

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18615 of 5333 Connecticut Neighborhood Coalition, et al., under 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, N.W. (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 with 32 individuals who are members of that 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. The 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, N.W.

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. The Appellant claimed that the DCRA approvals involved the following errors: (i) misidentification of the applicable zone district; (ii) failure to measure building height at the correct street and street location; (iii) allowing non-permitted roof structures above the maximum height allowed by the Height Act;¹ and (iv) the exclusion of lower portions of the building from the calculation of FAR.

Based on the evidence of record, including extensive prehearing submissions and testimony received at the public hearing, the Board affirms the DCRA decisions and denies the appeal.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on September 24, 2013. Under 11 DCMR §§ 3112.13

¹ Formally entitled An Act to Regulate the Height of Buildings in the District of Columbia.

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and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 3/4G (the ANC in which the property is located), the property owner, and to DCRA.

Parties

The Appellant is 5333 CNC, an unincorporated association of individuals and households 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, under 11 DCMR § 3199.1(a)(2). 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, originally filed as a party to the Appeal and withdrew its appeal by letter to the Board dated September 13, 2013, under a Memorandum of Understanding entered into with the Property Owner. (Exhibit 31.)

The Board received prehearing materials from the Appellant on September 13, 2013, under 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 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 Appellant, Elizabeth Lenyk and Richard Graham, and from Don Hawkins, whom 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 qualified and recognized as an expert in zoning and planning issues.

The Board deferred its decision on the merits 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 and voted to affirm DCRA.

FINDINGS OF FACT

The Property

1. The subject property is at Square 1873, Lot 128, premises address 5333 Connecticut Avenue, N.W. ("Property"). Square 1873 is bounded to the west by Connecticut Avenue, N.W., to the north by Military Road, N.W., to the east by Chevy Chase Parkway, N.W., and to the south by Kanawha Street, N.W.

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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 an elevation measuring along Kanawha Street approximately 18 feet higher than along Military Road. (Exhibit 49.)
4. The Property is unimproved.

Zoning of the Property

5. 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.)
6. 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.
7. These dimensions are reflected on the Zoning Map issued in 1966. 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 1973 Zoning Map continued to show the 290-foot dimension along Military Road.
9. The 1975 Zoning Map shows the location of the zoning boundary line identical to the 1973 Zoning Map although the 291 foot dimension for the R-5-C zone on Military Road is partly obscured by a dashed line indicating the building restriction line such that the "9" could be read as a "5".
10. The top of the number "9" is similarly obscured in subsequent maps (1983, 1984, 1987, and 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.
11. The R-5-C zoning category was reclassified to R-5-D by action of the Zoning Commission through its adoption of Zoning Commission Order No. 721, effective November 13, 1992.
12. 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.

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13. The Office of Zoning has concluded, and the Board finds, that the 251 foot dimension on this map was in error and resulted from reading the “291” figure in prior maps as “251”. (Exhibit 26.)
14. Effective April 13, 2012, the paper official zoning map was replaced with an electronic zoning map drawn and maintained on the Geographic Information System in the Office of Zoning. (11 DCMR § 106.1.)
15. Since April 13, 2012, the electronic zoning map has shown the entire Property zoned R-5-D. (Exhibit 37.)
16. The 2013 summary Zoning Map shows the entire Property zoned R-5-D. (Exhibit 36.)
17. The Office of Zoning may provide zoning certifications under 11 DCMR § 3045.1(a).
18. According to the certification of the Office of Zoning 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 entire Military Road frontage; and 10 feet along the Kanawha Street frontage.

Building Height

Measurement

19. The Height Act and the Zoning Regulations each establish maximum height limits for property. If there is a conflict between the two, the more stringent height limitation applies. (D.C. Official Code § 6-641.11 (2012 Repl.).)
20. The Zoning Regulations establish maximum height by zone district. Subsection 400.1 provides that the maximum height for a building in the R-5-D zone is 90 feet.
21. The Height Act establishes maximum building height based upon the width of the street abutting the property. Subject to certain exceptions not applicable here, the Height Act provides that:

On a residence street ... 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.C. Official Code § 6-601.05 (c).)

