March 22, 2017

DC Board of Zoning Adjustment
441 4th Street, NW
Washington DC 20001

Proposed Final Facts and Findings
BZA Appeal No. 19374 – 1514 Q Street NW

Dear Members of the Board:

As instructed by the Board in the February 22, 2017 hearing, we respectfully submit to you the proposed findings of facts and conclusions of law for the appeal of B1603105. Information presented in the attached document can be found in case materials and include:

- Initial pre-hearing statement (Exhibit 2).
- Revised pre-hearing statement (Exhibit 24).
- Response to DCRA prehearing statement in opposition to the appeal, which includes a 2007 Zoning Administrator's decision defining a "cellar" based on measurement *and* use/habitability, and an explanation of why the attic argument is not precedent for this case (Exhibit 41).
- Response to DCRA and owner's motions to dismiss (Exhibit 53).
- Transcripts of the 2/22/17 hearing.

Per Subtitle Y, 601.3, this document is also being sent via email to each party to the case.

Sincerely,

Robin Diener
President, DCCA

Attachment

# Appellant's Proposed Findings of Fact and Conclusions of Law

# Proposed Order

Appeal No. 19374 of Dupont Circle Citizens Association, pursuant to 11 DCMR 3100 and 3101, decisions by the Department of Consumer and Regulatory Affairs (DCRA) to issue building permit B1603105 (Square 0194, Lot 0027) to renovate an existing single family rowhouse located at 1514 Q Street NW in the R-5-B district into 4 units.

HEARING DATE: February 22, 2017
DECISION DATE: March 29, 2017

# Decision and Order

This appeal was filed on September 16, 2016 by the Dupont Circle Citizens Association (DCCA, the "Appellant) with the Board of Zoning Adjustment (the "Board"). This appeal challenged DCRA's decision to issue building permit B1603105 (July 18, 2016). This appeal deals with matters that occurred before the effective date of ZR-16. Therefore, the appeal of this permit and matters associated within its issuance are brought under the 1958 zoning regulations. Other matters specific to Board deliberations from December 2016 to March 2017 follow relevant provisions in ZR-16 Subtitle Y.

The Board held a hearing on the application on February 22, 2017.

A full discussion of the facts and law supporting this conclusion follows.

# Preliminary Matters

## Notice of Public Hearing

The Office of Zoning scheduled a hearing on December 14, 2016. In accordance with ZR-16 Subtitle Y, Section 103, the Office of Zoning mailed notice of the hearing to the Appellants and to DCRA. Matters before the Board relate to a building permit issued under the 1958 zoning regulations.

## Rescheduled Hearing Dates

On December 13, 2016, Appellant filed a request with the Board to postpone the hearing date of December 14, 2016 given that DCRA did not file its prehearing statement within 7 days prior to the December 14, 2016 hearing date, as required by ZR-16 Subtitle Y, Section 302.17. The postponement request was granted to a rescheduled hearing date of January 18, 2017.

The hearing date of January 18, 2017 was rescheduled per the request of the Board, in order to provide all parties an opportunity to respond to DCRA's motion to dismiss the case for lack of standing and timeliness.

The hearing was rescheduled and heard on February 22, 2017.

## Parties

The Appellant in this case is DCCA, which represents the area within which the property at 1514 Q Street, NW is located.

DCRA was represented by its Office of the General Counsel.

The owner of the property, John Casey, Principal, 1514 Q LLC, is automatically a party under ZR-16 Section 501.1 and was represented by Holland & Knight ("Owner's Representative").

## Pre-Hearing Submissions

Appellant filed an initial prehearing statement on September 16, 2016 and a revised prehearing statement on November 23, 2016, 21 days in advance of the December 14, 2016 hearing date.

On December 7, 2016, the Owner's Representative filed a prehearing statement in opposition to the appeal.

On December 9, 2016, DCRA filed its prehearing statement in opposition to the appeal, 5 days prior to the December 14, 2016 hearing date, contrary to the 7-day advance filing requirement of ZR-16 Subtitle Y, Section 302.17. DCRA asserted that new ZR-16 rules were the reason for the late filing.

On December 11, 2016, DCCA filed a response to the prehearing statement of the Owner's Representative in opposition to the appeal.

On December 13, 2016, Appellant filed a request with the Board to postpone the hearing date of December 14, 2016 given that DCRA did not file its prehearing statement within 7 days prior to the December 14, 2016 hearing date, contrary to the requirements of Subtitle Y, Section 302.17. The Board granted this request.

On January 13, 2017, Appellant filed a response to DCRA's December 9, 2016 prehearing statement in opposition to the appeal.

On January 25, 2017, the Owner filed a motion to dismiss based on timeliness.

On January 25, 2017, DCRA filed a motion to dismiss based on timeliness and standing.

On February 8, 2017, Appellant filed a Response to DCRA's Motions to Dismiss for Lack of Standing and for Untimely Filing.

On February 16, 2017, the Owner filed a Reply to Appellant's Opposition to Motion to Dismiss Appeal.

On February 18, 2017, DCRA filed a response to DCCA's Response to DCRA's Motions to Dismiss for Lack of Standing and for Untimely Filing.

## Hearing and Closing of the Record

The hearing was held February 22, 2017. At the conclusion of the hearing, the Board Chair closed the record with the exception of filing of proposed findings of facts and conclusions of law by the parties, due March 8, 2017.

On March 2, 2017, Appellant emailed Board staff regarding the lack of transcripts for the February 22, 2017 hearing, and requested a delay in the March 8, 2017 due date for the final facts. The request was based on the fact that ZR-16 Subtitle Y 601.2 references the timeline for submission of findings of facts and conclusions of law in reference to the transcript delivery date as follows: "When requested by the Board, a party shall submit proposed findings of fact and conclusions of law to the Office of Zoning within such time as the presiding officer may direct, which in any event shall not be less than seven (7) days after the transcript of the hearing is delivered to the Office of Zoning…."

The Board granted this request and set a new due date of March 22, 2017.

# Findings of Fact

## Timeliness

1. The administrative decision being appealed is building permit B1603105, which was issued on July 18, 2016. Appellant filed BZA 19374 on September 16, 2016, 60 days after issuance of B1603105.

2. The appeal of issuance of the building permit is in accordance with the 1958 zoning regulations, 11 DCMR 3112.2, which reads: "Any person aggrieved by any order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board as follows: (a) An appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier."

3. The Zoning Act, D.C. Official Code 6-641 -07 (f) provides that appeals may be taken from "any decision . . . granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map." (See Exhibit 53.)

