BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Dupont Circle Citizens Association

Appeal No. 19374
Hearing Date: December 14, 2016

OWNER'S PREHEARING STATEMENT IN OPPOSITION TO APPEAL

I. INTRODUCTION

This Statement is submitted on behalf of 1514 Q LLC, the owner of the property which is the subject of this appeal. The owner is automatically a party to this appeal, per Sub.Y, Sec. 501.1(c). For the reasons stated more fully below, this Appeal is without merit, and should be denied.

II. ALLEGATIONS OF THE APPEAL

This appeal was filed by the Dupont Circle Citizens Association (DCCA or Appellant) on September 16, 2016. The appeal alleges errors by the Zoning Administrator in the issuance of the Building Permit for 1514 Q Street, NW on July 18, 2016. The DCCA Prehearing Statement filed on that date (Ex. 2 of the record) alleges that the Zoning Administrator "did not properly apply the definition and use of a cellar as it relates to habitability and calculation for FAR density compliance". In that Statement, DCCA specified two errors:

a) Section 199.1 of the Zoning Regulations "defines a cellar as non-habitable space". The Zoning Administrator incorrectly classified the lower level dwelling unit as a cellar, because it contains habitable space.

b) The Zoning Administrator's approval "violates Section 402.4 regarding maximum allowable FAR in a R5-B zone".

More than two months later, on November 23, 2016, DCCA filed a "Revised DCCA Prehearing Statement" (Ex. 24, 24A and 24B), in which they alleged for the first time a new additional claim in their appeal. This new additional claim, identified as "Error 1" on page 3 of Ex. 24, is that "the permit and plans fail to achieve cellar measurement". In their "Error 1", DCCA challenges the ceiling height measurements included in the Zoning Administrator's March 21, 2016 administrative decision. To support this new claim, DCCA attaches as Exhibits 1 and 2 the Zoning Administrator's March 21, 2016 administrative decision, and portions of the exhibits to that administrative decision.

The Zoning Administrator's March 21, 2016 administrative decision was published on the Zoning Administrator's website on March 22, 2016 (see Exhibit A attached hereto). The Zoning Administrator also sent his administrative decision to a number of individuals in the community on March 21, 2016 (see attached Exhibit B). There was widespread knowledge of this matter in the community prior to that time, dating back to November 2015 (see letters, email exchanges and meeting notes attached as Exhibit C).

III.
THE NEW ADDITIONAL CLAIM IN THE APPEAL SHOULD BE DISMISSED

The new additional claim in the "Revised DCCA Prehearing Statement" is not properly before the Board for several separate and independent reasons, and should be dismissed. The Zoning Commission's new regulations, which became effective September 6, 2016, contain detailed procedural rules in Subtitle Y governing BZA appeals. Specifically:

a) 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". This new additional claim is not properly before

the Board. It was not included in the Form 125-Appeal nor identified in the statement of appeal that was filed on September 16, 2016.

b) 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". DCCA improperly amended its appeal. There is no allegation that the Zoning Administrator impeded the appellant's ability to identify this issue. The Zoning Administrator's widespread dissemination and publication of his administrative decision demonstrates the contrary.

c) Sub. Y, Sec. 302.5 states that "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..., may be appealed unless the document modifies or reverses the original decision or reflects a new decision" (emphasis added). The appeal must be filed within 60 days of the date of the administrative decision. Per Sub. Y Sec. 302.6, that 60 day period may only be extended if the appellant demonstrates that there are exceptional circumstances outside of the appellant's control and that could not reasonably be anticipated that "substantially impaired the Appellant's ability to file the appeal", and "the extension of time will not prejudice the parties to the appeal". This appeal was filed almost four months after the 60-day deadline for an appeal of the Zoning Administrator's March 21, 2016 administrative decision, and the new claim was not raised until two months after this appeal was filed. This new additional claim squarely challenges the measurements contained in the March 21, 2016 administrative decision. There was no demonstration of

exceptional circumstances outside of the appellant's control that could not have reasonably been anticipated, that substantially impaired DCCA's ability to file a timely appeal of that March 21 administrative decision.

The appeal filed on September 16, 2016 challenges the July 18, 2016 issuance of the building permit, and claims timeliness based upon that date. The Form 125-Appeal (Ex. 1 of the record) and Prehearing Statement (Ex. 2 of the record) mention only the July 18, 2016 building permit, and only the two allegations of error listed in Section II above. Neither Form 125 nor the Prehearing Statement at Exs. 1 and 2 of the record challenge the ceiling height measurements or the Zoning Administrator's rationale for adopting those measurements, as set forth in his March 21, 2016 administrative decision, which was widely disseminated to the community on that date, and published on his website on March 22, 2016.

