DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001

Appeal of Dupont Circle Citizens Association BZA Appeal 19374

DCRA'S PRE-HEARING STATEMENT

Appellant alleges that the Zoning Administrator (the "**ZA**") erred in approving building permit B1603105, issued on July 18, 2016 (the "**Permit**"), to renovate an existing building into 4 units located at 1514 Q Street, N.W. (the "**Building**"), known for assessment and taxation purposes as Lot 27 in Square 194 and located in the R-5-B Zone District under the 1958 Zoning Regulations under which the Permit was issued.[1] Specifically Appellant alleges that the ZA erred in approving the proposed classification of the 4th unit (the "**4th Unit**") located in the lowest level as a "cellar" and so excluded from the calculation of Floor Area Ratio ("**FAR**").

DCRA asserts that the ZA correctly reviewed and approved the Permit as compliant with the Zoning Regulations because the Permit, and approved plans with the Permit (the "**Approved Plans**"), authorized the 4th Unit on the basis that the finished ceiling of the 4th Unit would be less than four feet above the adjacent finished grade, and therefore properly classified as a "cellar" excluded from FAR. If the work constructed under the authority of the Permit does not conform to the Approved Plans, then DCRA also asserts contrary to Appellant's interpretation, that the Zoning Regulations use the term "habitable room" in very limited circumstances, none of which are applicable to the Permit. This interpretation that "habitable room" does not apply to the classification of a partly-below grade level as a "cellar" or "basement", and therefore to the calculation of FAR, is a long standing interpretation not only of the ZA, but also repeatedly approved by both the Board of Zoning Adjustment (the "**Board**") and the Zoning Commission.

DCRA therefore respectfully requests that the Board affirm that Appellant failed to meet its burden to prove that the ZA erred in determining that the Permit complied with the Zoning Regulations, specifically in classifying the 4th Unit as a "cellar" and so exempt from the FAR calculation and therefore deny the Appeal.

[1] All references to "Section" herein shall be to the 1958 Zoning Regulations unless specified otherwise.

APPELLANT'S ALLEGATIONS

Appellant alleges that the ZA made the following three errors in classifying the 4th Unit as a "cellar":

1. It is "unlikely" to be less than 4 feet from adjacent finished grade as required by the definition of "cellar" (Section 199.1);
2. The ZA failed to apply the definition of "habitable room" to exclude the 4th Unit from being a "cellar"; and
3. The ZA failed to comply with the "clear intent" of the FAR requirement to apply the definition of "habitable room" to exclude the 4th Unit from being a "cellar" and so include it in the FAR calculation.

ARGUMENT

DCRA asserts that Appellant has failed to meet its burden of proof that the ZA erred under Section 3119.2 of the 1958 Regulations, which has been adopted without change as Subtitle X, Section 1102.1 of the 2016 Regulations:

> "In all appeals and applications, the burden of proof shall rest with the appellant or applicant. If no evidence is presented in opposition to the case, the appellant or applicant shall not be relieved of this responsibility.

1. Approved Plans show the 4th Unit is a "cellar"

Sheets A0201, A0202, and A0203 of the Approved Plans shows that the 4th Unit finished floor ceiling is three feet and eleven inches (3' 11") above the adjacent finished front grade and two feet and five-and-a-half inches (2' 5½") above the adjacent finished rear grade (**Attachment A**). Since these dimensions are less than four feet (4') between the ceiling of the lower level and the adjacent finished grade, the ZA properly classified the 4th Unit as a "cellar" in compliance with the definition in Section 199.1. The ZA approved the Permit based on the dimensions shown on the plans submitted by the Permit Holder, as well as a site inspection by a DCRA inspector and a signed affidavit of the owner attesting to the accuracy of photos corroborating the dimensions.[2]

[2] BZA Appeal No. 19374, Exhibit 27B (Owner/Permit Holder's Pre-Hearing Statement).

Appellant alleges that it is "unlikely" that the distance between the finished ceiling height and adjacent finished grade will not comply with the definition of "cellar"[3]. This is clearly a hypothetical assertion – the ZA already performed an inspection to confirm that the Approved Plans were possible based on the current state of the Building. The ZA lacks the authority to bar a permit based on an alleged hypothetical violation.

The Permit only gives authorization to construct per the Approved Plans, so if the construction fails to comply with this aspect (or any other) of the Approved Plans, DCRA will take enforcement action to ensure the Building complies. Once construction is complete under the Permit, if Appellant believes that DCRA has failed to ensure that the final construction complies with the Approved Plans, then it is at that point that Appellant may appeal the ZA's failure to ensure compliance with the Approved Plans. At this point in the process, however, Appellant can only appeal the ZA's determination that the Permit and Approved Plans comply with the Zoning Regulations – which they do.

Therefore this claim is without merit and should be dismissed.

