BZA APPEAL NO. 19374

TESTIMONY OF

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1. Good day, Mr. Chairman and members of the Board, my testimony today will focus on demonstrating that the Appellant's position that the lower-level of the project at 1514 Q Street, NW is actually a basement rather than a cellar is based upon an incorrect reading of the plain language of the Zoning Regulations, and is inconsistent with longstanding interpretations and applications of the Zoning Regulations that have been employed not only by the ZA, but also the Board and the Zoning Commission; and therefore the appeal should be denied.

I. Lower Level is a Cellar Based Upon Clear Language of the Zoning Regulations

2. On Page 4 of its February 8, 2017, revised prehearing statement, the Appellant alleges that "the ZA erred in not following the full two-part definition of a "cellar"; [and] moreover, the ZA's application of the definition of a cellar is imprecise, selective, and inconsistent with related regulations."

3. To support its argument, the Appellant incorrectly takes the position that in order to derive the true definition of the term "cellar," you actually have to conflate the definitions of "cellar" and "habitable room."

4. Based on this logic, the Appellant draws its own conclusion that the full definition of a cellar is "a non-habitable room where the ceiling of the space is less than four feet above adjacent grade." The Appellant further concludes that any space with a ceiling less than four feet above adjacent grade that is habitable *cannot be* a cellar, *must be* classified as a basement, and therefore *must be* counted in gross floor area and FAR.

5. Despite the Appellant's statement on Page 7 of its revised prehearing statement that the term "cellar" is defined twice in the Zoning Regulations, one as a rule of measurement and the other as a rule of use, and its statement that "a 'cellar' is specifically and explicitly defined in the zoning regulations, on the basis of its habitability," a simple reading of the Zoning Regulations clearly shows that "cellar" is defined only once in the Regulations, and that definition is unambiguous as to when a space is considered a cellar, and is in no way conditioned upon that space not being able to contain habitable rooms.

6. As is clearly established in the definitions contained in Section 199 of the 1958 Zoning Regulations, the sole determining factor of whether the lower level of a building, or a portion of a lower level, is considered a cellar versus a basement, is whether the ceiling of the lower level is greater than or less than four feet above the adjacent finished grade. Specifically…as shown on the slide…

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

- Cellar – that portion of story, the ceiling of which is less than four feet above the adjacent finished grade.

7. As can be seen, neither of these very clear definitions include anything relating to how a basement and cellar must function, what they can and cannot be used for, or whether they can or cannot contain living rooms, bedrooms, and/or kitchens.

8. On page four of its revised prehearing statement, the Appellant states "[t]here are clearly two different definitions in DCMR 11-199.1 for partially below grade space – one being a basement and the other being a cellar." That we can agree on. However, we cannot agree with the Appellant's statement that "[b]y excluding an entire floor of habitable space from GFA and FAR by simply relabeling the space 'cellar,' the ZA has rendered meaningless the definitional difference between a basement and a cellar in DCMR 11-199.1" because the definitional difference between a cellar and a basement is solely based upon the four foot ceiling height threshold compared to adjacent finished grade.

9. Thus, as testified by Mr. Casey, based upon the clear results of the recent measurements taken by DCRA that show the finished ceiling of the lower-level of the project being less than four feet above the adjacent finished grade, it is clear that the ZA correctly classified the lower level of this project as a cellar, and thus correctly excluded this space from FAR.

II. The Definition of Habitable Room Does Not Modify the Definition of Cellar

10. The Appellant argues that the reference to cellars within the definition of "habitable room" somehow modifies the actual stated definition of the term "cellar," and somehow transforms what is clearly a cellar by definition into a basement that must be counted in gross floor area and FAR.

11. This is not an accurate reading of this definition, nor how it is intended to be applied.

12. As shown on the slide...a "habitable room" is defined as "an undivided enclosed space used for living, sleeping, or kitchen facilities. The term habitable room shall not include attics, cellars, corridors, hallways, laundries, serving or storage pantries, bathrooms, or similar space; neither shall it include mechanically ventilated interior kitchens less than one hundred square feet (100 sf) in area, nor kitchens in commercial establishments".

13. So...what is the purpose of the reference to cellars in this definition, and how is it intended to be applied?

14. As Mr. Collins stated at the onset of our presentation, there are only two places within the Zoning Regulations where the term "habitable room" is used, which are found within the criteria for special exception rear yard relief, in the SP and C-3 zones.

