting and shoring work, respectively. The "B" permit, which was issued on May 28, 2013, authorized construction of a new 263-unit apartment building. Appellant claimed that the DCRA approvals involved the following zoning errors: (i) construction in violation of the applicable zoning district; (ii) height of building measurement under both the Zoning Regulations (11 DCMR) and the General Height of Buildings Act of 1910 ("Height Act") including roof structures and uses (iii) challenge to building density and cellar calculations involving window wells and areaways under the Zoning Regulations.

Based on the evidence of record, including extensive 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 September 24, 2013. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to Appellant, ANC 3/4G (the ANC in which the property is located), the property owner, and to DCRA.

Parties

Appellant in this case is 5333 CNC, an unincorporated association of individuals and households asserting to live near the subject property that was formed to advocate against the development

proposed for the site. 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). The decision or determination in this case is DCRA's issuance of the Permits. The alleged zoning errors were the Zoning Administrator's determinations regarding building height, building density and configuration. CMK DEV, LLC, the owner of 5333 Connecticut Avenue, NW ("Property Owner" or "Owner") is automatically a party to the proceeding under 11 DCMR § 3199.1(a)(3). ANC 3/4G, also an automatic party in the case, originally filed as a party to the Appeal and withdrew its appeal by letter to the Board dated September 13, 2013, pursuant to a Memorandum of Understanding entered into with the Property Owner (Exhibit 31).

The Board received prehearing materials from the Appellant on September 13, 2013, pursuant to 11 DCMR § 3112.10 (Exhibits 16-29). The Property Owner submitted prehearing materials for the Board's consideration on September 19, 2013 (Exhibits 32-50), and DCRA submitted its prehearing statement on September 20, 2013 (Exhibit 51).

Hearing and Closing of the Record

The Board convened a public hearing on September 24, 2013, during which time the Appellant, DCRA and the Property Owner presented their respective cases through legal counsel. The Board received testimony on behalf of the Appellant from representatives of the Appellant, Elizabeth Lenyk and Richard Graham, and from Don Hawkins, who the Board qualified as an expert in architecture and in reading maps. Testimony was received on behalf of the Property Owner from Steven E. Sher, Director of Zoning and Land Use Services, Holland & Knight LLP, whom the Board has previously qualified as an expert in zoning and planning issues and recognized as an expert in this case.

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 October 22, 2013. The Board scheduled the case for decision on October 29, 2013, at which time it considered the merits of the case and voted - -1 to deny the appeal.

FINDINGS OF FACT

The Property

1. The subject property is located at Square 1873, Lot 128, premises address 5333 Connecticut Avenue, NW ("Property"). Square 1873 is bounded to the west by Connecticut Avenue, NW, to the north by Military Road, NW, to the east by Chevy Chase Parkway, NW, and to the south by Kanawha Street, NW.
2. The Property fronts on three streets: Kanawha Street, Connecticut Avenue, and Military Road. Connecticut Avenue is the widest of these streets, with a right of way measuring 130 feet. Kanawha Street has the highest elevation of the three streets.
3. The Property has a land area of approximately 47,370 square feet and increases in grade from north to south with elevation measures along Kanawha Street approximately 18 feet higher than along Military Road (Exhibit 49).
4. The Property is unimproved.

