BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Dupont Circle Citizens Association Appeal No. 19374

OWNER'S DRAFT ORDER ON THE MERITS OF THE APPEAL

FINDINGS OF FACT

1. The Property which is the subject of this appeal is located at 1514 Q Street, NW.

2. The Property Owner, who is an automatic party to this appeal, obtained a number of permits to alter and convert the building on the Property to a three-story-plus-cellar four-unit apartment house as a matter of right (the Project). Those permits for the Project included permits for demolition, repair and replacement, which were issued prior to the main Building Permit on July 18, 2016, which is the subject of this appeal. (Transcript at pages 148-49).

3. The R-5-B zone allows a maximum 1.8 FAR, a maximum height of 50 ft. and a maximum lot occupancy of 60%. The project was designed and approved as a matter-of-right under the then-applicable R-5-B zoning, and the Building Permit was issued on July 18, 2016.

4. Brian Gelfand, a member of the Appellant Dupont Circle Citizens Association (DCCA) since early 2015 (Tr. 130, 165), lives next door to the Project at 1516 Q Street, NW, Unit #3 (Ex. 48). Beginning in late 2015, Mr. Gelfand began a series of inquiries and complaints to DCRA about various aspects of the Project. (Tr. 266-67, and Exhibit 27C of the record).

5. The Zoning Administrator issued a determination letter on March 21, 2016 that the Project, as proposed, met the requirements of the Zoning Regulations. (Ex. 27A). He sent that letter by email on that same day to DCCA members Gelfand and Abigail Nichols. (Ex. 27B). Ms. Nichols was also the ANC Single Member District Commissioner for that area at the time. (Ex. 27B and 27C). On March 22, 2016, the Zoning Administrator sent a follow-up email

to DCCA members Gelfand and Nichols, explaining in more detail the bases for his determination that the project met the zoning requirements. (Ex. 27B). The Building Permit was issued on July 18, 2016. The building was "under roof" by July 31, 2016. (Ex. 49C).

6. DCCA filed this appeal on September 16, 2016, challenging the issuance of the Building Permit. The Appellants allege in Ex. 1 and 2 of the record in this appeal that:

- The term "cellar" is "defined as a non-habitable room where the ceiling of the space is less than 4' above the adjacent finished grade";
- The cellar space at 1514 Q Street has "multiple habitable rooms to be used for living, sleeping or kitchen facilities. Therefore the unit is NOT a cellar, as it is not functioning as a cellar";
- Because this space is habitable, "it is a basement, and its floor area must be included in calculation of maximum allowable GFA and FAR";
- Because this space is a basement, and is included in FAR, the building exceeds the permissible FAR limitation, and the building permit should be invalidated.

This will be referred to as Claim 1.

7. More than two months later, on November 23, 2016, DCCA revised its appeal to include an additional claim that "the permit and plans fail to achieve cellar measurement". (Ex. 24, 24A and 24B). This claim alleges that the height of the ceiling in the cellar is actually more than four feet above adjacent finished grade. This will be referred to as Claim 2.

CLAIM 1

8. The Appellant proposes in Claim 1 (Ex. 1 and 2) that the terms "cellar" and "habitable room" should be read together to create a new definition of a "cellar" for zoning

purposes as "a non-habitable room where the ceiling of the space is less than 4' above adjacent finished grade". Appellants assert that because the cellar level includes a habitable room, it "no longer functions as a cellar", and therefore no longer fits what they refer to as their "two-part definition of a 'cellar'". Consequently, Appellant asserts that this cellar level must be a basement, and therefore must be counted in FAR. The Board finds that the Appellant's proposed "two-part definition" of a cellar is not the published definition of a "cellar" in Section 199.1, nor is the Appellant's proposed "two-part definition" of a "cellar" consistent with the long-standing interpretation and application of the Zoning Regulations.