4. The 1958 zoning regulations do not contain the "first writing" provision (ZR-16, Subtitle Y, 302.5), which became effective September 6, 2016 and reads: "A zoning appeal may only be taken from the first writing that reflects the administrative decision complained of to which the appellant had notice. No subsequent document, including a building permit or certificate of occupancy, may be appealed unless the document modifies or reverses the original decision or reflects a new decision." (See Exhibit 53.)

5. No Board or Zoning Commission documentation identifies the meaning of "first writing" in ZR-16 Subtitle Y, 302.5. The Office of Planning, in a February 2, 2017 email, reported that it did not have any insights on the provision's interpretation and recommended that clarification be requested from the Board Secretary. (See 2/22/17 transcripts and attached copy of the email at end of this document.)

6. Numerous Board cases conclude that the 60-day timeline for filing an appeal cannot be based upon the date of issuance of a Zoning Determination Letter (BZA 18793 [2016]; BZA 18522 [2012]; BZA 18568 [2013]; BZA 16998 [2003]). These cases establish that a building permit's issuance date is the appropriate reference date. (See below tables and Exhibit 53.)

## Board: Timeliness Based on Building Permit, Not Zoning Determination Letter

| Case | Board Case Precedent: ZDL Cannot Be the Basis for an Appeal |
|---|---|
| BZA 18793 (2016) | ZDL Not an "Appealable Decision |
| BZA 18522 (2012) | ZDL Issued Before Building Permit May Not Be Basis for Appeal |
| BZA 18568 (2013) | Emails (i.e., Communications from DCRA) Cannot Serve as Basis for an Appeal |
| BZA 16998 (2003) | ZDLs Do Not Authorize Granting of Building Permits |

| Case | Additional Board Cases on 60-Day Timeliness |
|---|---|
| BZA 18300 (2012) | Board ruled that a Zoning Administrator email stating that the project complied with the Tree Protection Plan was the basis for the appeal, as this decision did not involve issuance of a subsequent building permit. |
| BZA 17411 (2005) | Board approved an ANC appeal of issuance of a Certificate of Occupancy, which came after the earlier issuance of a building permit, concluding that this was ""fair and equitable in light of the zoning error that had been made." |
| BZA 17513 (2006) | Board ruled that issuance of the building permit started the 60-day clock, rather than the date, 3 months later, when the Zoning Administrator shared the permit application that had been previously approved. |
| BZA 17468 (2006) | Board determined that the earlier date for determining the start of the 60-day clock was the issuance of the building permit, rejecting the ANC's claims that it lacked awareness of the permit decision. The Board also noted that the permit was posted on the property and thus visible to the public. |
| BZA 18070 (2010) | Board ruled that the ANC failed to file within 60 days of issuance of building permit, rejecting the ANC claim that it did not know when the clock started and lacked the opportunity to weigh in earlier given ANC meeting schedules. |
| BZA 17915 (2009) | Board ruled that failure to file 6 months after building permit issuance was not excusable. |
| BZA 17391 (2006) | Board disallowed appeal multiple building permits, which were filed 17 months to 2 years after permit issuance. |

7. In the February 22, 2017 hearing, DCRA cited BZA 19274 as a case in which a Zoning Determination Letter was the basis for filing of an appeal. According to the transcripts from BZA 19274, the Board accepted the decision of the ANC to appeal the Zoning Determination Letter. The case did not discuss or establish a Zoning Determination Letter as the basis for a timely filing. Furthermore, DCRA commentary framed the Zoning Determination Letter as "more conceptual" and that "some of what appellant is concerned about are issues that would be more clearly established at the moment of the building permit itself." (See attached clarification of discussion of 19274 by Mr. Tondro at 2/22/17 hearing.)

8. A building permit is required in order to initiate construction projects (ZR-58, Section 3202). A building permit must be posted at a location visible from the street until a project is completed (2013 12 DCMRA 105.1.9[1]). DCRA provides ANCs with a listing of building permit applications and issuances on a monthly basis.

9. Building permits are publicly available on DCRA's website on two searchable databases: on the home page (Property Information Verification System) and the first-level webpage of DCRA's Online Services (PIVS Online Building Permit Application Tracking, OBPAT). (See Exhibit 53.)

10. On a monthly basis, DCRA emails every ANC Commissioner a citywide listing of building permits applied for and issued during the previous month. (See Exhibit 53.)

11. Zoning Determination Letters do not constitute an authorization to proceed with construction projects. (See Exhibit 53.)

12. Vesting Guidance: ZR 16 Zoning Regulations, reads, in part: No other circumstance allows for a building permit application to be considered a Vested Application including, but not limited to, the following… A Zoning Determination Letter…."

13. The zoning regulations do not include the term "Zoning Determination Letter," do not make reference to Zoning Determination Letters as official documents, do not assign Zoning Determination Letters with official status as permission to initiate a construction project, do not require that Zoning Determination Letters be posted publicly on buildings or elsewhere, and do not require that Zoning Determination Letters be shared with ANCs. Furthermore, Zoning Determination Letters are not disseminated to ANCs. (See Exhibit 53.)

14. Zoning Determination Letters are available on the DCRA website under a "News" webpage that also contains announcements and other DCRA documents.

[1] DCRA. Guidelines for Posting Permits. 2014. Posting Permit: The permit, or copy of, shall be kept on the work site and displayed at a location visible from the street until the completion of project (see 2013 12 DCMR A 105.1.9). Available at https://dcra.dc.gov/sites/default/files/dc/sites/dcra/publication/attachments/Final_Building%20Permit%20Guidelines.pdf

## Building Permits and Zoning Determination Letters (ZDLs) and Legal Status

| Legal and Procedural Status of: | Building Permit | ZDL |
|---|---|---|
| Represents authorization to proceed with a construction project | Yes | No |
| Required in order to initiate a construction project | Yes | No |
| Referenced in the zoning regulations | Yes | No |
| Must be posted on building | Yes | No |
| Disseminated by DCRA to ANCs | Yes | No |
| Available to the public on a searchable database | Yes | No |
| Recognized by the Board as basis for 60 day timeliness | Yes | No |
| Include statements/conditions that are provisional and can be changed at a later date | No | Yes |

## Timeline

15. Following is a summary of events. The Zoning Determination Letter was issued by DCRA on March 22, 2016. Building permit B1603105 was issued July 18, 2016. Appeal BZA 19374 was filed on September 16, 2016. ZR-16, including the "first writing" provision, became effective on September 6, 2016, 10 days before the appeal was filed, 50 days after the building permit was issued, and nearly 6 months after the Zoning Determination Letter of March 22, 2016 was issued.