The Zoning Administrator's March 21, 2016 administrative decision is in accordance with his long-standing interpretation and application of the Zoning Regulations. Even if this issue was properly before the Board, his March 21, 2016 administrative decision should be upheld.

For any or all of the above reasons, this new additional claim in the appeal, specifically "Error 1" of Ex. 24, and Exhibits 24A and 24B of the record, is not properly before the Board, and should be dismissed.

IV.
THE REMAINDER OF THE APPEAL IS WITHOUT MERIT AND SHOULD BE DENIED

The remainder of the appeal alleges two errors by the Zoning Administrator:

a) The Zoning Administrator incorrectly classified the lower level dwelling unit as a cellar, because DCCA claims that Section 199.1 of the Zoning Regulations "defines a cellar as non-habitable space".

b) The Zoning Administrator's approval "violates Section 402.4 regarding maximum allowable FAR in a R5-B zone".

DCCA's argument in Exs. 2 and 24, using their own words, can be summarized as follows:

- 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.

DCCA's claims are without merit, and the appeal should be denied.

A. The Lower Level Space at 1514 Q Street Is Properly Classified As A Cellar

The Building Permit was properly issued based upon the classification of the lower level as a cellar, which is excluded from the 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".

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 administrative determination to exclude the cellar level from the FAR calculation is based upon a long-standing interpretation and application of the Zoning Regulations.

B. The Zoning Regulations Do Not Prohibit Habitable Space on the Cellar Level of a Dwelling

In their Revised Prehearing Statement at Ex. 24, p. 4, the Appellant invents "a new 'two-part definition of a 'cellar'" as "a non-habitable room where the ceiling of the space is less than 4' above adjacent finished grade". This is not the published definition of a "cellar" in Section 199.1, nor is the Appellant's new definition of a "cellar" consistent with the long-standing interpretation and application of the Zoning Regulations.

The definitions of "cellar" and "habitable room" are two separate and independent definitions that have been in the Zoning Regulations since 1958 (see attached Exhibit D). Section 199.1 of the 1958 Zoning Regulations (ZR58) states that "when used in this title, the following terms and phrases shall have the meanings ascribed". 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."

The definitions in Section 199.1 are used to define the terms used in the substantive portions of the zoning regulations. 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. These are 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. See attached Exhibit E. Nowhere else in the substantive regulations in ZR58 is the term "habitable room" used.

In order to determine what the phrase "habitable rooms" in Sections 534.9 and 774.4 means, one looks to Section 199.1-- "When used in this title, the following terms and phrases shall have the meanings ascribed". It would be illogical to interpret the regulations to use one defined term to define another defined term, as the Appellant is advocating. There is nothing in the substantive regulations of ZR58 that prohibits a habitable room on the cellar level of a dwelling.[1]

C. The Inclusion Of A Habitable Room In A Cellar Level Does Not Convert That Level To A Basement

Appellants claim that because the cellar level includes a habitable room, it "no longer functions as a cellar", and therefore no longer fits their invented "two-part definition of a 'cellar'". Consequently, Appellant continues, that space must be a basement, and counted in FAR. This argument defies logic.

The definition of "basement" in ZR58 is 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

[1] Of course, a cellar level dwelling unit must also comply with other applicable codes, including the Building Code. DCRA's issuance of the Building Permit is evidence of DCRA's satisfaction that the cellar level dwelling unit in this case complies with the applicable codes.

grade". A lower level of a dwelling that does not meet this ceiling height definition is not a basement; it is a cellar. Contrary to the Appellant's claim, the inclusion of a habitable room in a cellar does not somehow turn it into a basement.

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. There are no arguments that Appellants can put forward to change that simple truth.

D. The Zoning Administrator, The Zoning Commission, And The Board Of Zoning Adjustment Have All Recognized That Dwelling Units May Be Located In The Cellar

1. Office of the Zoning Administrator--The Zoning Administrator has over the years approved countless projects that include habitable rooms in cellars. Mr. LeGrant will address that in his presentation to the Board in this appeal.

DCRA has also published a Certificate of Inclusionary Zoning Compliance Application, which includes requests for information in Boxes 23 and 24 regarding gross floor area and net floor area for residential units in the cellar. (See Exhibit F). The Instructions and General Information are also included, where this issue is discussed on page 3.

2. Zoning Commission - A cursory review of several recent Zoning Commission actions shows that the Commission has recognized that dwelling units may be located on the cellar level:

a. ZC Case No. 04-33G—Notice of Proposed Rulemaking—Inclusionary Zoning—Amendments to Subtitle C, Chapter 10.

The Notice of Proposed Rulemaking was published in the DC Register on September 9, 2016. The Commission voted to take final action at its public meeting on October 17, 2016. The Final Order has not yet been issued.