Zoning of the Property

5. According to the certification of the Zoning Office from the official records issued January 15, 2013, on the plat issued by the District of Columbia Surveyor, the Property is zoned R-5-D, with the following street frontages: 203.20 feet along Connecticut Avenue; 221.22 feet along Kanawha Street; and 291.31 feet along Military Road (Exhibit 38). The plat also reflects building restriction lines applicable to the Property: 15 feet along the entirety of the Military Road frontage; and 10 feet along the Kanawha Street frontage.
6. On March 16, 1965, the Zoning Commission rezoned lots 44, 35, 37, 19, 20 and 21 in Square 1873 to R-5-C, extending the R-5-C zone to the eastern lot line of Lot 37 on Military Road and the eastern lot line of Lot 19 on Kanawha Street, NW (Exhibit 33). When added to the depth of the zoning line existing at the time, the depth of the R-5-C zoning was approximately 221 feet along Kanawha Street and approximately 290 feet along Military Road. These dimensions are reflected on the Zoning Map issued in 1966. The 1973 Zoning Map likewise shows a 290-foot dimension along Military Road.
7. As noted by the Office of Zoning, which office maintains the official Zoning Map, pursuant to 11 DCMR § 106.1, there have been no actions taken by the Zoning Commission since 1965 to change the zoning boundary line in Square 1873 (Exhibit 26).
8. The 1975 Zoning Map shows the location of the zoning boundary line identical to the 1973 Zoning Map although the dimension is partly obscured by a dashed line indicating the building restriction line. This condition is replicated in subsequent maps (1983, 1984, 1987, 1996). The dimension of the zoning boundary line along Kanawha Street is not shown except in the 1966 Zoning Map, however, the location of the line appears to be identical in all subsequent maps.
9. The R-5-C zoning category was reclassified to R-5-D by action of the Zoning Commission in 1992.
10. The 2003 Zoning Map, produced in a different format from the earlier maps, shows the same boundary line configuration as earlier maps, but with a dimension of 251 feet indicated along Military Road. This map also shows the outline of the planned unit development ("PUD") which was approved for the Property in 1990 (pursuant to Zoning Commission Order No. 656) and which expired in 1998 without the PUD having been constructed. The Office of Zoning has concluded that the 251 foot dimension shown on this map was in error (Exhibit 26).
11. The 2013 summary Zoning Map shows the entirety of the Property zoned R-5-D (Exhibit 36).
12. The current official Zoning Map shows the entirety of the Property zoned R-5-D (Exhibit 37).
13. The R-5-D zoning district allows a maximum building height of 90 feet with no limitation on number of stories, pursuant to 11 DCMR § 400.1. Housing for mechanical equipment, a stairway, or elevator penthouse may be erected to a height in excess of that authorized in the district in which it is located, pursuant to 11 DCMR § 400.8. Many other structures are permitted as a matter of right above the roof or parapet, pursuant to 11 DCMR §§ 411.15, 411.16, and 411.17.

14. The R-5-D zoning district allows a maximum building density of 3.5 floor area ratio ("FAR"), pursuant to 11 DCMR § 402.4. Residential developments on properties subject to the Inclusionary Zoning provisions of 11 DCMR Chapter 26, including the Property, are provided bonus density of 20 percent additional gross floor area as a matter of right. In the R-5-D Districts, the resulting maximum density is 4.2 FAR.

The Approved Construction

15. DCRA issued the Permits to the Owner for excavation, foundation work and construction of a 263-unit, nine-story apartment building with cellar and below-grade parking (the "Building") in an R-5-D zoning district.
16. The Building is designed in a roughly I-shaped footprint (Exhibit 48).
17. The measurement for purposes of building height was taken at the level of the curb opposite the middle of the front of the building along Kanawha Street, yielding an elevation measurement of 316.83 feet. From this measuring point, the building height to the top of the building or parapet has been determined by DCRA to measure 87.83 feet.
18. Given the site's lot area of 47,370 square feet, the permitted gross floor area is 198,954 square feet (4.2 FAR). As approved in the Permits, the Building's gross floor area measures 198,338 square feet.
19. DCRA approved the Permits based upon the determination that the Building could be constructed without need for any zoning relief under 11 DCMR.

ARGUMENTS OF THE PARTIES

Appellant's Case

The Appellant claims the following errors by DCRA in approving the Permits: (1) the Permits violate the Zoning Regulations in that they permit construction of the Building on a portion of the Property that is zoned R-1-B rather than R-5-D when the R-1-B zoning districts do not permit apartment buildings; (2)(a) the Building violates the Height Act in that its building height should be measured from Connecticut Avenue rather than Kanawha Street, which would yield a lower height than was approved in the Permits; (2)(b) the Building further violates the Height Act even if Kanawha Street is determined to be the proper street for measurement purposes in that the building measuring point chosen along Kanawha Street for purpose of the Permits is flawed; (2)(c) the Building further violates the Height Act in that the Permits approve a defective vertical measurement that excludes certain items located on the roof of the Building, particularly the pool deck and the guard railing; (2)(c) the Building further violates the Height Act because the Building's penthouse structure includes recreational and storage space that is not exempted under the Height Act; and (3) the Building exceeds permissible density because significant portions of the lowest habitable level of the Building were approved as "cellar" rather than "basement" space and therefore not included in building density calculations.

Zoning Boundary:

The Appellant argued that that only a portion of the Property is legally zoned R-5-D, which permits development of apartment buildings, and that the remainder of the site is zoned R-1-B. As such, the Appellant claimed that the Building as approved by DCRA is not in compliance with the Official Zoning Map. The Appellant acknowledged that the Zoning Commission extended the R-5-C zoning district in 1965 to include Lots 44, 35, 37, 19, 20, and 21 in Square 1873 and that the new zoning was reflected on subsequent Zoning Maps. However, the Appellant claimed that "sometime between the publishing of the 1973 Official Zoning Map and the 1975 Official Zoning Map, the zone boundary was amended by the Zoning Commission to be limited to 251 feet [from 291 feet] from the line of Connecticut Avenue along Military Road." (Exhibit 16, pg. 27). The Appellant argued that the zoning boundary along Military Road was correctly reflected on all paper Official Zoning Maps since 1973 and disputes the current electronic Official Zoning Map, which designates the Property R-5-D in its entirety. The Appellant did not dispute the zoning boundary line along Kanawha Street shown on the several Zoning Maps since the Zoning Commission took action in 1965.

