DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Dupont Circle Citizens Association
Appeal No. 19374

Statement of Kalorama Citizens Association in Support of Appeal

Kalorama Citizens Association has a longstanding interest not only in the soundness of the land use policies embodied in the Zoning Regulations, but in the integrity of the process by which those Regulations are formulated, interpreted and applied. Further, KCA's membership area extends to areas zoned R-4 (under ZR-58), as is the project at issue in this case, and R-5-B, in which most of the issues raised in this case are potentially relevant. Consequently we support the appeal in this case.

We address only one of the issues raised in this case: *Do the Zoning Regulations allow an apartment to be located in a cellar?*

We would note first that on the basis of the record in this case, as to this issue, this is a case of first impression. It is true, as indicated by the several Zoning Commission and BZA cases cited by the owner, that some years ago the Zoning Administrator began approving permits for projects that placed apartments in cellars, and that as a matter of fact, some of these projects were accepted by the Commission or Board. But it appears that in none of those cited cases was the issue of whether locating apartments in cellars is permitted by the Regulations raised by the parties or addressed by the Commission or Board. So the issue has yet to be decided.

For the following reasons we submit that the Regulations do not allow locating an apartment in a cellar.

§199.1 defines an "apartment" as

> "one or more habitable rooms with kitchen and bathroom facilities exclusively for the use of an under the control of the occupants of those rooms."

The plain meaning of this provision is that the first thing an owner contemplating constructing an apartment in his or her building must determine is whether the space proposed for the

apartment qualifies as a "habitable room" under the Regulations.[1] According to §199.1 a habitable room is

> "an undivided enclosed spaced used for living, sleeping, or kitchen facilities. The term habitable room *shall not include attics, cellars,* corridors, hallways, laundries, serving or storage pantries, bathroom, or similar space; . . . ."

We submit that the plain meaning of this provision would lead any reasonable person minimally acquainted with the English language to conclude that he or she cannot lawfully locate an apartment in a cellar, absent a zoning variance: an apartment must be located in a habitable room, a cellar can't be a habitable room, so an apartment can't be placed in a cellar.

So how do the Zoning Administrator, and the owner in this case, get around this obvious conclusion? As to the Zoning Administrator, note that this prohibition on putting people's living quarters down in the cellar dates from at least the early days of the 1958 Regulations, any space that far below grade being regarded at that time as substandard and unfit for regular human habitation. It appears that at some point in the more recent past a Zoning Administrator was persuaded that this policy had become obsolete, perhaps in view of provisions in the housing and construction codes that aimed at correcting some of the deficiencies of cellars as living space, for example as to safety and available light and air. The result was a *policy decision* by the Zoning Administrator to begin allowing apartments in cellars, knowing that they must comply with the other relevant code provisions.[2] This appears to be the reasoning of the current Zoning Administrator in his standard justification for allowing apartments in cellars:

> "This has been DCRA's long standing interpretation of the regulations and it is consistent with the many provisions of the District of Columbia Construction Codes (including the Building Code, Property Maintenance Code, and Fire Prevention Code) that specifically allow for the occupancy

[1] The same is true for the definition of "dwelling unit" – a broader concept that includes "apartment": "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."

[2] Since there was no corresponding change in the exclusion of cellar space from the calculation of gross floor area, this decision generated the variety of imaginative stratagems that row house re-developers have devised for maximizing cellar floor area, including manipulation of ceiling height, height of adjacent grade, and the method of allocation of floor area between basement and cellar.

> of partially below grade dwelling units. Here, as in other projects, the cellar units must be provided light, ventilation, and emergency egress required by those codes."[3]

The only thing the Zoning Administrator says in justification of his interpretation as a matter of law, however, is that

> "[a]lthough cellars and attics are excluded from the definition of 'habitable room,' the regulations do not prohibit those spaces from being used for sleeping, cooking, and living."[4]

There are two things wrong with this proposition. First, as seen above, the regulations clearly do prohibit cellars from being used for sleeping, cooking and living: if the Regulations say you can't do X, that, in common usage, is a prohibition of X. No additional prohibition is needed. Second, by the Zoning Administrator's reasoning, apartments may also be located in laundries, pantries, bathrooms, hallways, and "similar space" – an evident absurdity.

The owner's logic is similarly flawed. The Owner's Prehearing Statement correctly cites authority to the effect that "the literal reading of a statute is not mandated if an absurd result would follow."[5] But the owner then proceeds to turn that basic rule of statutory interpretation on its head, by arguing for *rejecting* the literal reading of the definitions of "Apartment" and "Habitable Room", with the effect that the Regulation would authorize having apartments not only in cellars but also in laundries, pantries, bathrooms, hallways, and "similar space" – again, an absurdity. In so doing the owner is doing precisely what the Board found the applicant in the *Draude* case (cited by the Owner's Prehearing Statement at p. 12) to be doing, namely, favoring an interpretation that "would greatly change the plain meaning of the Zoning Regulations."

Elsewhere the owner notes that the concept of "habitable room" is relevant in the determination of special exceptions for rear yards in certain zones.[6] This fact has no bearing on the issue of whether apartments may be located in a space that is not a habitable room.

Finally, the owner argues that the literal reading of the definitions of "apartment" and "habitable room" would have a detrimental effect on housing policy

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[3] See Exhibit 24, Appellant's Revised Prehearing Statement, p.3.
[4] Ibid.
[5] Owner's Prehearing Statement, p. 13.
[6] Ibid, p. 7.

citywide.[7] Whether that is the case is subject to debate, but in any event that is not an issue legitimately before the Board. It is not the function of the Board to determine what kind of housing policy should be implemented through the Zoning Regulations, and even less is that the legitimate function of the Zoning Administrator – whose inappropriate policy decision we have already discussed. That is a legislative function, which District law confers on the Zoning Commission. If, as the owner would have us believe, applying the plain meaning of these definitions would have undesirable consequences -- e.g. on the supply of affordable housing -- the Zoning Commission is amply empowered to forestall those consequences, by emergency action if necessary. And if the Commission thinks that Regulations need to be changed to permit placing apartments in cellars, it can do that, after proper notice, comment and hearing. What the Board cannot properly do in this case is deprive the Appellant of the benefit of a scrupulous application of the Zoning Regulations as presently written. So we urge the Board to grant the appeal.

Larry Hargrove, for Kalorama Citizens Association

[7] Ibid, p. 13.