## Timeline

| MONTH | ACTIVITY | | 1958 Zoning Regulations Effective | ZR-16 Zoning Regulations Effective |
|---|---|---|---|---|
| December 2015 | ZA/ANC Commissioner Meeting | 12/21/15 | Yes | No |
| February 2016 | Property inspection/emails | 2/18-22/16 | Yes | No |
| March 2016 | Email correspondence<br>Zoning Determination Letter Issued | 3/9/16<br>3/22/16 | Yes | No |
| April 2016 | Permit application under review | | Yes | No |
| May 2016 | Permit application under review | | Yes | No |
| June 2016 | Permit application under review | | Yes | No |
| July 2016 | Building permit issued<br>No DCCA meeting in July | 7/18/16 | Yes | No |
| August 2016 | No DCCA meeting in August | | Yes | No |
| September 2016 | DCCA approached to file appeal | ~9/5/16 | Yes | No |
| | ZR-16 Effective Date | 9/6/16 | No | Yes |
| | Appeal filed | 9/16/16 | No | Yes |

## Standing

16. DCCA's (the Appellant's) mission is to promote and protect the interests of the residents of the National Capital, and especially those in the vicinity of Dupont Circle. (See Exhibits 2 and 53.)

17. DCCA's catchment area includes the location of the property, 1514 Q Street, NW. (See Exhibits 2 and 53.)

18. DCCA was represented at the Board hearing by a member of DCCA (and owner of the property next to the subject property) and the president of DCCA.

19. Numerous Board and court cases establish standing for citizens' associations such as the Dupont Circle Citizen's Association, including BZA 16935, Southeast Citizens for Smart Development (2003); BZA 18568, Shaw Dupont Citizens' Alliance (2013); BZA 17513 Citizens' Association of Georgetown (2006); BZA 17109A, Kalorama Citizens' Association (2003). (See Exhibit 53.)

20. Standing to submit an appeal is illustrated by Form 125, which is required in order to submit an appeal. The options for signatories (under Waiver of Fee - Status of Appellant) listed on the form include: "Citizens' Association/Association created for civic purpose that is not for profit." (See Exhibit 53.)

## The Property

21. The subject property is located at 1514 Q Street, NW (0194 0027) in the former R-5-B zone of the Dupont Circle Historic District. The Property is a single-family 3-story residence being converted into a 4-unit, 5-level condominium under building permit B1603105.

22. The existing condition of the property's lower level including historic windows and a grade-to-ceiling height of 5'4".

## Events Leading Up to Issuance of the Permit

23. The lower level windows were shortened, contrary to requirements of historic preservation guidelines and without permission from either the Historic Preservation Office or the Historic Preservation Review Board.

24. The ZA, in issuing his Zoning Determination Letter of March 21, 2016 (see Exhibit 2), allowed the following alterations, proposed as a way to reduce the distance between the adjacent finished grade and the ceiling of the lower level to less than 4' in an effort to achieve a cellar designation: Shortening the window openings by 2 and 1/3 courses (an action contrary to the Historic Preservation Guidelines but retroactively approved by Historic Preservation Office staff); raising the grade and sills in front of the shortened windows; and installing a lowered ceiling in the lower level.

25. Building plans that were associated with the Zoning Determination Letter:

a. Show the grade to ceiling height was to be modified to 3'11" as a result of shortening the windows and lowering the ceiling.

b. Depict a measurement from the adjacent finished grade to the top of the archway as 3'11". Photographic evidence for this same distance shows an actual measurement of 4'5".

c. Show a distance from the floor above to the ceiling in the lower level at 11 ½ inches. (Photographic evidence of the location of the lower level ceiling suggests that the actual distance is approximately 18".)

d. Show inconsistent ceiling clear heights in the interior of the lower level (e.g., both 8'8" and 7'10").

## The Permit

26. B1603105 was issued July 18, 2016. According to DCRA's PIVS site, the permit provides permission as follows: "4 story rear addition to a SFD to be converted to 4 unit condominium units. Full mechanical, electrical & plumbing systems. Building to be fully sprinkled. Rear deck. Existing permits: B1600130: extension of rear areaway. B1601692: repair and repoint front facade of building. B1602851: New conc.

27. The plans associated with B1603105 depict a measurement of 3'11" at the front grade to the ceiling (denoted as the top of the archway. Photo evidence indicates that this distance is 4'4". (See Exhibits 2 and 24.)

28. The clear ceiling height in the interior is shown on the plans associated with B1603105 to be both 7'10" and 8'8" and thus uncertainty on the ceiling height in relation to the adjacent finished grade. (See Exhibits 2 and 24.)

## Zoning Regulations: Definitions

29. The zoning regulations include the following definitions:

- *Basement*: that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade.
- *Cellar*: the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade.
- *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 sq. ft.) in area, nor kitchens in commercial establishments.

  The term "habitable room" is specifically referenced with regard to sight lines (11 DCMR 534.9) and as a factor for special exception from rear yard requirements in select zoning districts (11 DCMR 774.4).

- *Story*: the space between the surface of two (2) successive floors in a building or between the top floor and the ceiling or underside of the roof framing. The number of stories shall be counted at the point from which the height of the building is measured. For the purpose of determining the maximum number of permitted stories, the term "story" shall not include cellars, stairway or elevator penthouses, or other roof structures; provided, that the total area of all roof structures located above the top story shall not exceed one-third (1/3) of the total roof area.
- *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."

30. The zoning regulations do not define the terms "adjacent finished grade" or "areaway".

## Zoning Regulations: Density Formulas

31. The zoning regulations include the following provisions regarding density calculations:

    a. *Gross floor area*: the sum of the gross horizontal areas of the several floors of all buildings on the lot, measured from the exterior faces of exterior walls and from the center line of walls separating two (2) buildings. The term "gross floor area" shall include basements, elevator shafts, and stairwells at each story; floor space used for mechanical equipment (with structural headroom of six feet, six inches (6 ft., 6 in.), or more); penthouses; attic space (whether or not a floor has actually been laid, providing structural headroom of six feet, six inches (6 ft., 6 in.), or more); interior balconies; and mezzanines. The term "gross floor area" shall not include cellars and outside balconies that do not exceed a projection of six feet (6 ft.) beyond the exterior walls of the building. (Case 62-32, May 29, 1962)

    b. *Floor area ratio*: a figure that expresses the total gross floor area as a multiple of the area of the lot. This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot.