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22. The Property Owner had the building's maximum height determined from Connecticut Avenue, which has a width of 130 feet. Since deducting 10 feet would still result in a height greater than the 90 foot maximum permitted, the maximum height of the Building for Height Act purposes was 90 feet.
23. As of the date upon which the building permits were issued, the Zoning Regulations provide that for all zone districts height was to be "measured from the level of the curb, opposite the middle of the front of the building."
24. Section 7 of the Height Act provides that 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" (D.C. Official Code § 6-601.07.)
25. The Zoning Administrator determined that the elevation of Kanawha Street permitted the greatest height and therefore used that street frontage to measure height
26. In determining the exact point of measurement along Kanawha Street, the Zoning Administrator followed the long-standing interpretation of the term "the middle of the front of the building" to mean the middle point of the full length of the exterior walls of a building. This location was determined by drawing lines out perpendicular to Kanawha from both ends of the building.
27. Based upon this calculation, the middle of the front of the building on Kanawha Street was determined to be at elevation 316.83.
28. Under the Zoning Regulations, the height of a 90 foot building in the R-5-D zone district is measured to the top of the roof from the point of measurement at street level. However, under §§ 5 and 7 of the Height Act, the height is measured to the top of the roof or parapet, the latter of which is normally slightly above the height of the roof.
29. From the measuring point selected, the Zoning Administrator determined that building's height to the top of the parapet measured 87.83 feet.

Roof Structures

30. The roof of the building will have a roof deck, a pool, protective guard rail, and a penthouse.
31. The roof deck measures 86.5 feet above the measuring point and less than four feet above the parapet wall.
32. The upper most portion guardrail is 90 feet above the height measurement point.
33. The penthouse of the Building contains elevators, mechanical equipment, stairs, and accessory storage space to the rooftop pool and recreation space.

Building Density

34. The R-5-D zone district allows a maximum building density of 3.5 floor area ratio ("FAR"), under (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% additional gross floor area as a matter of right. In the R-5-D zone district, the resulting maximum density is 4.2 FAR.
35. 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").)
36. The difference between the two is that cellars are less than four feet above the adjacent finished grade, while basements are four feet or more above the adjacent finished grade.
37. 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.
38. The lowest habitable level of the Building is located partly above-grade.
39. The Zoning Administrator utilized the long-accepted "perimeter wall method" to determine the floor area on this level appropriately charged to gross floor area ("GFA").
40. The perimeter wall method has been utilized to differentiate cellar space from basement space in buildings throughout the District for decades.
41. As stated in the Memorandum of James J. Fahey dated September 11, 1990 (included within Exhibit 20 as "Exhibit R"), the perimeter wall method involves the following steps:
 - A. First measure the total perimeter of the floor,
 - B. Then measure that portion of the perimeter of the floor, the ceiling of which is four feet or more above the adjacent finished grade, and what percentage this is of the total perimeter of that floor.
 - C. The answer to the above will be the percentage of the floor area chargeable to gross floor area.
42. Applying this methodology to the proposed building, the Zoning Administrator determined that the perimeter of the lowest habitable floor was 982 linear feet with 121.6 feet being above four feet or more above the adjacent finished grade, or 12.38% of the perimeter. This calculates to 2,689 square feet to be counted in gross floor area at this level (12.38% times 21,718 square feet). (Exhibit 48.)

43. Because of this calculation, portions of 17 apartment units were included in the cellar level of the proposed building and not counted towards FAR.
44. A portion of the finished grade on the Military Road side is approximately two feet higher than the existing condition over a distance of approximately 30 feet. Measurements along that point reflected that the ceiling of the lowest floor to be less than four feet above this adjacent finished grade and therefore a cellar not countable against GFA.
45. Along Military Road and in the interior courtyard of the proposed building, plans show an areaway. Similar to a window well, this areaway is a narrow space between the grade and the building to provide additional light to the lowest units.
46. 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.)
47. Based upon prior administrative practice, the Zoning Administrator identified the top of the grade behind the areaways as being the adjacent finished grade. Measurements reflected that the ceiling of the lowest floor adjacent to this finished grade was less than four feet, and therefore a cellar not countable against GFA.
48. The Zoning Administrator has never considered the bottom of an areaway as the adjacent finished grade.