9. The Board finds that the definitions of "basement" and "cellar" in Section 199 of ZR58 are clear. A "basement" is defined as "that portion of a story partly below grade, the ceiling of which is 4 ft. or more above adjacent finished grade". Conversely, a "cellar" is defined as "that portion of a story partly below grade, the ceiling of which is less than 4 ft. above adjacent finished grade". A lower level of a dwelling is classified as either a basement or a cellar based solely on these definitions. There is no objective or logical reading of these definitions that would turn a cellar into a basement if it contains a habitable room. Contrary to the Appellant's claim, the inclusion of a habitable room in a cellar does not somehow turn it into a basement. Moreover, a basement is included in gross floor area, and therefore is included in FAR; a cellar is not. The plain language of the definition of "gross floor area" makes that clear.

10. Section 199.1 of the 1958 Zoning Regulations (ZR58) is the section that provides the definitions of the terms that are used in the substantive portions of the Zoning Regulations. Section 199.1 states: "When used in this title, the following terms and phrases shall have the meanings ascribed:". Accordingly, the definitions in Section 199.1 are used to define the terms used in the substantive portions of the zoning regulations.

11. The Board finds that the definitions of "cellar" and "habitable room" are two separate and independent definitions that have been in the Zoning Regulations since 1958 (Ex. 27D). A "cellar" is defined in Sec. 199 as "that portion of a story partly below grade, the ceiling of which is less than 4 ft. above adjacent finished grade". The definition of "habitable room" in Sec. 199.1 states as follows: "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 kitchens interior kitchens less than 100 sq. ft. in area, nor kitchens in commercial establishments."

12. The purpose of the second part of the definition of "habitable room" ("The term 'habitable room' shall not include...") applies in only two instances in the substantive regulations of ZR 58, and there are only two places in the substantive regulations of ZR58 where the term "habitable room" is found. These are ZR58 Sections 534.9 and 774.4, which include "the distance of penetration of sight lines into habitable rooms" (emphasis added) as a criterion for special exception relief from the rear yard requirements in the SP and the C-3-A through C-3-C zones. Nowhere else in the substantive regulations in ZR58 is the term "habitable room" used. Therefore, based upon the language of Section 199.1 of ZR58 ("When used in this title, the following terms and phrases shall have the meanings ascribed:"), the Board finds that in order to determine what the phrase "habitable rooms" in Sections 534.9 and 774.4 means, one looks to the definition in Section 199.1. The Board finds that it would be illogical to interpret or apply the regulations in the way that the Appellant is advocating. There is nothing in the substantive regulations of ZR58 that prohibits a habitable room on the cellar level of a building. The definitions of "cellar" and "habitable room" have been in the Zoning Regulations since 1958,

and there is no evidence in the record indicating that those two definitions have ever been interpreted or applied in the way that the Appellant asserts. Nor has the Appellant provided any rational reason for this Board to mandate the changes to the regulations that the Appellant is advocating.

13. The Board finds that the Zoning Administrator, the Zoning Commission, and this Board have all recognized that habitable rooms may be located in the cellar level of a building:

- DCRA has published a Certificate of Inclusionary Zoning Compliance Application, and Instructions and General Information, which include (in Boxes 23 and 24) requests for information regarding gross floor area and net floor area for residential units in the cellar. (Ex. 27F).
- The Zoning Commission has recently adopted Inclusionary Zoning regulations in ZC Case No. 04-33G recognizing in ZR16, Sub. C, Sec. 1003.9, as amended, that dwelling units may be located on the cellar level of a building.
- In ZC Order No. 15-33 and ZC Order No. 06-34A, the Commission approved PUD's that specifically include habitable rooms and dwelling units on the cellar level. (Ex. 27I, page 8, paragraph c; and Ex. 27J, page 5, paragraph 1 and attached drawings).
- The Board of Zoning Adjustment has approved a number of cases where cellar habitable rooms and dwelling units were included as part of the approved project. See, e.g., Order No. 18615 (Ex. 27K, page 7, paragraph 43); Order No. 19127 (Ex. 27L, sheets 16 and 17 of the attached plans); Order No. 19035 (Ex. 27M, plans attached); Order No. 18814 (Ex. 27N,

plans attached); Order No. 18785 (Ex. 27O, plans attached); Order No. 18724 (Ex. 27P, plans attached); Order No. 17679C (Ex. 27Q, plans attached); Order No. 17111A (Ex. 27R, page 2).