The following language appears on p. 10 of the Notice of Proposed Rulemaking, which is attached as Exhibit G, and includes Section 1003.9:

1003.9 **A inclusionary development's entire residential floor area including dwelling units located in cellar space or enclosed building projections that extend into public space, shall be included for purposes of calculating the minimum set-aside requirements of Subtitle C §§ 1003.1 and 1003.2**

Also attached as Exhibit H are relevant portions of the transcripts of the April 14, 2016 public hearing and the July 20, 2016 special public meeting for this case. On page 76 of the April 14 transcript is a portion of the testimony of a representative of the Kalorama Citizens Association, where he raises the very same issue that the Appellant raises in this appeal—that "allowing habitable rooms to be located in cellars is in plain contravention of the definition of habitable room in Section 199.1". The Commission acknowledged receipt of that testimony, but no changes to that section were made in the Notice of Proposed Rulemaking. Nor were any amendments to Section 1003.9 made in the Commission's final action vote on October 17, 2016.

b. ZC Order No. 15-33—The following appears in Page 8, Paragraph 30(c) of this PUD Order, under the heading of Public Benefits and Amenities:

> *"Housing & Affordable Housing (*§ 2403.9(f)). The project results in the creation of new housing and replaces industrial uses in an area designated for residential use and consistent with the goals of the Zoning Regulations and the Comprehensive Plan and Future Land Use Map. The project will replace existing non-residential uses with up to 123.549 square feet of

gross floor area as well as additional floor area in both the penthouse and cellar dedicated to residential use." (emphasis added).

Relevant pages from that PUD Order, and pages A501 and A506 of the approved plans showing the cellar units, are attached as Exhibit I.

c. ZC Order No. 06-34A—Attached as Exhibit J is the PUD Modification Order and relevant pages from the approved original plans and the approved modification plans, showing 16 cellar-level dwelling units.

3. Board of Zoning Adjustment — A cursory review of BZA Orders includes the following cases where cellar dwelling units were included as part of the approved project:

a. Order No. 18615—This case was an appeal of the Zoning Administrator's approval of building permits for the construction of an apartment building. One of the issues of concern was the inclusion of dwelling units partially in the cellar level and therefore excluded from the FAR calculation. This Board denied the appeal and upheld the Zoning Administrator's method of measurement of FAR and the approval of portions of 17 dwelling units in the cellar level, and excluded from the FAR calculation. The Board's Order and a portion of the approved plans showing the cellar level units are attached. (See attached Exhibit K at Pages 6 and 7, and cellar level plans).

b. Order No. 19127—The Summary Order and a portion of the approved plans showing the site plan and the sections indicating 11 cellar-level dwelling units (see attached Exhibit L).

c. Order No. 19035—The Summary Order and a portion of the approved plans showing the cellar level dwelling unit floor plans (see attached Exhibit M).

d. Order No. 18814—The Summary Order and a portion of the approved plans showing two cellar level dwelling units (see attached Exhibit N).

e. Order No. 18785—The Summary Order and a portion of the approved plans showing seven cellar level dwelling units (see attached Exhibit O).

f. Order No. 18724—The Summary Order and a portion of the approved plans showing nine cellar level dwelling units (see attached Exhibit P).

g. Order No. 17679-C—The Summary Order and a portion of the approved plans showing eight cellar level dwelling units (see attached Exhibit Q).

h. Order No. 17111-A —This Order approves modifications to the dwelling units in the cellar level. (see p. 2 of attached Exhibit R).

E. Adoption Of The Appellant's Position Would Have Negative Consequences Across The District

The Board's 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.

It is well-known, and the Board can take official notice, that dwelling units in the lower levels of residential buildings are less expensive, on a per square foot basis, than upper level units, whether for sale or for rent, and even in instances when Inclusionary Zoning is not involved. The Board's reversal of the long-standing interpretations of the Zoning Administrator, the Zoning Commission, and this Board, allowing 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.

The inability to devote cellar level space to "living, sleeping, or kitchen facilities", as the Appellant advocates, would also have other city-wide impacts. There is no city repository of information that keeps track of the number 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". But the Board can take official notice of the fact that there are likely hundreds, if not thousands, of these cellar level "living" rooms in dwellings throughout the city. 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.

F. The Appellant's Reliance On The Building Code And The Housing Code Are Specious

Similar to the long-time approval of dwelling units in the cellar level by the Zoning Administrator over the years, the Building Permit Branch of DCRA and its predecessor agencies have historically approved habitable rooms in the cellar level when they meet the applicable code requirements. The Appellant's position on this building permit application is contrary to a long history of agency approvals by both the Office of the Zoning Administrator and the agencies responsible for Building Code and Housing Code compliance in the District.