32. In BZA 17109, the Board and a subsequent court ruling[2] determined that habitability was not relevant for purposes of determining inclusion or exclusion of attic space from the density formula. This decision was based upon the following facts (see Exhibit 41):

    a. Zoning definitions do not define the term "attic" and Webster's Dictionary does not define "attic" in terms of its habitability;

    b. "Evidence of habitability" was not relevant to the definition of attic and its treatment in density formulas but, rather, "attic" space with structural headroom of more than 6'6" is included in the density formula, per the definition of GFA;

    c. Other regulations (e.g., housing code) set habitability, but at points above 6'6", thus further establishing that the measurement of 6'6" is not a proxy for habitability.

[2] Kalorama Citizens Association v. DC Board of Zoning Adjustment, 06-AA-486. 2007.

## Zoning Administrator Basement/Cellar Interpretations: 2007-2017

33. In 2007, the Zoning Administrator allowed a project at 1736 Corcoran Street NW to redefine its lower level basement to a cellar based upon completion of a two-part measurement and use modification that involved: (1) lowering the ceiling to achieve a less than 4' grade to ceiling measurement and (2) removing the apartment from the lower level space and converting that space into non-habitable use. (See Exhibit 41.)

34. The Zoning Determination Letter of March 22, 2016 for 1514 Q Street NW states that lowering a ceiling in order to achieve a less than 4' grade to ceiling measurement is "long-standing practice to allow changes to the bottom of the ceiling level to measure the cellar minimum dimension."

35. The Zoning Administrator has interpreted the adjacent finished grade to ceiling measurement in multiple cases to be located at various places, for example, outside of an areaway and at the top of a retaining wall embedded within a building.

36. In 2013, the Zoning Administrator testified before the BZA in Case 18615 on the location of the adjacent finished grade in situations with an areaway, a term not defined in the zoning regulations but understood to mean a lowering of the grade next to partially below grade space in a building in order to comply with light and air requirements in the building code. The Zoning Administrator, in BZA 18615, testified that an areaway is a "generally accepted five-foot width standard" intended to bring adequate light and air into a lower level unit in compliance with the building codes and that the Zoning Administrator has "never considered" an areaway as the adjacent finished grade.

## Under Roof

37. The Owner's Representative stated that the project was "under roof" July 31, 2016, 13 days after the date the building permit was issued on July 18, 2016, and that the owner had expended $780,000 in costs.

| Event | Days After Issuance of Building Permit |
|---|---|
| Permit Issued July 18, 2016 | 0 |
| Claim of Building "Under Roof" | 13 days later |
| 60 days to file appeal 3112.2(c) | 60 days later: September 16,2016 |

38. 11 DCMR 3112.2(a) states: "An appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision

complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier."

39. 11 DCMR 3112.2(b) states: "If the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, the following subparagraphs shall establish the latest date on which an appeal may be filed: (1) No appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof.

40. 11 DCMR 3112.2(c) states: "Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal.

41. The Owner's Representative stated that the project was "under roof" July 31, 2016, 13 days after the date the building permit was issued on July 18, 2016, and that the owner had expended $780,000 in costs.

## The Appeal

1. On September 16, 2016, Dupont Circle Citizens Association (DCCA, the Appellant) filed an appeal of DCRA's decision to issue building permit B1603105. DCCA contends that DCRA erred in allowing for a habitable lower level to be improperly deemed as a "cellar," thereby enabling this space to be excluded from Gross Floor Area (GFA) and the Floor Area Ratio (FAR) density formula. DCCA outlined three errors: (1) that the approved building plans fail to achieve a less than 4' adjacent finished grade to ceiling measurement and that the plans contain multiple inconsistencies in measurements; (2) that DCRA failed to follow the clear language in the zoning regulations that define a cellar based upon its measurement and its use; (3) that DCRA failed to apply the clear intent of the density formula to count habitable space in density calculations.

2. DCRA and the Owner's Representative filed motions to dismiss based upon both standing of DCCA and timeliness, contending that the 60-day filing period was established with issuance of the Zoning Determination Letter on March 22, 2016. DCRA and the Owner's Representative also argued that the habitable space language did not apply to the definition of a cellar or the density formula.

3. A Board hearing was convened on February 22, 2017, at which time the Board heard arguments on timeliness, standing, and the Appellant's appeal. DCRA and the Owner's Representative argued that the appeal was untimely, that the Appellant lacked standing, and argued against the merits of the alleged zoning errors as outlined by the Appellant. In turn, the Appellant and witnesses argued that the appeal was timely, that DCCA had standing, and that the merits of the appeal were self-evident based upon the wording of the zoning regulations as well as the precedent set in 2007, when the then-Zoning Administrator determined that cellar space could only be excluded from the Floor Area Ratio (FAR) density formula if the space was both (1) less than 4' from adjacent finished grade to ceiling and (2) converted from apartment space to non-habitable space.

## Conclusions of Law and Opinion

The Board 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.).) The decision or determination is DCRA's issuance of the Permit, issued under the 1958 zoning regulations.

Matters of timeliness in this case are established under the 1958 regulations, 11 DCMR 3112.2, given that events relevant to measurement of timeliness began prior to the effectiveness of ZR-16. Specifically, the Zoning Determination Letter was issued approximately 6 months before the effective date of ZR-16, while the building permit was issued nearly 2 months before ZR-16 became effective.

The only ZR-16 provisions that apply to this case relate to Board procedures in hearing this case, under Subtitle Y. As summarized below, the Appellant has met the test of timeliness, having filed its appeal within 60 days of issuance of the permit. Regardless, the irrelevance of the Zoning Determination Letter's issuance as a marker for timeliness is well-established by the Board in multiple cases and is further explained in this Order.

Regarding matters of standing, citizen association participation in Board proceedings has been well-established in numerous prior Board cases, as is explained in this document.

Finally, for alleged zoning errors, per 11 DCMR § 3119.2 and ZR-16 Subtitle 203, for all appeals and applications, the burden of proof shall rest with the appellant or applicant. In the appeal, the Appellant argues that the Zoning Administrator erred by issuing B1603105, which defines the lower level as a cellar and excludes this space from the FAR density formula.

The Board has issued multiple rulings concurring with the Zoning Administrator regarding the definition of a basement and a cellar based upon the measurement definition. However, the Board has never entertained a case challenging the definition of a "cellar" on the basis of the *habitability* of such space. The zoning regulations exclude cellars from the definition of a "habitable room," as do other definitions associated with habitation (e.g., apartments). In turn, density calculations are reflected in Gross Floor Area (GFA) and Story both exclude cellar space, which is defined based upon both its measurement in relation to grade and use as habitable rooms. The Board thus concurs with the Appellant on the errors identified, as is explained in detail below.