Events leading to the filing of this Appeal

49. On May 28, 2013, DCRA issued Permit No. B1208792 that authorized the construction of a 263-unit, nine-story apartment building with cellar and below-grade parking on the Property.
50. This appeal was filed three days later.

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) (2012 Repl.)) (See also 11 DCMR § 3100.2.) The decision or determination is DCRA's issuance of the Permits. The Board also has the authority to hear appeals alleging errors in interpreting the Height Act. *See Appeal No. 17109 of Kalorama Citizens Association* (2005).

Under 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 argues that the Zoning Administrator

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erred by: (1) calculating zoning compliance based entirely upon the requirements of the R-5-D zone, rather than recognizing that a portion of the building was zoned R-1-B, (2) using the wrong street and street measurement point for determining the building height, (3) allowing non-permitted roof structures, and (4) erroneously excluding portions of the building from being counted as gross floor area.² This Order will refer to DCRA as the entity that issued the Permits and the Zoning Administrator as the person whose decision is the subject of the Appellant's complaint.

The Board addresses each of these issues in turn, based upon the record and testimony in this case.

1. The Entire Property is Zoned R-5-D.

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 does not comply with the zoning regulations.

The Board disagrees and concludes that on the dates Permits were issued the entire Property was zoned R-5-D.

The Zoning Commission extended the R-5-C zone district in 1965 to include Lots 44, 35, 37, 19, 20, and 21 in Square 1873 and that effective November 13, 1992, all R-5-C properties were rezoned to R-5-D. 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 proffered no evidence that the Zoning Commission issued any notice of public hearing or any order adopting such a change, which would be a necessary legal prerequisite for such an action. The Zoning Act of 1938, as amended by § 492 of the District's Home Rule Act, required notice of a public hearing before the Zoning Commission could adopt a map amendment. (D.C. Official Code § 6-641.05.) Further, the Zoning Commission was also required to publish a notice of proposed rulemaking for any map amendment under § 6(a) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206) codified at D.C. Code Official § 2-505(a). The Board credits the statement made by Office of Zoning Deputy Director Richard Nero in his March 29, 2013 memorandum to Richard Graham on behalf of 5333 CNC that there have been no actions since 1965 by the Zoning Commission to change the location of the zone boundary line in Square 1873. (Exhibit 26.)

Although irrelevant absent a zoning order, the Appellant incorrectly states that the 1975 Zoning Map showed a change in the R-5-C zone's length on Military Road from 291 to 251 feet. The

² 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 because those provisions are not contained within the Zoning Regulations.

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number shown is 291, but the top of the “9” is partly obscured by a dashed line indicating the building restriction line, such that the “9” could be read as a “5”. The top of the number “9” is similarly obscured in the zoning maps published in 1983, 1984, 1987, and 1996.

The 2003 zoning map was produced in a different format than the prior maps. Unfortunately, the mappers made the same error as the Appellant by reading the figure “291” as “251.” This error was corrected when the Zoning Map was transitioned from an analog to a digital format. The 2013 summary Zoning Map shows the entire Property zoned R-5-D. (Exhibit 36.) The Office of Zoning confirmed the accuracy of the electronic zoning map through a certificate made on January 15, 2013. (Exhibit 38).

Therefore, the Zoning Administrator did not err in ascertaining the zoning compliance of the project based on the provisions of the Zoning Regulations that pertained to the R-5-D District.