2. The definition of "habitable room" does not apply to the Permit or to the classification of the 4th Unit as a "cellar"

DCRA believes that Appellant's 2nd and 3rd claim are two aspects of the same issue – does the definition of "habitable room" in Section 199.1 apply to the classification of the 4th Unit as a "cellar"? DCRA asserts that "habitable room" does not apply to the 4th Unit because the Zoning Regulations only apply the term "habitable room" in two substantive provisions imposing restrictions on exceptions from rear yard requirements for the SP and C Zone Districts:

> **534 REAR YARDS (SP)**
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> **534.6** The Board of Zoning Adjustment may waive the rear yard requirements of §534; provided, that the objectives of this section are met in accordance with the standards provided in §§ 534.7 through 534.11.
>
> …
>
> **534.9** In buildings that are not parallel to the adjacent buildings, the angle of sight lines and the distance of penetration of sight lines into ***habitable rooms*** shall be considered in determining distances between windows and appropriate setbacks.
>
> **774 REAR YARDS (C)**
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> **774.2** The Board of Zoning Adjustment may waive the rear yard requirements of this section pertaining to C-3-A, C-3-B, C-3-C, and C-4 Districts in accordance with the

[3] BZA Appeal 19374, Exhibit 24 (Appellant's Revised Pre-Hearing Statement) at page 3.

> requirements of §3104 for special exceptions; provided, that the standards in §§ 774.3 through 774.6 shall be met.
>
> …
>
> **774.4** In determining distances between windows in buildings facing each other, the angle of sight lines and the distance of penetration of sight lines into ***habitable rooms*** shall be sufficient to provide adequate light and privacy to the rooms.
>
> (bold, underscore and italics added)

These two provisions provide a valid and sufficient reason for the Zoning Commission to have adopted a definition of "habitable room" that excludes attics, laundries, storage pantries, bathrooms, commercial kitchens and "mechanically ventilated interior kitchens less than one hundred square feet in area" as well as cellars – these types of rooms are not deemed to require the same type of privacy protection as a bedroom in the main stories of a building. These two applications of "habitable room" counter Appellant's allegation that "habitable room" is deprived of any meaning unless applied to the classification of a "cellar" versus a "basement".

The Zoning Regulations also use "habitable room" in a second sense – to define a necessary part of various residential uses – dwelling unit, apartment, rooming unit, apartment house, tenement, motel, inn, and hotel (**Attachment B**). Again, this use counters Appellant's assertion that "habitable room" has no meaning unless used to reclassify "cellar" and "basement". The ZA's determination that "habitable room" does not apply to the Permit or to the 4th Unit does not make the definition of "habitable room" a surplusage, but instead recognizes the limited application of "habitable room" under the Zoning Regulations to the rear yard setbacks in the C and SP Zone Districts and to the definitions of residential uses in Section 199.1.

Moreover, the Zoning Commission provided explicit rules for the classification of a "cellar" versus a "basement" in Section 199.1's definition of each term – a bright line rule that a story with a ceiling four or more feet above the adjacent finished grade constitutes a "basement" and so is subject to inclusion in the FAR calculation, whereas the lowering of the ceiling or raising of the adjacent finished grade to create a distance less than four feet removes that story from the FAR calculation. Appellant's interpretation would require the ZA to void Section 199.1's definitions of "basement" and "cellar" with their explicit measurements in favor of a determination of whether a space was "habitable" or not. If the Zoning Commission had wanted to enact what Appellant alleges they did, the Zoning Commission could have amended the definition of "cellar" to read:

> "that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade, *except that a habitable room otherwise classified as a cellar shall be considered a basement*." (underscored and italicized portion added to definition in Section 199.1)

But the Zoning Commission did not define cellar in this manner – it established the definitions of "basement" and "cellar" only in terms of the bright line rule of the four foot distance between ceiling and adjacent finished grade. Indeed, contrary to Appellant's assertions, "cellar" is not defined in relation to "habitable room" – rather it is "habitable room" that refers to "cellar".

Appellant provides no clear justification for overruling the Zoning Commission's definitions of "basement" and "cellar" other than referring to the intent of the Zoning Regulations to control and restrict the building envelope and "density of population" by provisions including FAR requirements. But Appellant's argument that the ZA's failure to apply the definition of "habitable room" to overrule the Zoning Regulations' definitions of "cellar" and "basement" allows population densities that contravene the intent of the Zoning Regulations fails to recognize that the Zoning Regulations were designed for the 1958 District, which had a population density of 757,000 people, almost 100,000 more people than currently live in the District.

