

**BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA**

Appeal of Dupont Circle Citizens' Association

Appeal No 19374

Hearing Date January 18th, 2017

RESPONSE TO DCRA PREHEARING STATEMENT IN OPPOSITION TO APPEAL

January 13th, 2016

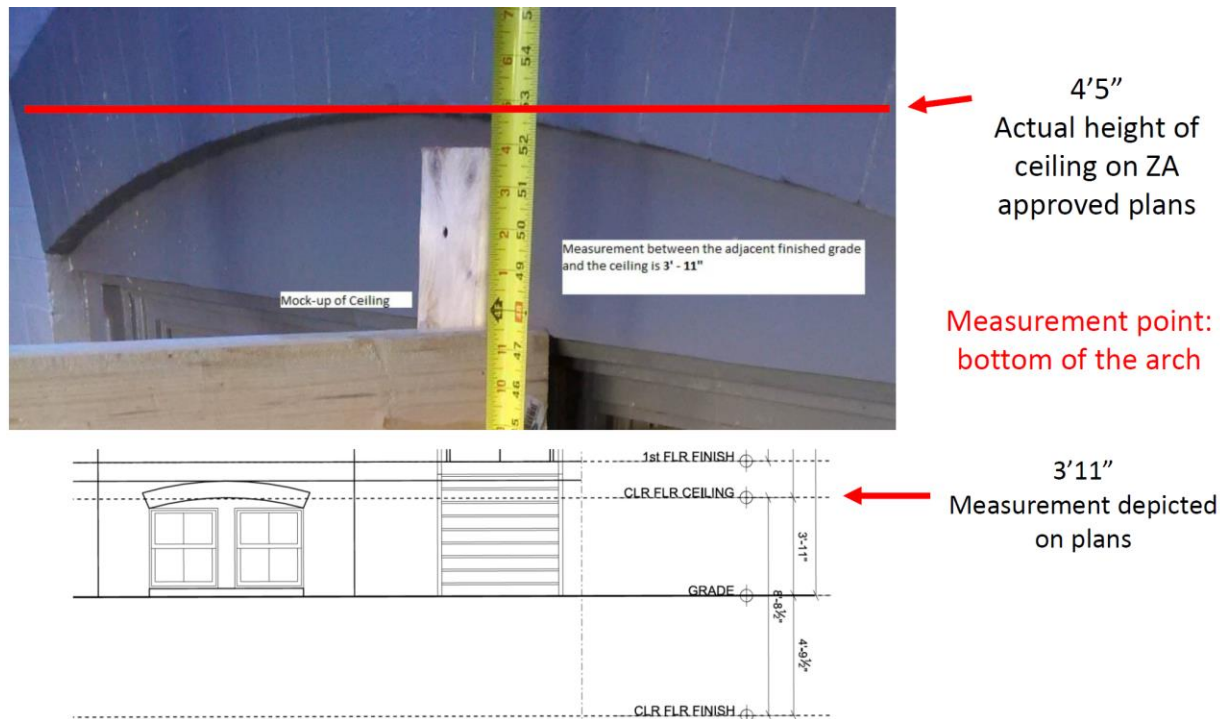
This Response is filed pursuant to Title 11, Subtitle Y, 302.18, "No later than three (3) days before the public hearing, the appellant may file a brief and supporting information in reply to any of the responsive briefs." Outlined below is a response to DCRA's Pre-Hearing Statement.

Response to Section 1 of DCRA Pre-Hearing Statement

DCRA makes the argument that the Zoning Administrator approved the permit based on submitted plans as well as a site inspection measurement performed by a DCRA inspector. What DCRA fails to mention in their Pre-Hearing statement is that the Zoning Administrator was unable to cross reference the plans and this photographic measurement and, as a result, erred in approving a purported 3'11 dimension which was actually 4'5" as measured and photographed by DCRA staff and included as an Exhibit in the Zoning Administrator's determination letter.

DCRA, while not acknowledging this critical mistake by the Zoning Administrator, tries to rationalize away the impact of such mistake by saying that, if there were a discrepancy or error, it could be appealed at a further point in time once construction is complete. DCRA's position is impractical and illogical. The issue before this Board is whether the permit approved by the Zoning Administrator was appropriate. By the Zoning Administrator's own standard, and DCRA's own measurement, this permit did not comply with the regulations. Surely, it would be inappropriate for this Board to legitimize improper permit approvals on the grounds that all errors could be appealed once construction was completed.