14. The Board finds that adoption of the Appellant's position would have negative consequences across the District. The evidence of record indicates that a reversal of the long-standing interpretation allowing habitable rooms and dwelling units in cellars will negatively affect the delivery of affordable housing. There is substantial evidence in the record to support the position that dwelling units on the cellar level of a building (including market-rate housing) are typically the most affordable units in a residential building. A letter in opposition to the appeal from one non-profit housing provider states that "the use of the cellar level for housing units and living spaces is a practice widely used in the affordable housing industry. Such spaces are not counted in the gross floor area, which helps to reduce the development costs and increase the usability and efficiency of the building. A decision which prohibits cellar-level use could negatively impact affordable-housing providers in the District". (Ex. 68). Similarly, letters from two District of Columbia agencies, the DC Housing Finance Agency and the DC Housing Authority, state that a prohibition of housing units in the cellar levels of buildings could have an adverse effect on the delivery of affordable housing units. (Ex. 63 and 64). A number of other housing providers, as well as the Coalition for Smarter Growth and others, have also submitted letters to the record, citing the long-standing interpretation of the regulations to allow habitable rooms and dwelling units on the cellar level, and the adverse effect on the delivery of affordable housing units if the cellar level were no longer allowed to be used for habitable rooms and dwelling units. (Ex. 36 through 40, 47, 51, 54, 55, 58 through 69, 76, and 79).

15. The Board finds that a decision in this case will not just impact this one project with the one dwelling unit on the cellar level. Rather, the Board's decision in this case will affect housing policy city-wide. The Board also finds that a reversal of the long-standing interpretations of the Zoning Administrator, the Zoning Commission, and this Board, which currently allow cellar level dwelling units ,would have a negative impact on the availability of affordable housing options throughout the District, at a time when the District is actively working to increase the supply of affordable housing.

16. The Board also finds that the inability to devote cellar level space to "living, sleeping, or kitchen facilities", as the Appellant advocates, would also have other city-wide impacts. The Board takes official notice of the fact that there are likely hundreds, if not thousands, of cellar-level TV rooms, game rooms, rec rooms, hobby/craft rooms, dens, community rooms, and other similar "living" rooms in single family and multi-family dwellings throughout the city that meet the definition of a "habitable room". Adoption of the Appellant's position would render these dwellings as non-conforming, and no such rooms could be included in the cellar level of any dwelling in the future.

17. The Appellants also claim that the Building Code prohibits habitable rooms on the cellar level. This Board has no jurisdiction to review appeals based upon the Building Code. However, the Board also notes that based upon the evidence of record, DCRA has historically approved building permits that include habitable rooms and dwelling units in the cellar level.

CLAIM 2

18. In Claim 2, filed on November 23, 2016, Appellant DCCA amended their original appeal by filing an additional claim in their "Revised DCCA Prehearing Statement" (Ex. 24, 24A and 24B), in which they alleged that "the permit and plans fail to achieve cellar measurement".

In that revised document, Appellant DCCA challenged the ceiling height measurements of the cellar that were included in the Zoning Administrator's March 21, 2016 administrative decision.

19. To support Claim 2, Appellant DCCA attached the Zoning Administrator's March 21, 2016 administrative decision, and portions of the exhibits to that administrative decision, along with some of their own exhibits. In their Claim 2, the Appellants allege that the ceiling height of the cellar level is more than 4 ft. above the adjacent finished grade. To support that position, Appellants submitted a photo taken in early 2016, showing a ceiling height measurement of greater than 4 ft. However, no clear evidence was presented to establish that the measurement was taken from "the level of the finished grade" as that term has been consistently applied by the Zoning Administrator.