## Timeliness

The matter of timeliness of the Appellant's filing is clearly established, since the appellant followed established procedure and filed its appeal within 60 days of issuance of the building permit. Numerous Board and court decisions have verified that a building permit is the basis upon which timeliness is established. A building permit is plainly an appealable decision under the statute and the Board cannot interpret its regulations to conflict with the plain language of its governing statute. Viera v. D.C. Dep't of Employment Services, 721 A.2d 579, 582 (D.C. 1998)

Numerous cases were submitted to the record by DCRA to argue that both a building permit and a Zoning Determination Letter set the timeliness clock. A thorough reading of these cases reveals a consistent and clear pattern: Zoning Determination Letters are not the basis for establishing timeliness under the 1958 Regulations.

A Zoning Determination Letter shares none of the properties that a building permit does. Zoning Determination Letters, unlike building permits, do not convey authorization to proceed with a construction project; are not stamped or signed by the DCRA Director as such authorization; are not required in order to initiate a construction project; are not referenced in the zoning regulations; are not required to be posted on buildings in order to inform the public of authorization to proceed with construction; are not disseminated by DCRA to ANCs; and are not available to the public on a searchable database. Furthermore, Zoning Determination Letters typically include statements/conditions that are provisional and can be changed at a later date, since a building permit must still be obtained in order to proceed with a project.

A Zoning Determination Letter is also an uncertain basis for a party to bring an appeal, since an individual who secures a Zoning Determination Letter is under no obligation to pursue a building project under the scope of work agreed to in the Zoning Determination Letter. Any parties appealing a Zoning Determination Letter would thus incur the risk of time and money spent appealing a document that may very well change drastically between the issuance of the Zoning Determination Letter and the building permit, since the latter occurs only after DCRA's robust and official review process.

As for ZR-16 Subtitle Y, 302.5, the term "first writing," and DCRA's suggestions that timeliness is set in relation to the "first writing" of a Zoning Determination Letter, the matter is irrelevant to this case. The Zoning Determination Letter for this property was issued six months before ZR-16 became effective. The procedures described in ZR-16 do not apply retroactively to the previous time period.

Regardless, to the extent that "first writing" requires clarity, there is simply no evidence or indication in the public record that the Zoning Commission intended the term "first writing" to mean a Zoning Determination Letter, nor is there any Board precedent to assign such meaning. The Appellant was, in fact, very clear in that it filed an appeal of the "first writing" of the building permit, not the first writing of the Zoning Determination Letter.

Even if the Board were to apply ZR-16 Subtitle Y, 302.5 to this case, the appeal is still timely as the Appellant, DCCA, first became aware of the permit after its issuance on July 18, 2016 and filed the appeal within 60 days. It is undisputed that no DCCA Board member was a recipient of the Zoning Determination Letter in this matter.

There have been a handful of cases in which Zoning Determination Letters have been the basis for an appeal. These cases, however, do not establish timeliness in relation to issuance of Zoning Determination Letters. One such case, BZA 19274 (July 2016), was cited in DCRA's oral testimony during the February 22, 2017 public hearing of the current case. The transcripts of BZA 19274, demonstrate that Case 19274 did not involve a discussion of, or a determination that, a Zoning Determination Letter sets the clock for timeliness. Rather, the appellant in that case, ANC3D, simply chose to bring its appeal based on the Zoning Determination Letter. DCRA did not take exception to

that decision. In fact, DCRA raised the possibility that, by appealing the Zoning Determination Letter, specific zoning issues may have made the filing a premature action on the part of ANC 3D (see attached at the end of this document). Furthermore, DCRA commentary framed the Zoning Determination Letter as "more conceptual" and that "some of what appellant is concerned about are issues that would be more clearly established at the moment of the building permit itself." Finally, BZA 19274 was heard two months before both ZR-16 and its "first writing" provision became effective, again making the question of ZR-16 Subtitle Y, 302.5 irrelevant as a regulation with relevance to that case or the one before the Board.

As another example of the Board's finding that decisions prior to building permits are not the basis for setting the timeliness clock, the decision in *Basken v. D.C. Board of Zoning Adjustment*, 946 A.2d 356 (D.C. 2004), merits review. *Basken* concerned whether an appeal of a certificate of occupancy to the Board was timely when the underlying zoning issue had been decided in an earlier building permit. Thus, the earlier "decision" that triggered the deadline for filing a zoning appeal was the final building permit. As noted above, the permit is an obviously final and appealable agency decision that was formally noticed after its official issuance through its posting on the property and through written notifications to the ANC (not through informal communication to a neighbor).

The owner and DCRA are asking this Board to interpret ZR-16 Subtitle Y-302.5 to preclude the filing of a timely appeal of a building permit. Yet, such an interpretation is flatly contrary to the Zoning Act, D.C. Official Code 6-641 -07 (f). The plain language of the Zoning Act provides that appeals may be taken from "any decision . . . granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map." A building permit is plainly an appealable decision under the statute. The Board cannot interpret its regulations to conflict with the plain language of its governing statute. *Viera v. D.C. Dep't of Employment Services,* 721 A.2d 579, 582 (D.C. 1998)

In summary, it is clear that the 60-day timeliness clock does not start with issuance of a Zoning Determination Letter. As we summarize above, this has been exhaustively established by Board and court case precedent, from a clear reading of the zoning regulations, and a clear reading of DCRA's own position that a Zoning Determination Letter is not an official document authorizing a construction project.

Even if there were any remaining uncertainty, it is well-established that "[i]n situations where ambiguity exists regarding the date of an order or decision, this court has resolved the ambiguity in favor of the party seeking review." Askin v. D.C. Board of Rental Housing Commission, 521 A.2d at 675. See also In re D.R., 541 A.2d 1260, 1264 (D.C. 1988) ("In areas of administrative law, we have emphasized the importance of eliminating ambiguity, and, where we have found ambiguity, we have construed it against the government agency that drafted the language"). This ambiguity here must be resolved by finding that the building permit, rather than the Zoning Administrator's letter, is the pertinent final appealable order.

## Standing

Standing, likewise, is clearly established by the Appellant. DCCA is a citizens' association. Its bylaws state that DCCA's mission is to promote and protect the interests of the residents of the National

Capital, and especially those in the vicinity of Dupont Circle within the boundaries prescribed in the DCCA Articles of Incorporation. The DCCA's general purposes include, but are not limited to, efforts to preserve the historic, architectural, and aesthetic value of property and objects within said boundaries; to present views of the Association to government, public, private and other organizations; to engage in any lawful activity and to take legal action to protect the interests of the neighborhood as determined by the Association. Furthermore, the catchment area of DCCA encompasses the property location, 1514 Q Street, NW.