Building Height:

The Appellant claimed the Building violates the Height Act in that DCRA should have measured its building height from Connecticut Avenue rather than Kanawha Street, which would yield a lower height than was approved in the Permits. The Appellant argued that the Zoning Administrator misinterpreted the Height Act and that, to the extent the Zoning Administrator relied upon the 1950 Opinion issued by the Office of Corporation Counsel regarding interpretation of the Height Act for purposes of properties with multiple street frontages, the Appellant claimed that that opinion is flawed and DCRA erred in relying upon it.

The Appellant argued that the Building further violates the Height Act even if Kanawha Street is determined to be the proper street for measurement purposes in that the building measuring point chosen along Kanawha Street for purpose of the Permits is flawed. The Appellant claimed that the Owner selectively, absurdly and illegally chose a location along Kanawha to measure so as to ensure compliance with the vertical limitation of the Height Act and Zoning Regulations, and that DCRA erred in approving same.

The Appellant claimed that the Building further violates the Height Act in that the Permits approve a defective vertical measurement that excludes certain items located on the roof of the Building, particularly the pool deck and the guard railing.

The Appellant also claims that the Building further violates the Height Act because the Building's penthouse structure includes recreational and storage space that is not exempted under the Height Act.

Building Density:

The Appellant argued that the Building exceeds permissible density because significant portions of the lowest habitable level of the Building were approved as "cellar" rather than "basement" space and therefore not included in building density calculations. The Appellant noted that some of the dwelling units in question sit as much as 5-6 feet above street level along Military Road and are being excluded from density calculations because the Owner is creating an artificial berm along that frontage and also creating an artificial condition in the courtyard.

DCRA/Appellee's Case

Through its prehearing statement (Exhibit 51), DCRA disputed each of the Appellant's claims and noted that DCRA officials, including the Zoning Administrator, the Chief Building Official and the DCRA Director had conducted meetings with numerous community members, representatives of 5333 CNC, representatives of the ANC, and Ward 3 Councilmember Mary Cheh and further responded to numerous email inquiries from representatives and counsel for the Appellant, and in those meetings and correspondence, addressed the claims raised by the Appellant.

Zoning Boundary:

DCRA pointedly rejected the Appellant's claims that a portion of the Property is zoned R-1-B and notes that DCRA relied upon the certification issued by the Office of Zoning confirming that the Property is entirely zoned R-5-D in approving the Permits. DCRA noted that the Appellant's claim has been extensively researched by the Office of Zoning, the determination was made that a typographical error occurred in past issues of the Zoning Map, and the official Zoning Map corrected to reflect that the Property is zoned R-5-D. DCRA further noted that only the Zoning Commission is empowered to amend the Zoning Map and that no action has been shown to have been taken by the Zoning Commission with regard to the zoning boundary line in Square 1873 since 1965.

Building Height:

DCRA rejected each of the Appellant's arguments regarding compliance of the Building's height as inconsistent with the language of the Zoning Regulations and the Height Act, decades of interpretation by the Zoning Administrator and clear direction provided from the Office of the Corporation Counsel (now Office of Attorney General) dating as far back as 1950.

With regard to the Appellant's claim that Connecticut Avenue should have been utilized for purposes of measuring point, DCRA clarified that there is a consistent two-step process to be followed in applying the provisions of the Height Act to properties fronting on more than one street, which properly identified Kanawha Street as the appropriate location for the measuring point, and, further, that the point chosen as the measuring point, namely the middle point of the full length of the exterior walls running along Kanawha, is consistent with past administrative practice, and prudent to prevent manipulation of the measuring point for unusually-configured buildings.