20. In contrast, the evidence of record includes a sworn affidavit by the Owner, with photos taken during a site visit on February 12, 2016 in the presence of a DCRA code inspector, demonstrating that the proposed ceiling height of the cellar level would be less than 4 ft. above the adjacent finished grade. (Ex. 27A). The evidence of record also includes Exhibits 42 and 42A through 42H, submitted by DCRA, which include a report and photos submitted to the Zoning Administrator by a DCRA inspector on January 13, 2017, almost one year after the initial site visit, verifying that the existing finished ceiling of the cellar level, after construction, is also less than 4 ft. above the adjacent finished grade.

21. The front of the building appears in those photos to include a very shallow areaway adjacent to the front windows on the cellar level of the building. Appellant claimed in their presentation that the Owner altered the adjacent grade in front of the building, and measured the ceiling height of the cellar from a point other than the adjacent grade. The Appellant's photographs and testimony appear to suggest that the grade in front of the building

has been altered, and that the cellar ceiling height measurement should have been taken from the bottom of the areaway, or at another location. However, there is also evidence in the record that there has been no alteration or change in grade at the front of the building. (Ex. 70). As further explained below, it is immaterial to the outcome of this appeal whether the adjacent grade in front of the building has been altered or not.

22. This Board has previously upheld the decision of the Zoning Administrator that the measurement of the cellar ceiling height, for purposes of determining whether the level is a basement or a cellar, is from the "finished grade". In Appeal No. 18615 of 5333 Connecticut Neighborhood Coalition (June 18, 2014), this Board found that "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 ft. 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". Appeal No. 18615, at p. 7, Finding No. 43 (Ex. 27K of the record in this appeal). The Board also found that the top of the grade behind an areaway is the adjacent finished grade for purposes of this measurement, and that the "Zoning Administrator has never considered the bottom of an areaway as the adjacent finished grade". Appeal No. 18615 at p. 7, Finding Nos. 47 and 48. The Board concluded in that Order that it "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'". The Board also concluded that the "Zoning Administrator properly determined that the finished grade adjacent to the areaway was the top of the grade behind each areaway. The Appellant erroneously contends that the finished grade should be considered as the bottom of each areaway. This has never been the method followed by the Zoning Administrator". Appeal No. 18615 at p. 13.

CONCLUSIONS OF LAW

CLAIM 1

The interpretation favored by the Appellant, to no longer allow habitable rooms and dwelling units on the cellar level of buildings, would significantly change the consistent interpretation of the Zoning Regulations. "The Board may interpret the meaning of the Zoning Regulations when their meaning is ambiguous or open ended, [but not when the regulation] is not ambiguous or open ended so as to require interpretation". BZA Order No. 16970, footnote 13 (March 29, 2005) (citing Draude v. DC BZA, 527 A.2d 1242, 1247 (DC 1987). In that case, the Board found that " the interpretation favored by the Applicant would greatly change the plain meaning of the zoning regulations". In this case, the long-standing application of the Zoning Regulations by the Office of the Zoning Administrator allows cellar-level habitable rooms and dwelling units. The Zoning Commission and this Board have also approved numerous projects that include cellar level habitable rooms. It is clear that the only substantive zoning regulations that use the term "habitable room" are Sections 534.9 and 774.4, which involve special exceptions for rear yards in the SP and C-3-A through C-4 zones.