Numerous Board and court cases establish standing for citizens' associations such as the Dupont Circle Citizens' Association, including BZA 16935, Southeast Citizens for Smart Development (2003); BZA 18568, Shaw Dupont Citizens' Alliance (2013); BZA 17513 Citizens' Association of Georgetown (2006); and BZA 17109A, Kalorama Citizens' Association (2003). The appropriateness of the participation of citizens' association in such appeals is illustrated by the process of submitting an appeal, which requires completion of Form 125, which includes, as signatory options (under Waiver of Fee - Status of Appellant): "Citizens' Association/Association created for civic purpose that is not for profit."

## Under Roof

The claim that the project was under roof simply does not comport with the provisions under which "under roof" is calculated in relation to the 60-day time frame allotted for appeals to be brought before the Board. In this case, the building permit was issued July 18, 2016 and the project was alleged to be under roof 13 days later, on July 31, 2016, with $780,000 in costs having been incurred. However, ZR-16 allows for a **60-day** appeal filing timeframe under 11 DCMR 3112.2(a). To endorse the "under roof" claim in this case would effectively invalidate the timeliness provision and tie it entirely to a claim of "under roof" status. This is simply impractical and contrary to the clear intent of the zoning regulations.

Further, 11 DCMR 3112.2(c) requires that, notwithstanding provisions (a) and (b), appellants have a minimum of 60 days to appeal. It reads: "Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal."

## Zoning Errors

The Board has heard multiple cases dealing with the basement/cellar rule in terms of application of its measurement (e.g., perimeter wall versus grade plane method, location of the adjacent finished grade). However, this is the very first case in which the question before the Board is whether the zoning regulations define "cellars" and "basements" based upon both measurement (adjacent finished grade to ceiling) **and** use (i.e., habitability) for purposes of inclusion or exclusion of such spaces in density formulas.

This is a fundamental question as determinations of density are central to the very purpose of the zoning regulations, which is to ensure quality of life and of built structures.

The information presented in this case documents that, as recently as 2007, the definition of a cellar was based upon both measurement and use considerations. The wording of the zoning

regulations has not changed since then. The only change is the Zoning Administrator's interpretation. The Board is thus being asked to rule on the Zoning Administrator's recent, 10-year history of interpreting the meaning of a cellar and its application in density calculations solely on the basis of its measurement.

In turning to the actual zoning regulation text, the Board finds that the plain meaning of the definitions for "cellar" and "habitable room" and "apartment" are conclusive. Both measurement (cellar) and use (habitable room and apartment, neither of which can exist in a cellar, according to their definitions) are relevant and necessary in defining a cellar and the treatment of such space in density formulas. To ignore such clear and plain logic would open the door to such absurdities, for example, as authorizing location of apartments not only in cellars but also laundries, pantries, bathrooms, hallways, and other such spaces.

Please note that policy questions about the ruling's impact on affordable housing, which were introduced into the record during the hearing, are beyond the Board's purview, as its mandate is to rule on interpretations of the zoning regulations. However, it is notable that DCRA introduced information into the record during oral testimony, alleging that such partially below grade spaces expand access to affordable housing. DCRA did not demonstrate that such partially below grade spaces are, in fact, offered as either "affordable housing" or units that are subject to "Inclusionary Zoning." In fact, unit prices for such spaces (including that at 1514 Q Street NW) typically are offered at prices well above affordable housing benchmarks.

## Measurement Errors

The Board was asked to dismiss the appeal on the basis of measurement errors, which were allegedly not brought forth in the initial prehearing statement. The Board finds that this part of the appeal is justified in being raised in the revised prehearing statement filed November 23, 2016, as the accuracy of measurements on plans associated with B1603105 was raised during the March 8, 2016 meeting with the owner of 1514 Q Street NW and DCRA officials but not resolved. Furthermore, the Appellant was unsuccessful in attempts to obtain plans associated with the approved permit and had no knowledge that the plans associated within the March 2016 Zoning Determination Letter were, in fact, the final measurements to rely upon.

As for the measurements in approved plans, the measurement from grade to "cellar" ceiling of 3'11" is in dispute and may actually be 4'5". While the Zoning Administrator could occasionally rationalize such an error by claiming reliance on the submitted plan's accuracy, that is not true in this situation. In this case, representatives of DCRA and the Zoning Administrator went to the site to perform their own measurements in order to verify the actual measurements. The Zoning Administrator himself used the photographs of this measurement as his own exhibit in his Zoning Determination Letter. If the Zoning Administrator had accurately compared the submitted plans to the actual measurements, he would have clearly seen that the two conflict. Specifically, the actual height of the ceiling on the plans, as confirmed by the DCRA/Office of Zoning Administrator on-site measurement, was 4'5". Accordingly, these plans could in no way be approved as containing a cellar on the sole basis of measurement from adjacent finished grade to ceiling.

Finally, at the February 22, 2017 hearing, Counsel for DCRA characterized the measurement inconsistencies as a "clerical error" and a "scrivener's" error. Such an acknowledgement, and the

contention that cellar definitions are solely based on being less than 4' from adjacent finished grade to ceiling, compels the Board to step in where DCRA did not and fully allow for adjudication of the matter of the accuracy of these measurements.

Multiple measurement inconsistencies are evident from an examination of the approved plans and photographic evidence. These include:

a. Show the grade to ceiling height was to be modified to 3'11" as a result of shortening of the windows and lowering of the ceiling.

b. Depict a measurement from the adjacent finished grade to the top of the archway as 3'11". Photo evidence for this same distance shows a measurement of 4'5".

c. Show a distance from the floor above to ceiling in the lower level at 11 ½ inches. (Photographic evidence depicting the location of the lower level ceiling suggests that the actual distance is approximately 18".)

d. Show inconsistent ceiling clear heights in the interior of the lower level (e.g., both 8'8" and 7'10").

## Error in Not Following Zoning Regulation Definitions and Density Formula

The central issue in this case is what constitutes the definition of a "cellar" versus a "basement" in the zoning definitions and, in turn, how such space is included or excluded in density formulas. In applying the definitions, the critical questions are: (1) why there are two distinct defined types of partially below grade space, and (2) what are the reasons for, and real world implications and effects of, these two separate classifications of space in density formulas.

We analyze this issue as follows.