DCRA noted that the roof of the Building is proposed to contain a pool, pool deck and penthouse, all of which are compliant with both the Height Act and the Zoning Regulations. The pool deck is compliant as it measures 86.5 feet above the measuring point, when 90 feet is permitted under both the Height Act and the Zoning Regulations. The building height to the top of the parapet wall measures 87.83 feet, and to the top of the protective guardrail is 90 feet. The pool deck structure is less than 4 feet above the parapet wall and permitted under 11 DCMR § 411.17. The penthouse of the Building contains elevators, mechanical equipment, stairs, and accessory space to the rooftop pool and recreation space, all of which are specifically allow under 11 DCMR § 411.1. Further, the roof structures and uses are likewise excluded from the limitations of the Height Act, as confirmed by the Office of Corporation Counsel, which noted in its 1953 opinion that the list of exempted items established in the Height Act is not exhaustive and extends to other structures that meet the three-pronged test of (1) fireproof construction, (2) not used for human occupancy, and (3) set back from exterior walls. Given that the roof structures of the Building satisfy this test, DCRA noted that they are exempted from building height measurement under the Height Act. When asked by the Board to

clarify its interpretation of "human occupancy", DCRA referenced the 1953 Opinion and noted that it contemplates residential or business uses, such as dwelling space or offices, which would be prohibited, but not temporary or occasional uses of space accessory to outdoor activity spaces, such as approved in the present case.

Building Density:

With regard to the Appellant's claim that the Building exceeds permissible density by virtue of the exclusion of a portion of the lowest habitable level of the Building from building density calculations, DCRA confirmed that this portion, which contains 17 dwelling units, was properly excluded from calculation as "gross floor area", and therefore also from the Building's "floor area ratio," because it is "cellar" space, rather than "basement" space, all as defined in 11 DCMR §199.1. DCRA noted that as a result of the long-established and uncontroverted "perimeter wall method" of measurement undertaken by the Zoning Administrator, which method is employed for levels of buildings that are located partly above-grade, a small portion of this lowest habitable level of the building was determined to be four feet or more out of grade, thus qualifying as basement and therefore countable toward gross floor area. The remainder was determined to be less than four feet out of grade and thus cellar and not countable toward gross floor area (Exhibit 48).

DCRA countered the Appellant's argument that the areaway designed along a portion of the Building's Military Road and courtyard perimeters causes the cellar space to become basement space and therefore countable toward building density, noting that the Appellant's position is without basis in either the Zoning Regulations, the past determinations of the Zoning Administrator or past decisions of the Board, and that the Zoning Administrator has never considered the bottom of a window well or areaway as "adjacent finished grade."

Further, in response to Appellant's claims that the adjacent finished grade along Military Road, particularly the berm, has been wrongly manipulated to create the cellar space in question, DCRA identified that the proposed top of berm height along Military Road is virtually the same as the existing grading of the Property and, in any event, the Zoning Regulations refer to "adjacent finished grade", which contemplates a necessary alteration to the natural grade.¹

Owner's Case

Through its prehearing statement and presentation at the public hearing, including testimony from Steven Sher, the Owner responded to the claims of error raised by the Appellant regarding zoning designation, density and height calculations, and roof structures. In addition to the arguments made by DCRA, with which the Owner concurred, the Owner further responded as follows:

- With regard to the zoning boundary claim, the Owner cited Zoning Commission Order 656-D (Case No. 89-15C) regarding the previously-approved PUD for the Property, and particularly

¹ DCRA noted that despite Appellant's reference, recent amendments to the Zoning Regulations effective June 14, 2013, are not applicable to the Building because they became effective after Permit B1208792 was issued. Further, while those amendments do not allow the use of a berm to be included in the measurement of building height, which is not in issue in the present case, the Zoning Commission did not exclude a berm from being considered as adjacent finished grade for purposes of determining if a building story is a cellar or basement.

the Commission's statement therein that "the site remains in the R-5-D (formerly known as R-5-C) zone district and in the high density residential land use category."