15. Specifically, as shown on the slide...Sections 534.9 and 774.4 require consideration of "the distance of penetration of sight lines into *habitable rooms*" as a criterion that

must be considered for rear yard relief. Thus, as it relates to these two sections of the Regulations the term "habitable rooms" does not include cellars, regardless of how a cellar is used, and even if it contains undivided enclosed space that is used for living, sleeping, or kitchen facilities.

16. Stated another way, in order to determine the meaning of "habitable rooms" in these particular special exception criteria, one would look to the definition of "habitable room" and find that a cellar, defined specifically and solely as that portion of a story, the ceiling of which is less than four feet above adjacent finished grade, is not included in the term habitable room; and therefore, need not be included in the evaluation of sight lines for requests for rear yard relief in SP and C-3 zones.

17. That is the sole purpose of the reference to cellar in the definition of habitable room. The reference does not mean a cellar is prohibited from containing habitable rooms, nor does it mean that if a cellar contains habitable rooms it must be fully or partially classified as a basement even if it meets the express definition of a cellar.

18. So...contrary to the Appellant's arguments that the term cellar is defined twice, and that the term "habitable room" modifies the clear and express definition of "cellar," I believe these two terms must be read independently in order to maintain their intended meaning.

19. While completely separate definitions, this does not mean that they are unrelated. In fact, as I have just described, the term "cellar" actually informs how the term

"habitable room" shall be interpreted and applied throughout the regulations, not the other way around.

20. As can be seen on the slide...this is similar to how the term cellar informs how the term "stories" shall be interpreted in those zones that have a limitation on number of stories. While by definition a cellar is considered to be part of a story, the definition of "story" makes clear that "[f]or purposes of determining maximum number of permitted stories, the term 'story' shall not include cellars or penthouses."

21. This is also consistent with how the term cellar informs how "gross floor area" is calculated where as a general rule cellars are specifically not counted in gross floor area.

22. It is important to note, the way in which I have described how a cellar relates to the term habitable room when that term is used in the Regulations is exactly the way in which the DC Court of Appeals addressed an issue related to attics, which are also specifically excluded from the definition of habitable room, in Kalorama Citizens Association vs. BZA, the case referenced in the Appellant's filing found at Exhibit 41.

23. In that case, the Court sided with the property owner stating..."We also agree with Montrose that the fact that attics are explicitly excluded from the definition of "habitable room"...does not mean that a so-called "attic" that is habitable is not actually an attic with[in] the meaning of the zoning regulations. As Montrose aptly explains, 'Simply put, [the effect of this regulation is that] when the term 'habitable

room' is used in the [zoning] regulations, those regulations do not apply to an attic, for whatever reason deemed appropriate.'"

24. It is also noteworthy that in that case, the Court also acknowledges that "the regulations define a "cellar" as "the portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade." They make no reference to a two part definition for the term cellar that involves the term habitable room.

25. So...to frame this case in similar terms as the DC Court used in the Kalorama case...the fact that cellars are explicitly excluded from the definition of "habitable room" does not mean that a so-called "cellar" that is habitable is not actually a cellar within the meaning of the zoning regulations. Simply put, when the term "habitable room" is used in the [zoning] regulations, those regulations do not apply to a cellar, for whatever reason deemed appropriate.

III. Numerous Approvals of Dwelling Units in Cellars by ZA, BZA, and ZC

26. The fact that there hundreds, if not thousands, of existing dwelling units located in spaces that would be defined as cellars is evidence that the Zoning Administrator has approved countless projects over the years that include habitable rooms in cellars.

27. The Zoning Commission, the body responsible for creating the Zoning Regulations, has also approved numerous projects that include dwelling units in cellars, some of which we included as examples in our prehearing statement.

28. In addition, as shown on the slide...the Commission's recent amendments to the Inclusionary Zoning regulations specifically acknowledge dwelling units in cellars by providing a new provision at Subtitle C § 1003.9 that in relevant part states, "[a]n inclusionary development's entire residential floor area *including dwelling units located in cellar space*..., shall be included for purposes of calculating the minimum set-aside requirements."

29. This provision was created in order to square up how the ZA had been interpreting the IZ regulations through its Certificate of Inclusionary Zoning Compliance ("CIZC") process.

30. In its response to our prehearing statement, the Appellant states that "references to Zoning Commission IZ and PUD language in fact reveal imprecision in use of the word "cellar," which this case seeks to clarify...and that Subtitle C § 1003.9 reflects that cellar space is being counted in density calculations".