***Cellar and Basement Definitions***

There 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. A cellar, being uninhabitable, is excluded from the definitions of GFA, which is used to calculate FAR. A basement, on the other hand, is habitable and is included in GFA. Basic principles of statutory construction call for defined terms to have meaning and their distinctions to be purposeful. The Law of Surplusage states that the regulations should not be interpreted so as to render the words meaningless. By excluding an entire floor of habitable space from GFA and FAR by simply relabeling habitable space as a "cellar," the Zoning Administrator has rendered meaningless the definitional difference between a basement and a cellar. He is simply ignoring the definition of "cellar" that is contained within the "habitable room" definition.

***Practical Meaning of Cellar Versus Basement***

In the case before the Board, the partially below grade residential condominium dwelling unit consists of an entire floor of 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. Instead, it is a basement, and is intended for use as a residence. Thus, its floor area must be counted in the calculation of maximum allowable GFA and FAR in the R-5-B district.

The Appellant does not contest the assertion that partially below grade space can be habitable. This is routinely done by both the measurement (greater than 4') as well as ensuring that conditions meet building code habitability standards for adequate light and air, which—incidentally—results in an adjacent finished grade to ceiling height of greater than 4'. However, assigning the label "cellar" to an *entire floor of habitable rooms* in order to allow its exclusion from FAR is a gross misapplication of the zoning regulations' clear intent. The logic is clear: space that is defined as a cellar should function as a cellar. Space that functions as habitable space should be included in the density formulas, even when it is partially below grade.

***Interrelatedness of Definitions***

The definition of a "cellar" does not include the term "habitable." This is not, however, cause to dismiss the claim that habitability is irrelevant to the definition of a cellar. To the contrary, the zoning definitions are interrelated and include countless instances in which cross-referencing is required in order to fully apply their intent. This is not a matter of conflating the definitions (as DCRA asserts) but, rather, understanding their meaning within the context of related definitions and regulations.

To illustrate, density definitions require one to look at many other definitions in order to gain an understanding of their meaning and to appropriately apply them in zoning decisions. There are many terms in the definition of GFA that have separate definitions. Among these are the definitions for building, mezzanine as well as cellar and basement. For FAR, one must turn the page in order to cross-reference the definitions of GFA, Lot Occupancy (called "area of the lot" in the FAR definition), and building. In each case, the reader must turn to each of these definitions, as presented within the definitions for GFA and FAR, to gain a full appreciation of their meaning and—most importantly—to apply these definitions to density formulas.

With respect to the definition of " cellar," the word is defined once and then used 38 additional times in the 1958 zoning regulations, in order to apply its meaning in density formulas and usage requirements for buildings. This reflects the practical structure of the zoning definitions and specific regulations, which are interdependent and rely upon cross-referencing to fully apply them. To conclude that the term "cellar" must include all of these cross-references in order to fully convey the meaning of the term would require an unwieldy definition of a "cellar" that not only included its measurement but also a laundry list of how cellar is applied to the meaning of habitable room, GFA, FAR, as a story, in the WH and DD Overlay Districts; in requirements for parking space requirements, loading berths, loading platforms, and service/delivery loading spaces; and with regard to the location of bicycle parking. In summary, "cellar" and "basement" are among many other terms that are initially defined and then cross–referenced elsewhere in the zoning regulations.

***Zoning Administrator Cellar Decisions Changed Within Last Decade***

The history of the Zoning Administrator's determinations on the matter of basements and cellars in density calculations merits examination. The Appellant provided evidence of multiple cases of the current Zoning Administrator's rulings that excluded cellars from density formulas even when they were comprised of habitable living space. It is not clear that the Zoning Administrator endorses the term "habitable cellar," however, since these approvals use the phrase "partially below grade dwelling units."

The Owner's Representative presented oral testimony stating that the Zoning Administrator has, during the entire history of the 1958 zoning regulations, excluded cellars from density formulas even when they are comprised of living space. Documentation of this claim was not presented, however. In contrast, the Appellant presented clear evidence that, as recently as 2007, a prior Zoning Administrator *only* allowed lower level space to be defined as a cellar and excluded from FAR when the project both lowered the ceiling inside to reduce the grade-to-ceiling measurement to less than 4' *and* simultaneously converted a lower level apartment to a common room that was no longer definable as a habitable room. In summary, contrary to the Zoning Administrator's statements, there is not, in fact, a "long-standing precedent" for the Zoning Administrator to allow so-called habitable cellars.

No Zoning Administrator determinations or building permits prior to 2007 were introduced into the record to document a longer time frame for basement/cellar interpretations. The Appellant speculates that recent development pressures in the District of Columbia may have created new incentives for property owners to seek cellar determinations for occupied lower levels in order to enable additional livable and marketable square footage on upper floor or rear additions. The Board cannot rule on the rationale for the Zoning Administrator's changed interpretation since 2007. The Board must do what it is charged with doing: interpret the plain meaning of the zoning regulations.

***Application of Habitable Room in Other Sections in the Regulations***

Evidence presented by DCRA and the Owner's Representative argued that the appeal was a confusing misinterpretation of the application of "habitable room" in zoning definitions and that the regulations only explicitly discuss habitable space in two distinct areas. One area, they maintained, deals with "the distance of penetration of sight lines into habitable rooms" (11 DCMR 534.9), while another deals with habitability as a factor for special exception from rear yard requirements (11 DCMR 774.4). These references do not deal with the matter before the Board, however, which is what constitutes the definition of a cellar in relation to the definition of "habitable room" and the treatment of such spaces in density formulas. As noted above, the zoning regulation definitions rely upon cross-referencing specific terms in order to fully explicate their application in various situations. As such, the Board concludes that the discussion of where habitable room is referenced in the zoning regulations is germane to this case.

Also raised in this case was the argument that habitable cellars are allowable. This is evidenced by Inclusionary Zoning language that was recently approved by the Zoning Commission, which introduces an entirely new term: cellar dwelling units. While the case before us does not involve Inclusionary Zoning, the subject merits review. In ZC 04-33G, the Zoning Commission approved

language to allow for occupancy of " cellar dwelling units" and to include such space in the calculation of minimum set-aside requirements for Inclusionary Zoning. In other words, habitable space is to be considered and counted in density formulas, which is precisely what density formulas are designed to do when distinguishing basement space from cellar space.

In putting this new allowance into practice, DCRA's Certificate of Inclusionary Zoning Compliance Application (Box 3) counts cellar space as part of Inclusionary Zoning compliance. This demonstrates that special circumstances have been created for allowing for space that can be defined as a "habitable cellar"—a phrase otherwise not defined in the zoning regulations—and that such space is to be counted when tabulating total residential GFA in relation to Inclusionary Zoning compliance. If "habitable cellar" space is counted for Inclusionary Zoning compliance, it should be counted in all other development density formulas as well.