- With regard to building height measurement under the Height Act and also the Zoning Regulations, the Owner noted that the relevant provisions regarding properties with multiple street frontages has been consistently applied by DCRA, the Board, the Zoning Commission and the Zoning Administrator for decades, consistent with legal interpretation issued by the District's Office of Corporation Counsel. Further, the Owner identified several projects approved by the Board, Zoning Commission and Zoning Administrator that involve properties with multiple frontages and where the two-part test under the Height Act and Zoning Regulations has been applied (Exhibit 32, pgs 5-7).
 - With regard to location of measuring point along Kanawha Street, the Owner responded that the longstanding and consistent approach taken by the Zoning Administrator is to use the full length of a building on a lot in order to determine the middle of the building, drawing lines out perpendicular to the street on which the building fronts from both ends of the building but not beyond the end of the street on either end. The mid-point of those projected lines is then used to fix the location on the top of the curb to begin the vertical measurement. The Owner noted that this approach taken by DCRA provides a consistent point of measurement no matter the shape or configuration of a building, and prevents a developer from gerrymandering the design of its building so that only a portion of the building's façade is used determine the measuring point.² The Owner demonstrated that even utilizing two other points of measurement along Kanawha as suggested by the Appellant, the Building still remains compliant with respect to the 90-foot limit (Exhibit 47).
 - With regard to the vertical measurement from the Kanawha Street measuring point, the Owner clarified that, contrary to Appellant's assertions, the Building's height is 90 feet to the top of the protective guardrail, which is not the top measuring point required under either the Height Act or the Zoning Regulations, and that when measured pursuant to the "highest point of the roof or parapet," the Building measures 87.83 feet in height. The Owner also submitted a detailed section of the Building along Kanawha Street in support of its position that the top of the Building's roof and the top of the parapet are below the 90-foot limit permitted in the R-5-D zoning district, that the 90-foot vertical measurement reaches to the protective guardrail, and that the top of the pool deck structure is less than four feet above the parapet, as permitted by 11 DCMR §411.17 (Exhibit 40).
20. With regard to the pool deck, protective guardrail, accessory recreation and storage spaces on the roof, the Owner responded that, contrary to the Appellant's claims, these types of structures and uses have been approved for decades under long-standing applications of the Height Act and Zoning Regulations, as reflected in building construction throughout the District of Columbia (Exhibit 32, pgs 5-7). The Owner further stated that the Appellant has misinterpreted Section 5 of the Height Act, and that the Act is over a century old and obviously does not address low-impact uses required in the modern world. Therefore, as has been consistently administered by the Zoning Commission and DCRA, the Height Act does

² In June 2013, the Zoning Commission took certain rule-making action subsequent to the issuance of the Permits and therefore does not apply to the Building. Among the amendments to the Zoning Regulations made by the Commission is a change to the definition of "Building, Height of", to provide that in residential districts, the measuring point is to be assigned as the mid-point of the "building façade of the principal building that is closest to the street line." The Owner demonstrated that under either approach to measurement, the Building's height remains under 90 feet (Exhibit 39).

not preclude or regulate miscellaneous structures or uses above the roof such as guardrails, flagpoles, window washer davits, skylights, pools, and other reasonable structures than those specifically enumerated in the Act.(Exhibit 41). Owner noted that the Zoning Regulations permit many other structures as a matter of right above the roof or parapet, pursuant to 11 DCMR §§ 411.15, 411.16, and 411.17.

- With regard to the Appellant's claims regarding building density, the Building's cellar level and the employment of window wells and areaways to allow for additional light and air, the Owner responded that the narrow area in question of permitted areaway depth has consistently been interpreted to be in the range of five feet for hundreds of buildings approved in the District, and that in the case of the Building, the areaway along Military Road measures approximately four feet wide, with no access from the units, and the areaways within a portion of the courtyard measure five feet wide and are accessible only to each individual unit (Exhibit 48).
- With regard to all the various claims regarding height, density and rooftop uses made by Appellant challenging the long-standing interpretations of the Zoning Regulations and Height Act by the Zoning Administrator, DCRA, the Board and the Zoning Commission, the Owner noted that the Board must also consider these long-standing interpretations under principles of administrative *stare decisis*, pursuant to the District of Columbia Court of Appeals ruling in Smith v. District of Columbia Board of Zoning Adjustment, 342 A.2d 356, 359 and fn. 9 (1975), and therefore, even should the Board determine to interpret any of the building height or density issues contrary to the longstanding administrative interpretations referenced by DCRA and the Owner, the Board must do so only prospectively, and not including the instant controversy.

CONCLUSIONS OF LAW AND OPINION

The Board of Zoning Adjustment is authorized by § 8 of the Zoning Act of 1938 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 officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.)) (See also 11 DCMR § 3100.2.) The decision or determination in this case is DCRA's issuance of the Permits. The alleged zoning errors were the Zoning Administrator's determinations regarding building height and building density.³ This Order will refer to DCRA as the entity that issued the Permits and the Zoning Administrator as the person who made the decisions that are subject of the Appellant's complaint. As is explained below, the Board concludes that the Zoning Administrator did not err with respect to determinations made regarding building height or building density. Therefore, the Board concludes that DCRA did not err in issuing the Permits.

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, Appellant argues that the Permits were erroneously issued on the bases that the Building exceeds permit building density as established in the Zoning Regulations, exceeds permitted building height under both the Zoning Regulations and the Height Act, and allows construction that violates the applicable zoning designation for the Property. The Board addresses each of these issues in turn, based upon the record and testimony presented in this case.