31. This is simply incorrect. The examples of PUDs and the recent IZ amendments show consistency in the use of the term "cellar," and Subtitle C § 1003.9 further clarifies that dwelling units in cellars do not count towards FAR by specifically referring to a development's residential "floor area" rather than "gross floor area," which is a separate term used in the Zoning Regulations that does not have the same meaning as gross floor area.

32. Similar to the Zoning Commission, the Board has also approved numerous projects involving dwelling units and habitable rooms in the cellar level, examples of which are included in our prehearing statement.

33. The Board has also had occasion to rule upon the same exact questions being discussed today in BZA Appeal No. 18615...those questions being: (i) what is the definition of cellar and, (ii) does the presence of habitable rooms in a cellar require that space to be fully or partially classified as a basement, and included in gross floor area and FAR.

34. The Board denied that appeal and upheld the ZA's method for measuring gross floor area which resulted in the approval of portions of 17 dwelling units in the cellar level that were excluded from FAR.

35. In its response to our prehearing statement, the Appellant states that "[n]one of the prior BZA cases cited dealt with the question that the BZA is considering in this case; the relevance of habitability to FAR calculations." The Appellant reasserts this position in Exhibit 41, stating that "[w]hile the BZA has dealt with basement/cellar determinations in multiple prior cases, the BZA has never reviewed a basement/cellar determination on the basis of the cellar definition and the related habitable room definition." The Appellant makes a similar statement in its most recent filing stating "there has never been a case or ruling on proper definition of 'cellar' in terms of the above two-part definition."

36. I disagree with these assertions. The issue before the Board in Appeal No. 18615 is directly applicable to the question that is currently before the Board today.

37. Specifically, at Finding of Fact 35 and 36, the Board states that cellars are excluded from gross floor area, basements are included, and also specifically states what the definitional difference is between a cellar and basement, that being only whether a space is greater than or less than four feet above adjacent finished grade.

38. Further, at Finding of Fact 43, the Board acknowledged that "portions of 17 apartment units were included in the cellar level of the proposed building and not counted towards FAR." Despite the presence of habitable rooms in the cellar level, the Board did not conclude that these cellar areas must be included in FAR.

39. After acknowledging that portions of 17 dwelling units were located in the cellar level, the Board had every opportunity to conclude that the portion of the cellar containing habitable rooms must be counted in FAR. The Board did not come to that conclusion, but instead found that the "[ZA] did not err in its calculation of the Building's density to exclude certain portions of the Building's lowest level..."

Impacts of Upholding Appellant's Appeal

40. As Mr. Collins mentioned, and as stated in several letters and articles that have been submitted to the record, a decision to grant the appeal would have significant impacts on existing and future development in the District, including the availability of lower-priced market rate housing, and the supply of affordable housing.

41. It would immediately render all existing buildings that contain cellar-level habitable rooms non-conforming structures not only as to FAR, but under the Appellant's argument that any space partially below grade and habitable *must* be classified as a basement, structures would also become non-conforming as to number of stories in certain zones because a basement is included in the number of stories.

42. Secondly, it is well known that dwelling units in the lower level of a building rent or sell for a lower price per square foot than dwelling units on the upper levels of a building. Not only can Mr. Casey attest to that as an experienced developer in the District, but this is also something that was commented on in the Greater Washington article and the letter submitted by the Coalition for Smarter Growth that were submitted to the record.

43. Specifically, the article states that a Redfin search for condominium sales that include the word "basement" over the past twelve months shows an average sale price of $476 per square foot, while the average sale price for a condominium unit was $527 per square foot...a 10% difference.

44. Finally, contrary to the Appellant's statement that there is no evidence to support the claim that cellar units expand the stock of affordable housing, the Zoning Regulations are clear that in fact they do, by requiring any residential floor area in the cellar to be included in the set aside calculation for an IZ development.

45. Therefore, if the Board grants this appeal, not only would this result in a future prohibition on dwelling units and all types of "living areas" in the cellar levels of residential buildings, it would render countless existing residential buildings and residential dwelling units within the cellars of buildings as nonconforming, including existing cellar-level affordable dwelling units. In addition, it would also decrease the availability of lower-priced market rate housing in the District, and the amount of affordable housing that is generated by the District's IZ regulations since residential floor area would no longer be allowed in a cellar; and therefore, no longer be included in an IZ development's set aside calculation.

46. Thus, based upon the testimony I have provided today, I believe the Board is correct to deny the subject appeal.