***Attic Argument is Not Precedent***

Arguments were also presented that the relevance of habitability has been fully vetted by the Board and a subsequent court ruling in a case dealing with "attics." In that case, BZA 17109 and a follow-up court ruling, both the Board and Court determined that the definition of habitable room was not relevant to determining an attic's inclusion/exclusion in FAR. However, the particulars of BZA 17109 cannot be applied to the cellar discussion as both the Board and the Court concluded that the inclusion or exclusion of attic space in the density formula was solely a matter of whether structural headroom was greater than 6'6", which is precisely what the GFA definition states.

The Board and Court also deemed habitability to be irrelevant, as the definition of an "attic" in Webster's Dictionary (where one must turn for terms undefined in the zoning regulations) does not reference habitability. In contrast, the zoning regulations do contain a definition for a "cellar," which is a non-habitable space according to the "habitable room" definition. Furthermore, there is no equivalent distinction for an "attic" as occurs with the two types of partially below grade space (i.e., basement and cellar), which are defined in the zoning regulations. In conclusion, the attic definition is an apples and oranges comparison. It simply does not apply to the cellar definition.

# Attachment – Transcript Excerpts from BZA 19274

**BZA 19274: Case Does Not Address Timeliness in Relation to a Zoning Determination Letter**

In BZA 19374, during the Board's discussion over whether a Zoning Determination Letter was the appropriate basis for establishing timeliness, DCRA Counsel Max Tondro referenced BZA 19274 (July 2016).

A review of the transcripts from BZA 19274 (cited below) makes clear that this case did not debate nor establish that the issuance of a Zoning Determination Letter was the basis for establishing timeliness.

In BZA 19274, the appellant, ANC3D, made the choice to file an appeal of a Zoning Determination Letter, taking the position that the property owner was seeking a Zoning Determination Letter in order to enable them to move forward with the project without a zoning variance. The ANC believed that this action by the Zoning Administrator usurped the authority of the Board, the only body authorized to grant a variance. ANC3D therefore made the decision to appeal the Determination Letter instead of waiting for issuance of a permit.

* * *

Relevant transcripts from the hearing on BZA 19274 are presented below and include statements by DCRA counsel Tondro that a determination letter is "conceptual" and that appellants "chose to appeal the zoning determination letter, which is their absolute right to do so."

"MR. SMITH [ANC3D]: ANC 3D is here today because we believe a March 24th, 2016 determination letter from the Zoning Administrator concerning parking requirements at the Spring Valley Shopping Center has the effect of granting a variance at only the BZA is empowered to grant under the city's Zoning Regulations. We object to this decision on two grounds. First, that the determination is inconsistent with Section 2100.10A of the Zoning Regulations, because the ZA does not require the property owner to provide parking consistent with the number of spaces when the property was designated in July 1989, as an historic landmark."

Page 10, lines 5-17, Board of Zoning Adjustment Public Meeting & Hearing of July 6, 2016 : Appeal No. 19274: Appeal of ANC 3D

"MR. TONDRO: However, I do want to make sure that we're clear on one thing, and that is that the issue that's being appealed here, the decision by the Zoning Administrator, **is that determination letter which by definition is sort of a more conceptual stage in the process. In other words, it's not a building permit where you have absolute final details.** [Emphasis added.] I just want to make sure that we're all clear on that because I think some of what appellant is concerned about are issues that would be more clearly established at the moment of the building permit itself. **But they chose to appeal the zoning determination letter, which is their absolute right to do so, but I just want to make sure that we're clear that it is therefore the conceptual aspects of it that we're basically talking about here**." [Emphasis added.]

Page 22, lines 3-17, Board of Zoning Adjustment Public Meeting & Hearing of July 6, 2016 : Appeal No. 19274: Appeal of ANC 3D

“MS. BUTANI-D'SOUZA: I have one other question. At the start of your presentation you mentioned that the Zoning Administrator was presented with the conceptual plan, and that they provide a determination letter based on the conceptual plan, but that I believe what you were saying is that there would be a greater review, more in depth review when the building permit was actually applied for, which hasn't happened yet. Is that correct?

MR. TONDRO: Yeah. The point was, I think I was responding to the appellant’s raising of issues that I think I can understand why they're important to the appellant. But I don't think they're relevant right now, which is what was said or not said before HPRB and the whole issue of the basement being subject to Army Corps of Engineers. Review that subject to the Army Corps of Engineers, that’s not what the Zoning Administrator faced. The Zoning Administrator was faced -- this is a project -- does this comply? Does this aspect of the project comply or not comply. That was what the zoning determination letter responded to. It's very specific in terms of responded to this issue of, what were the number of parking spaces required, and the bicycle parking spaces required? That's all that it dealt with.

In terms of the broader project, if there are any other allegations about issues or aspects of compliance with the Zoning Regulations, that was not something that the Zoning Administrator was requested to weigh in on to make a determination on. Those issues will come up, however, when there will be a building permit and then there will be plans and at that point then the Zoning Administrator will have to review that again.”

Pages 42-43, Board of Zoning Adjustment Public Meeting & Hearing of July 6, 2016: Appeal No. 19274: Appeal of ANC 3D

**From:** **Steingasser, Jennifer (OP)** jennifer.steingasser@dc.gov
**Subject:** RE: ZR-16 Provision
**Date:** February 2, 2017 at 8:53 AM
**To:** Alan Gambrell gambrell@aol.com

JS

Alan,
I don't have any insight into this section and am not sure how the section is administered. I suggest asking Cliff Moy, the BZA secretary - he may know more about it.

clifford.moy@dc.gov

Jennifer Steingasser • Deputy Director
Development Review and Historic Preservation
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Metro station: Waterfront on the Green line.

-----Original Message-----
From: Alan Gambrell [mailto:gambrell@aol.com]
Sent: Monday, January 30, 2017 1:37 PM
To: Steingasser, Jennifer (OP)
Subject: ZR-16 Provision

Good afternoon: I'm writing to see if you can provide any insights on the meaning of the below provision. Is there any ZC discussion, task force discussion or other information to explain what the intent is of this new provision? Let me know if you want additional information regarding the nature of my request for this clarification.

Section Y-302.5. "A zoning appeal may only be taken from the first writing that reflects the administrative decision complained of to which the appellant had notice. No subsequent document, including a building permit or certificate of occupancy, may be appealed unless the document modifies or reverses the original decision or reflects a new decision."