³ Appellant further asserts that the approved construction involves illegal projections, in violation of the Construction Code (12 DCMR), which claim is not properly before the Board nor addressed herein.

Zoning Designation

As provided in 11 DCMR § 107.7, in cases of disagreement or uncertainty existing as to the exact location of a zone district boundary line, the Board, upon appeal, shall determine the exact location of the boundary. Thus, the question presented, whether or not the Property is zoned R-5-D in its entirety, or whether a portion of the Property is zoned R-1-B is properly before the Board. The Board is not persuaded by the arguments or testimony offered by the Appellant and determines that the Property is zoned R-5-D in its entirety.

The parties do not dispute that in 1965 the Zoning Commission extended the R-5-C zoning district to include Lots 44, 35, 37, 19, 20, and 21 in Square 1873 and that the official Zoning Map accurately reflected this rezoning action as early as 1966. At some point subsequent, the Board concludes that a typographical error occurred in the Zoning Maps and the dimension notation changed from 291 feet to 251 feet, which has been corrected by the Office of Zoning, the office charged with drawing and maintaining the official Zoning Map pursuant to 11 DCMR §106.1.

The Board is aware of the background regarding the dimensional reference on the various Zoning Maps, however, the Board notes the official zoning certification issued by the Office of the Zoning in January 2013 confirms that the Property is zoned R-5-D (Exhibit 38). Furthermore, the Board is persuaded by the observation made by Deputy Director Richard Nero of the Office of Zoning in his March 29, 2013, memorandum to Richard Graham on behalf of 5333 CNC, wherein Mr. Nero notes that the location of the Zoning Map boundary line is unchanged throughout the various maps (Exhibit 26). If the Zoning Commission had taken some intervening action to relocate the zoning boundary line, a conforming relocation of the boundary line would be reflected on the subsequent maps. That is not borne out by the evidence presented. The Board likewise notes that the Appellant has not argued that the Kanawha street boundary line is defective, which would necessarily have to be demonstrated in order to support Appellant's claim. There has been no evidence provided that the Zoning Commission took any such subsequent action with respect to the zoning boundary line in Square 1873. For all these reasons, the Board concludes that the Property is zoned R-5-D in its entirety.

Building Height

The primary law governing the height of buildings in the District of Columbia is the 1910 Height of Buildings Act codified in § 6-601 of the DC Official Code. The District of Columbia Zoning Regulations essentially follow these provisions. In applying the Height Act, DCRA must apply a two-step process: (1) determine the maximum permissible height allowed on a property; and (2) determine the point of measurement to establish the height. These processes are located in two separate sections of the Height Act.

With regard to the first step of this process, § 5 of the Height Act (DC Official Code § 6-601.05 (c)) provides that:

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

Given that the Property has frontage along Connecticut Avenue, which has a right of way dimension of 130 feet, the building height is limited to 90 feet, which is also consistent with the Property's R-5-D zoning classification.

With the maximum permissible height established pursuant to § 5 of the Act, a separate section of the Act, § 7 (codified as D.C. Official Code § 6-601.07) directs from what point of a property the building height measurement is to be taken, providing specific details for properties with multiple street frontages such as the Property. This section provides that:

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 highest point of the roof. If the building has more than one 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. No parapet walls shall extend above the limit of height .
... (Emphasis added)

The Property is a corner lot fronting on three streets. As the Board has found, of these streets, Connecticut Avenue provides the maximum permissible building height of 90 feet under § 5 of the Act. Separately, for properties with multiple frontages, Section 7 of the Height Act requires that the height "shall be measured ... from the middle of the front that will permit the greater height." In the present case, given the respective elevations of the three frontages of the Property, Kanawha Street clearly "permits of the greater height" and is the appropriate frontage for purposes of establishing the measuring point.

Appellant's claims of "mixing and matching" notwithstanding, the Zoning Administrator's determination to measure building height from Kanawha Street is consistent with longstanding applications of the Height Act in the District of Columbia, including approvals by the Zoning Commission, the Board, as well as DCRA (Exhibit 32, pgs 5-7). Further, these determinations follow direction provided by the District of Columbia Office of Corporation Counsel more than sixty years ago. The Board has reviewed the May 11, 1950, Opinion interpreting building height measurements under the Height Act for construction on a property with multiple frontages (the "1950 Opinion" (Exhibit 23). In that opinion, Corporation Counsel Vernon E. West notes,

the Act of 1899 [predecessor to the Height Act], both as originally enacted and as amended, clearly shows the intent of Congress that the measurement of the actual height of the building was to be made without regard to the street the width of which permitted the greater theoretical height, and there is nothing in the [Height Act] which indicates that Congress intended to change this principle.