G. The Board's Denial Of This Appeal Would Be Consistent with Board Precedent And With The Law

"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. The Zoning Commission and the 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 narrow reading of the definition of "habitable room" 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 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.

In 1965, the Board heard Appeal No. 8038 by the Citizens Association of Georgetown challenging the Zoning Administrator's interpretation to allow a tire recapping use in a C-M-2 zone. The Board's logic in that case is directly applicable to the Zoning Administrator's allowance of a cellar level habitable room in this case:

> "We believe it significant that tire recapping has been considered a C-2 service-type operation since 1958, that those charged with the enforcement of the

> Zoning Regulations have uniformly construed such regulations as not prohibiting tire recapping in most of the C Districts,* and that numerous permits have been issued by the city for such purpose. We believe it to be a general rule of statutory construction that in any doubtful case great weight shall be given to contemporaneous construction of regulations by the officials charged with their enforcement. This is particularly true where the administrative construction has been accompanied over a period of years by the silent acquiescence of the legislative body."

In this case, the Zoning Administrator, as the official charged with zoning enforcement, has "uniformly construed" the zoning regulations to allow cellar level dwelling units, and has issued "numerous permits" for that purpose. The Board, as the body to which appeals of Zoning Administrator decisions are taken, has also approved projects that include cellar level dwelling units. The Zoning Commission, as the "legislative body" for the Zoning Regulations, has not "silently acquiesced" in this interpretation; rather, they have embraced this interpretation of the Zoning Regulations in their rulings as well.

V.
EXHIBITS

Exhibit A – Zoning Administrator's March 21, 2016 administrative decision.

Exhibit B – Zoning Administrator's two memos of March 22, 2016 to Community Members.

Exhibit C – Letters, Email Exchanges and Meeting Notes.

Exhibit D – May 12, 1958 Zoning Regulations – Definitions of "cellar" and "habitable room".

Exhibit E – ZR58, Sections 534.9 and 774.4.

Exhibit F – DCRA Certificate of Inclusionary Zoning Compliance, and Instructions.

Exhibit G – Z.C. Case No. 04-33, Notice of Proposed Rulemaking

Exhibit H – Z.C. Case No. 04-33, transcripts of April 14, 2016 public hearing and July 20, 2016 special public meeting.

Exhibit I – PUD Order No. 15-33, and pages A501 and A506 of the approved plans showing the cellar units.

Exhibit J – PUD Order No. 06-34A, and relevant pages from the original approved plans, approved modification plans showing 16 cellar level units.

Exhibit K – Order No. 18615 – Appeal Denial Order, and relevant pages from the approved plans showing the cellar level units.

Exhibit L – Order No. 19127 — Summary Order and portion of the approved plans showing the site plan and the sections indicating 11 cellar-level dwelling units.

Exhibit M – Order No. 19035 — Summary Order and a portion of the approved plans showing the cellar level dwelling unit floor plans.

Exhibit N – Order No. 18814 — Summary Order and portion of the approved plans showing two cellar level dwelling units.

Exhibit O – Order No. 18785 — Summary Order and portion of the approved plans showing seven cellar level dwelling units.

Exhibit P – Order No. 18724 — Summary Order and portion of the approved plans showing nine cellar level dwelling units.

Exhibit Q – Order No. 17679-C — Summary Order and portion of the approved plans showing eight cellar level dwelling units.

Exhibit R – Order No. 17111-A — Summary Order indicating apartment units in cellar level on page 2.

Exhibit S – Outlines of Testimony.

Exhibit T – Resume of Shane L. Dettman, AICP.

VI.
WITNESSES

1. John Casey, Principal, 1514 Q, LLC

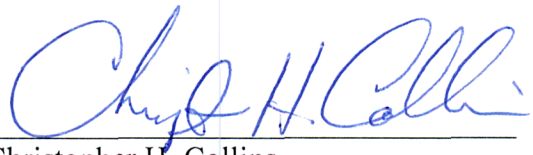
2. Shane L. Dettman, AICP, Expert Witness

VII.
CONCLUSION

The Zoning Administrator's administrative decision to issue the Building Permit was procedurally and substantively correct, and consistent with the long-standing interpretation and application of the Zoning Regulations by the Office of the Zoning Administrator, as well as the Zoning Commission and the Board of Zoning Adjustment. This appeal is without merit, and should be denied.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 

Christopher H. Collins

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Owner's Prehearing Statement in Opposition to Appeal was filed electronically with the Office of Zoning and was sent by first-class mail and electronic mail, this 7th day of December, 2016, to the following:

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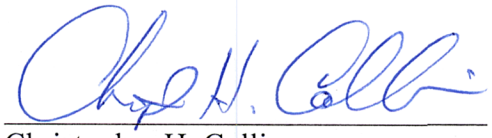

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