Appellant's conviction that the definition of "habitable room" is a constituent element of a uniform density formula resulting in the FAR calculation ignores the inconsistencies in their interpretation. The FAR calculation is based on gross floor area ("**GFA**"), which specifically includes areas that are excluded from the definition of "habitable room" – "attics" with headroom of six feet and six inches or more; "elevator shafts and stairwells", which would appear to be included in "corridors and hallways … or similar space" excluded from "habitable rooms"; and "mechanical rooms" with headroom of six feet and six inches or more, which would appear to be included within the "laundries, serving or storage pantries … or similar space" excluded from "habitable rooms".

These inconsistencies militate against Appellant's allegation that the Zoning Commission intended to include the definition of "habitable room" as a necessary component of the FAR calculation. Instead these inconsistencies support the ZA's determination that "habitable room" is included in the Zoning Regulations not implicitly and indirectly for purposes of the FAR calculation, but instead for the purposes explicitly stated: to limit the Board's authority to exempt

rear yard setbacks in the C and SP zones (Sections 534.9 and 774.4), and to define a necessary part of various residential uses (Section 199.1).

Indeed it was for similar reasons that the Court of Appeals, in affirming the Board's interpretation of an analogous allegation that the ZA erred in not applying the definition of "habitable room" in classifying an upper floor of a structure as an "attic":

> "During the BZA's deliberations, BZA members rejected the argument, urged primarily by the ANC, that the sixth level is not an attic because it has amenities that show that it is intended to be a habitable space rather than a storage area. … **We also agree with Montrose [the permit holder/intervenor] that the fact that attics are explicitly excluded from the definition of "habitable room" in 11 DCMR §199.1 does not mean that a so-called "attic" that is habitable is not actually an attic with [*sic*] 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."[4]

The Board, in acting on the Court of Appeals' remand, reaffirmed its ruling: "And, as noted by the Court [of Appeals], the issue of habitability is not relevant to whether a space is or is not an attic. … [A]ny evidence of habitability is not relevant to the Board's determination that the sixth level is an attic."[5]

Additionally, Appellant's interpretation of "habitable room" runs counter not only to the ZA's long-standing interpretation, as confirmed by the Board and Court of Appeals, but also to the practice of both the Board and the Zoning Commission, as is more fully laid out in the Permit Holder's Pre-Hearing Statement.[6] DCRA will note that the Board, in Appeal No. 18615, explicitly contemplated and approved as compliant with the Zoning Regulations dwelling units in "cellars" excluded from the FAR calculation:

> "The Appellants's final claim of zoning error regards **DCRA's determination to exclude certain portions of the lowest habitable level of the Buliding [5333 Connecticut Avenue, NW] from the calculation of building density**. … 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 Board determines 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. … The Board finds the appeal without merit. … [T]he interpretations used by the Zoning

[4] *Kalorama Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393, at 407 (2007) (bold added).
[5] *BZA Appeal No. 17109-C of Kalorama Citizens Association*, June 15, 2011, at 6 and 7.
[6] BZA Appeal No. 19374, Exhibit 27 (Owner/Permit Holder's Pre-Hearing Statement), at 8-11.

> Administrator to measure height and density … were based upon long standing administrative practice and precedent. … [T]he Zoning Administrator's actions were both reasonable and consistent with the letter and spirit of the regulations."[7]

Therefore, DCRA agrees with the Permit Holder that Appellant's interpretation would render a huge number of existing buildings and dwelling units across the District non-conforming.

Finally, Appellant's reference to the Housing Code for support of its assertions is misplaced, as Chapters 1-13 of the Housing Code, including the provisions cited by Appellant, have been effectively superseded by the adoption of the 2013 Construction Codes (Title 12A of the District of Columbia Municipal Regulations ("**DCMR**")). A Notice of Proposed Rulemaking ("**NPR**") to effect that change was first published in the D.C. Register on May 16, 2014 (61 DCR 4951), superseded by a Second NPR published on January 9, 2015 (62 DCR 300), and superseded again by a Third NPR published on November 6, 2015 (62 DCR 82).

The Housing Code provisions cited by Appellant were replaced by the Property Maintenance Code (Title 12G of the DCMR), which does include a definition of "habitable space" in Section 202:

> **HABITABLE SPACE.** Space in a structure for living, sleeping, eating or cooking. *Bathrooms*, *toilet rooms*, closets, halls, storage or utility spaces, and similar areas are not considered *habitable spaces*. (italics in original indicating a defined term)

However, not only is this definition broader than "habitable room", but this definition also does <u>not</u> refer to, let alone exclude, "cellars" or "attics". Moreover, the Property Maintenance Code <u>only</u> applies to <u>existing</u> buildings, per Section 101.4.5.3 of the Building Code, since the Building Code or Residential Code regulates new construction. The Building Code does <u>not</u> include a definition of "habitable room" or "habitable space". The only provision in the Building Code that remotely resembles Appellant's argument that a "habitable room" cannot be in a cellar is Section 1205 (mirroring Section 402 of the Property Maintenance Code), which establishes minimum natural light requirements for "bedrooms, living rooms and sleeping units" of 8% of the floor area. But this does not prevent a partly-below grade story from being used for living, as long as sufficient natural light can be provided – which is possible under the Zoning Regulations' definition of "cellar" that can include up to four feet of distance above adjacent finished grade.