For all these reasons, the Board concludes that DCRA's application of the Height Act to determine that a maximum building height of 90 feet is permissible as measured from Kanawha Street is consistent with the 1950 Opinion and the clear language of the Height Act.

Building Height Measuring Point

With Kanawha Street established as the appropriate location from which to measure building height, the Board next turns to Appellant's argument that the wrong location was chosen along the Kanawha Street to serve as the base measurement.

Section 7 of the Height Act provides in relevant part that "the height of buildings shall be measured from the level of the sidewalk opposite the middle of the front of the building to the highest point of the roof." In determining the exact point of measurement, DCRA confirms that the Zoning Administrator uses middle point of the full length of the exterior walls that run along a street - drawing lines out perpendicular to the street on which the building fronts from both ends but not beyond the end of the street on either end. The mid-point from those projected lines establishes the location on the top of the curb to begin the measurement vertically. Despite Appellant's objections, the Board is persuaded that through this longstanding administrative approach, a building, no matter the shape, (for example a building that squarely fronts on the street, or has a portion a few feet back or many feet back, or is designed with an angle back) would always have the same consistent point of measurement. This approach would seem to discourage a "gerrymandering" approach to development of a site where a developer might otherwise design a building so that only a small portion of that building's façade were on the front property line and thereby achieve a higher point of measurement without respect to the rest of the building. The Board concludes that DCRA's determination of the building height measurement at Elevation 316.83 along Kanawha Street, as shown at Exhibit 39, is an appropriate interpretation of the Height Act and the Zoning Regulations in effect at the time of the approval of the Permits.

The Board is aware that after the full building permit was issued on May 28, 2013, the Zoning Commission, effective June 14, 2013, in Order No. 12-11, made a change to the definition of "Building, Height of" to provide that in residential districts, the measuring point would be at the midpoint of the "building façade of the principal building that is closest to the street lot line." Under the revised definition, although not applicable to the Permits pursuant to 11 DCMR § 3202.4, the height of the building would be 89.07 feet -- still below 90 feet (Exhibit 39).

The Board further concludes that DCRA correctly determined that the Building's height did not exceed 90 feet from the designated Kanawha Street measuring point either under the Height Act or under the provisions of the Zoning Regulations applicable to R-5-D zoning districts. Under the Zoning Regulations, the height of a 90 foot building in the R-5-D zoning district is measured to the top of the roof from the point of measurement at street level. However, under § 5 of the Height Act, the height is measured to the top of the roof or parapet, which is normally slightly above the height of the roof. Roof structures, railings, guards, architectural embellishments, and certain other roof-top uses permitted by the Zoning Regulations, may extend above the maximum height of buildings. The Board acknowledges that many other structures are permitted as a matter of right above the roof or parapet, pursuant to 11 DCMR §§ 411.15, 411.16, and 411.17.

In the present case, the Owner has demonstrated that the Building has been designed to be lower than the permitted 90 feet, and that the Building actually measures 87.83 feet from the approved base measuring point along Kanawha to the top of the parapet (Exhibit 40). With regard to the swimming pool deck, which occupies only a small part of the roof footprint (only six percent and well below the four foot limitation) as demonstrated at Exhibit 39, that structure is exempted from the building height calculation as a structure that less than four feet in height above a roof or parapet, pursuant to 11 DCMR § 411.17.

With respect to the Appellant's claim that the Building's penthouse structure illegally includes recreational and storage space, the Board concludes that the proposed uses identified at Exhibit 44 are permitted under the Height Act and the Zoning Regulations. Section 411.1 of the Regulations provides that "penthouses for storage, showers and lavatories incidental and accessory to roof swimming pools or communal recreation space located on that roof; and (b) other enclosed areas, within the area permitted as roof structure used for recreational uses accessory to communal rooftop recreational space, shall be subject to conditions in variable floor area ratio credit specified in this section." The challenged uses fall within this section. With regard to the Height Act, DCRA confirms that the Zoning Administrator relied in his determination upon a 1953 opinion of the Office of Corporation Counsel (the "1953 Opinion") which notes that the Height Act "was intended by Congress to prevent the use of enclosed space above the height limit for residential, office or business purposes ... and was not intended to preclude the use of space in connection with the maintenance of such building and operation of its utilities." (Exhibit 42). The Board concurs with DCRA's interpretation of "human occupancy" and notes that this has been the consistent and reasonable interpretation of DCRA, the Zoning Commission and the Board of several decades, and the Board will not reverse this longstanding determination in the present case. Further, the Board is fully aware of the principle of administrative *stare decisis* as discussed in the Smith case and that even were the Board inclined to reverse decades of consistent interpretation, it could do so only proactively, without impact upon the District's determinations underlying the instant appeal.