2. Building Height.

A. The measurement of the building’s height was correctly taken from Kanawha Street.

The Appellant claims 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 argues that to determine the maximum height on one street and determine actual height from another is a form of “mixing and matching” not permitted by the Height Act. Both the Zoning Regulations and the Height Act establish maximum height limits for building and structures in the District. The Zoning Regulations establish maximum height by zone district whereas the Height Act limits are based upon the width of a street upon which the building fronts. In this instance, the building fronted three streets and as authorized by the Zoning Regulations, the height of the building was determined by the Connecticut Avenue frontage giving a maximum height of 90 feet.

The Zoning Administrator then had to determine whether the building’s height fell within the 90-foot limit. . However, because the Property fronts three streets, Section 7 of the Height Act provides that “height *shall* be measured from the elevation of the sidewalk opposite the middle of the front that will permit of the greater height.” (D.C. Official Code § 6-601.07 (emphasis added).) In the present case, given the respective elevations of the three frontages of the Property, Kanawha Street "provides the greater height.

The Appellant's claim that the Zoning Administrator improperly determined the height by "mixing and matching" has no merit. 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 the Corporation Counsel (now the Office of the Attorney General) over 60 years ago.

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For all these reasons, the Board concludes that DCRA's use of Kanawha Street to determine whether the Building's height would be within the 90 foot limit follows both the clear language of the Height Act and its subsequent interpretation.

B. The Zoning Administrator correctly identified the middle of the front of the building when measuring its height.

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

Section 7 of the Height Act (D.C. Official Code § 6-601.07) provides that "the height of buildings shall be measured from the level of the sidewalk opposite the middle of the front of the building." As of the date upon which the building permits were issued, the Zoning Regulations provided that for all zone districts height was to be "measured from the level of the curb, opposite the middle of the front of the building." The Appellant claims that the location chosen by the Zoning Administrator to measure height was not opposite the middle of the front of the building on Kanawha Street.

In locating the middle of the front of the building the Zoning Administrator followed the longstanding approach of using 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 the Appellant's objections, the Board is persuaded that this longstanding practice "is neither clearly erroneous [n]or inconsistent with the zoning regulations as a whole." *Wallick v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 1183, 1184 (D.C. 1985)." *Kalorama Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 934 A.2d 393, 402 (D.C. 2007). The interpretation ensures that every 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 height measurement.

The Board concludes 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. From this measuring point, the building height to the top of the parapet has been determined by DCRA to measure 87.83 feet and therefore was within the 90 foot maximum allowed by the Height Act and the Zoning Regulations.

C. The Roof Structures are Lawful.

i. The Swimming Pool Deck and Guard Rail.

The Appellant claims that the swimming pool deck and the guard rails exceed the maximum

height limits established by the Zoning Regulations and the Height Act. First, neither element exceeds matter of right height. The dimension from the measuring point to the top of the guard rail, which is greater than the top measuring point under either the Zoning Regulations or Height Act, is 90 feet. Second, the deck is less than four feet above the parapet and is therefore permitted by 11 DCMR § 411.17 and guardrails, such as the one involved here (Exhibit 40), were recognized as an allowed structure by this Board in *Appeal No. 17335 of Kalorama Citizen's Association* (2005).

ii. The Penthouse

The penthouse of the Building contains elevators, mechanical equipment, stairs, and accessory storage space to the rooftop pool and recreation space, all of which are permitted by the Zoning Regulations to exceed the maximum building height. (11 DCMR § 411.1.) At the time the building permits were issued, § 5 of the Height Act, D.C. Official Code § 6-601.05 (2012 Repl.) provided that ... penthouses over elevator shafts ... may be erected to a greater height than permitted” if approved by the Mayor. The Section also prohibited “human occupancy above the top story of the building upon which such structures are placed.”³

The Appellant argues that the space accessory to the rooftop pool and recreation space is not among the penthouse types eligible to exceed the limitations of the Height Act, either in the express language of the Act or as interpreted by the Corporation Counsel. The Appellant's arguments are based upon two erroneous premises: (1) that the Corporation Counsel Opinion contained the exclusive list of permitted penthouses and (2) that the penthouse space was intended for human occupancy.