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[7] *BZA Appeal No. 18615 of 5333 Connecticut Avenue Neighborhood Coalition, et al.* June 18, 2014, at 12-14 (bold added).

DCRA therefore asserts that Appellant's allegation that "habitable room" is a required component in calculating FAR is without merit and should be dismissed.

CONCLUSION

For the reasons stated above, DCRA asserts that the allegations stated in the Appeal are without merit and that Appellant failed to meet its burden of proof to establish that the ZA erred in approving the Permit. DCRA therefore respectfully requests that the Board affirm that the Zoning Administrator correctly applied the Zoning Regulations to approve the Permit as compliant with the R-5-B Zone District standards, specifically in classifying the 4th Unit as a "cellar" and therefore exempt from the FAR calculation, and that the Board therefore deny this Appeal.

Respectfully submitted,
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Date: _12/9/16___

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2016, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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ATTACHMENT A (filed separately)

Sheets A0201, A0202, and A0203 of the Approved Plans with ZA's stamp

ATTACHMENT B

Occurrences of "habitable room" in the Zoning Regulations

1) Definition – Section 199.1

Habitable room - 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 ft.²) in area, nor kitchens in commercial establishments.

2) Use as a standard limiting Board authority to act

534 REAR YARDS (SP)

534.6 The Board of Zoning Adjustment may waive the rear yard requirements of §534; provided, that the objectives of this section are met in accordance with the standards provided in §§534.7 through 534.11.

…

534.9 In buildings that are not parallel to the adjacent buildings, the angle of sight lines and the distance of penetration of sight lines into ***habitable rooms*** shall be considered in determining distances between windows and appropriate setbacks.

774 REAR YARDS (C)

774.2 The Board of Zoning Adjustment may waive the rear yard requirements of this section pertaining to C-3-A, C-3-B, C-3-C, and C-4 Districts in accordance with the requirements of §3104 for special exceptions; provided, that the standards in §§774.3 through 774.6 shall be met.

…

774.4 In determining distances between windows in buildings facing each other, the angle of sight lines and the distance of penetration of sight lines into ***habitable rooms*** shall be sufficient to provide adequate light and privacy to the rooms.

3) Use to define necessary aspect of a residential use – various definitions in Section 199.1

Apartment - one (1) or more ***habitable rooms*** with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms.

Apartment, bachelor - one (1) or more ***habitable rooms*** with bathroom facilities exclusively for the use of and under the control of the occupants of those rooms in a building containing three (3) or more apartments; provided, that in the building no kitchen facilities or privileges shall be available to or used by the occupants of the bachelor apartment.

Dwelling unit - one (1) or more ***habitable rooms*** forming a single unit that is used for living and sleeping purposes, that may or may not contain cooking facilities. The term dwelling unit shall include a dwelling, apartment, bachelor apartment, or tenement, but shall not include a rooming unit.

Hotel - a building or part of a building in which not less than thirty (30) ***habitable rooms*** or suites are reserved primarily for transient guests who rent the rooms or suites on a daily basis and where meals, prepared in a kitchen on the premises by the management or a concessionaire of the management, may be eaten in a dining room accommodating simultaneously not less than thirty (30) persons. The dining room shall be internally accessible from the lobby.

Inn - a building or part of a building in which ***habitable rooms*** or suites are reserved primarily for transient guests who rent the rooms or suites on a daily basis. Guestrooms or suites may include kitchens, but central dining, other than breakfast for guests, is not allowed. The term "inn" may be interpreted to include an establishment known as a bed and breakfast, hostel, or tourist home, but shall not be interpreted to include a hotel, motel, private club, rooming house, boarding house, tenement house, or apartment house. For the purposes of this definition, the limitation on central dining does not prohibit an inn from allowing guests to prepare their meals at centrally located cooking facilities and to eat such meals in a central dining area. (36 DCR 7627 and 53 DCR 2671)

Motel - a building containing non-connecting ***habitable rooms***, suites, or combinations of both, reserved exclusively for transient guests; with each room or suite having a private bath and at least one (1) private parking space. (21 DCR 1030 and 21 DCR 1423)

Rooming unit - one (1) or more ***habitable rooms*** forming a single, habitable unit used or intended to be used for living or sleeping purposes; but not for the preparation or eating of meals. The term rooming unit shall not include a tenement or a bachelor apartment.

Tenement - One (1) or more ***habitable rooms*** in an apartment house, under the exclusive control of the occupant of the apartment house.