Building Density

The Appellant's final claim of zoning error regards DCRA's determination to exclude certain portions of the lowest habitable level of the Building from the calculation of building density. The parties agree that the applicable building density maximum for the site is 4.2 FAR, however, the Appellant claims that DCRA erroneously excluded the majority of the lowest habitable level even though certain units fronting Military Road sit above the sidewalk and street level. Essentially, the Appellant claims that DCRA wrongly determined that the majority of this lowest habitable level was classified as "cellar" under the Zoning Regulations and therefore not chargeable toward building density, especially when the Building design employs window wells and areaways around significant portions of this level.

Given that this lowest habitable level of the Building is located partly above-grade, the Board concludes that the Zoning Administrator appropriately utilized the long-accepted "perimeter wall method" to determine the amount of floor area on this level that was appropriately charged to gross floor area. The perimeter wall method has been utilized to differentiate cellar space from basement space in buildings throughout the District for decades.

The Appellant seeks to differentiate the present case from past approvals on the basis that, in the present case, a significant portion of the units deemed to be cellar-level units by the Zoning Administrator have window wells and areaways immediately adjacent to the units. The Appellant further accuses the Owner of illegally changing the adjacent grade along Military Road to create an artificial condition in violation of the Zoning Regulations. The Board is not persuaded by the Appellant's argument to differentiate this case from numerous other projects approved by DCRA. Nor does the Board find that the grade is being significantly changed along the areas in question. In fact, the Board notes that it is even being lowered in certain areas according to the final building permit plans (Exhibits 49 and 50). DCRA also has confirmed that the Zoning Administrator has never considered the bottom of a window well or areaway to be the "adjacent finished grade" for

purposes of the perimeter wall method calculation. The Board agrees with this position as a reasonable and consistent interpretation of the Zoning Regulations. Window wells and areaways are a common and efficient method of maximizing light and ventilation to dwelling units in an urban environment. The Board takes notice that there is extensive precedent for the use of areaways and window wells throughout the District. In the present case, the Board understands that the proposed areaways measure within the generally-accepted five-foot standard for window wells and areaways, measuring four feet along Military Road and five feet adjacent to the courtyard. In addition, the areaway along Military Road is not accessible from the dwelling units, and the areaways adjacent to the courtyards are only accessible from the adjacent dwelling units (Exhibit 48).

As to the issue of "adjacent finished grade," the Board declines to follow the Appellant's argument regarding illegal site alteration by the Owner. The Owner has demonstrated that the proposed finished grade following construction will very closely follow the contours of the existing grade of the Property (Exhibit 49). Further, the Board notes that the very term "adjacent finished grade" connotes the ability to adjust the grade as compared to keeping "natural" or "previously existing grade." Following testimony of the Appellant and cross-examination by the Owner, the Board is persuaded that at least a part of Appellant's concern and confusion on this issue may relate to Appellant's reliance upon buildings plans that were filed as part of the earlier site work approvals rather than the full building permit application drawings set. Further, the Board is persuaded by certain testimony from Mr. Hawkins on behalf of the Appellant in response to cross-examination by DCRA regarding adjacent finished grade and application of the perimeter wall method of determining density for new construction involving courtyard construction above a garage. Mr. Hawkins acknowledged his opinion that in such circumstance there is no such concept as "adjacent finished grade" to apply, thereby frustrating any effort by DCRA to make a determination as to what portion of a level is countable toward building density under the perimeter wall method. Regardless of material that forms the adjacent finished grade, be it dirt or other landscaping, or paving or hardscaping, the Board is persuaded that DCRA must be able to utilize said "adjacent finished grade" in order to calculate permissible building density. DCRA's long-standing approach is a reasonable one that the Board will not overturn.

For all these reasons, the Board concludes that the Zoning Administrator did not err in its calculation of the Building's density to exclude certain portions of the Building's lowest level pursuant to the perimeter wall method. The Board further concludes that DCRA did not err in issuing the Permits.

Based on the foregoing, the Board finds the appeal without merit. It is therefore **ORDERED** that the appeal is **DENIED**.

Vote taken on October 29, 2013.

VOTE: _____ ([Lloyd J. Jordan, Marcie I. Cohen and Jeffrey L. Hinkle] to deny the appeal; S. Kathryn Allen, not present, not voting; third mayoral appointment vacant).

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: _____

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.