Contrary to the 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

³ As of May 16, 2014, the Height Act was amended to make any type of penthouse eligible for a Height waiver and to permit human occupancy within “a penthouse which is erected to a height of one story of 20 feet or less above the level of the roof. *See* Public Law 113-103, An Act To amend the Act entitled “An Act to regulate the height of buildings in the District of Columbia” to clarify the rules of the District of Columbia regarding human occupancy of penthouses above the top story of the building upon which the penthouse is placed.

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[.]

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.

3. 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 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.

Cellars are excluded from gross floor area, but basements are included. (See 11 DCMR § 199.1 (Definition of "Gross floor area").) The Zoning Regulations define the term "cellar" as that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade and "basement" as "that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade." (11 DCMR 199.1.) When, as here, a portion of the building is partly below grade, the Zoning Administrator uses the perimeter wall method to determine which area are located four or more feet above the finished grade and therefore included within the computation of gross floor area.

The Appellant argues that the Zoning Administrator considered areas of the building's lowest floor to be less than four feet by counting as finished grade: (1) an area along Military Road approximately two feet higher than the existing condition over a distance of approximately 30 feet; and (2) the top of the grade adjacent to areaways along Military Road and in the interior courtyard. On the latter, the Appellant claims that the Zoning Administrator should have measured from the bottom most portion of the areaways.

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The Board concludes that the Zoning Administrator properly identified the finished grade at both locations.

In neither location was the grade substantially raised from the natural grade. The Board notes that it is even being lowered in certain areas according to the final building permit plans. (Exhibits 49 and 50.) The Appellant's assertion to the contrary likely results from its failure to use the final building plans showing the building walls adjacent to the finished grade on the Military Road side or at the center court level of the building. (Compare Appellant's Exhibit 4, which is part of record Exhibit No. 17 with Exhibit 49.)

Further, the Board agrees with DCRA that the term "adjacent finished grade" connotes the ability to adjust the grade as compared to keeping "natural" or "previously existing grade." And contrary to the position of the Appellant, the determination of density for new construction involving courtyard construction above a garage requires the use of finished grade irrespective of the material that forms the adjacent finished grade, be it dirt or other landscaping, or paving or hardscaping.

The slightly elevated grade along the 30-foot portion of Military Road and adjacent to the areaways is no greater than has been allowed in countless number of projects approved by DCRA. It was in reaction to the potential abuse of this practice that the Zoning Commission, subsequent to the issuance of these permits, adopted a rule providing that in residence zones "berms or other forms of artificial landscaping shall not be included in measuring building height." Although the Board doubts that the minor increase in grade involved here would run afoul of this rule, the Appellant's construction rights were vested against any change to the Zoning Regulations as of the date the building permit was issued. (11 DCMR § 3202.4.)

Areaways, are a common and efficient method of maximizing light and ventilation to dwelling units located partially below grade in an urban environment routinely approved by DCRA. The proposed areaways measure within the generally accepted five-foot width standard. The Zoning Administrator properly determined that the finished grade adjacent to the areaways was the top of the grade behind each areaway. The Appellant erroneously contends that the finished grade should be considered to be the bottom of each areaway. This has never been the method followed by the Zoning Administrator.

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 as determined by the perimeter wall method.

DECISION

The Board finds the appeal without merit. The entire property is zoned R-5-D and the interpretations used by the Zoning Administrator to measure height and density and approve the roof structures were based upon long standing administrative practices and precedent. While the Board is not required to honor past administrative precedent clearly erroneous or inconsistent

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with the zoning regulations, *Kalorama Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment supra*, the Zoning Administrator's actions were both reasonable and consistent with the letter and spirit of the regulations.

It is therefore **ORDERED** that the DCRA administrative decisions are **AFFIRMED**.

Vote taken on October 29, 2013.

VOTE: **4-0-1** (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle (by absentee vote), and Marcie I. Cohen to Affirm; one Board seat vacant)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

The majority of the Board members approved the issuance of this order.

ATTESTED BY:  _____ *for*
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: June 18, 2014

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