Appellant advocates a literal and narrow reading of the definition of "habitable room" in Section 199.1 of the Zoning Regulations in order to achieve their desired result. This Board has recognized that "a departure from a literal, narrow interpretation of an enactment is justified when [that narrow interpretation] would produce an inequitable and pointless outcome inconsistent with the purposes and policies behind the regulations". BZA Order No. 15565, at p. 5 , citing 2A, SUTHERLAND, STATUTORY CONSTRUCTION 4th ed. 1984). In that case, the Board also cited Wright v. US, 315 A.2d 839 (DC 1974) for the proposition that "the literal reading of a statute is not mandated if an absurd result would follow". The Appellant's narrow

and literal reading of the definition of "habitable room" in this case would produce a result that is inconsistent with the long-standing interpretation and application of the regulations, and would create a new housing policy for the District. The record contains a number of letters from DC government agencies, and from non-profit and for-profit housing providers, and from housing advocacy groups, architects and others, citing the adverse impacts on the delivery of affordable housing in the District if this Board was to adopt the Appellant's position.

The Board concludes that Claim 1 is without merit and is therefore denied. The Building Permit was properly issued based upon the classification of the lower level as a cellar, in accordance with the definition of "cellar" in the Zoning Regulations. A cellar is excluded from gross floor area, and is therefore excluded from the building's FAR calculation. The Zoning Administrator issued an earlier administrative decision on March 21, 2016, in which he "determined that there is sufficient evidence to determine the Cellar Area satisfies the definition of a 'cellar' under 11 DCMR Sec. 199.1. Therefore, the Project satisfies the requirements of the R-5-B Zone District". The administrative determination to exclude the cellar level from the FAR calculation is based upon a long-standing interpretation and application of the Zoning Regulations.

CLAIM 2

The Board concludes that Claim 2 was not timely filed and must be dismissed. Sub. Y, Sec. 302.12(g) requires the Appellant to submit, at the time of the filing of the appeal, "a statement of the issues on appeal, identifying the relevant subsection(s) for each issue of the Zoning Regulations". Claim 2 is not properly before the Board. It was not included in the Form 125-Appeal that was filed on September 16, 2016 (Ex. 1) nor was it identified in the statement of appeal that was filed on September 16, 2016 (Ex. 2). Moreover, Sub. Y, Sec. 302.13 states that

"an appeal may not be amended to add issues not identified in the statement of the issues on appeal submitted in response to Subtitle Y Sec. 302.12(g) unless the appellee impeded the appellant's ability to identify the new issues identified". The Appellant improperly amended its appeal, and made no allegation or assertion that the Zoning Administrator or DCRA impeded the Appellant's ability to timely identify the issue raised in Claim 2. The Zoning Administrator's widespread dissemination and publication of his administrative decision, including emailed copies to the Appellant's three witnesses almost one year before the public hearing in this appeal, demonstrates the contrary.

Even if the Board was to find that Claim 2 was timely filed, the appeal on this issue would be denied. The Zoning Administrator's 5-page determination letter on March 21, 2016 includes photographic documentation that the ceiling of the cellar level as proposed would be less than 4 ft. above the adjacent finished grade. This 5-page determination includes an extensive discussion of the cellar area and the FAR calculation, with written documentation from the architect and the structural engineer for the project, and with photos of the cellar measurements taken during a February 12, 2016 site visit by a DCRA Inspector, with the ANC Commissioner, the Property Owner and the project architect also present. The record also includes photographic and written evidence from a DCRA Inspector on January 13, 2017 that the ceiling of the cellar level, after construction of that ceiling was completed, is less than 4 ft. above the adjacent finished grade.

For all of the forgoing reasons, this appeal is DENIED.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Owner's Findings of Fact and Conclusions of Law – Motion to Dismiss was filed electronically with the Office of Zoning and was sent by first-class mail and electronic mail, this 22nd day of March, 2017, to the following:

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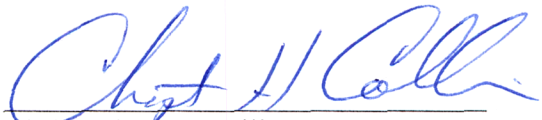

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