The below photos evidence these described errors.



Response to Section 2 of DCRA's Prehearing Statement

DCRA's engages in detailed analysis of the definition for "habitable room." However, our appeal is focused on the definition of a *cellar*, which is referenced within the definition for habitable room. As our prehearing statements explain, the two definitions (cellar and habitable room) are not separate and unrelated. The zoning definitions contain multiple interrelated and interdependent definitions.

While the BZA has dealt with basement/cellar determinations in multiple prior cases, the BZA has never reviewed a basement/cellar determination on the basis of the cellar definition and the related habitable room definition. None of the prior BZA cases cited dealt with the question that the BZA is considering in this case: the relevance of habitability to FAR calculations.

We are aware of one case and precedent, which supports both the Appellants position and the plain text of the zoning code that excludes cellars from habitable space. This case, addressed Studio Theater's renovation and extension of 1736 Corcoran Street NW where, in order to stay within the allowable FAR, the Theater proposed to lower the ceiling of a basement apartment to count it as a cellar in order to remove this space from the FAR calculation and allow the proposed rear addition. While the Theater was ultimately allowed to proceed with this addition, it was conditioned upon the newly made "cellar" space NOT being habitable and in addition removing the apartment from that space and converting that space into another use. This case is further described in the attached Exhibit A and supports DCCA's reading of the zoning regulations.

In addition, DCRA alleges that the relevance of habitability has been fully vetted by the BZA in a case dealing with “attics,” which determined that the definition of habitable room was not relevant to determining an attic’s inclusion/exclusion in FAR. However, the facts in that case are clearly distinct, as we outline in Exhibit B. The attic argument is not precedent.

DCRA addresses Appellant’s references to the Housing Code and Building Code. References to Building and Housing codes were prompted by the Zoning Administrator’s general references to these very same codes, as far back as 2011, using the exact same language (see our prehearing statement), as justification for the treatment of cellar space in FAR rules. More recent changes by DCRA in applicable building and housing codes (if they exist in a final adopted form) have not been reflected in an updated basement/cellar rationale by the Zoning Administrator.

Furthermore, DCRA’s prehearing statement makes assertions that housing codes referenced by Appellants “have been effectively superseded” However, the referenced sections of the Housing Code are the current, final adopted text, as published at <http://www.dcregs.dc.gov/>

For the foregoing reasons, Appellant asks the Board to reject DCRA’s defense of the Zoning Administrator’s errors and to rule in favor of Appellant in seeking that the issuance of permit B1603105 be overturned.

Respectfully submitted,

Dupont Circle Citizens Association

Exhibit

A

Exhibit

2007 DCRA Zoning Administrator Decision with ANC2B Commentary

Determination Based Upon
(1) Grade/Ceiling Measurement Distance and
(2) Occupancy/Usage

1736 Corcoran Street, NW
Washington DC 20009

January 10, 2017

TO: Board of Zoning Adjustment

FR: Bob Meehan

ANC Commissioner ZBO3, 2002-2012

RE: 2007 Zoning Determination:
Cellar Defined on Measurement and Habitability

Following is my recollection of a 2007 determination on treatment of cellar space under FAR rules. My involvement was as an ANC2B Commissioner.

Zoning Determination

In 2007, the Studio Theatre was seeking to renovate its property at 1736 Corcoran Street, NW into apartments for visiting artists. The scope of work involved expanding the building's square footage with a rear addition. Doing so, however, would result in the building exceeding FAR.

In order to avoid the need for a BZA request for the excess FAR, an agreement was reached to modify the basement apartment space into a "cellar" so as to exclude this square footage from FAR. The cellar designation was based upon two factors:

1. Lowering of the basement ceiling by about 1 foot to achieve less than a 4' measurement from adjacent finished grade to ceiling; and
2. Conversion of the basement apartment space into a common room that would no longer be defined as habitable space, according to the zoning regulations.

The ANC was not happy about Studio wanting to avoid the uncertainty of the zoning variance process, particularly since for this particular property Studio had a good case for a variance. The back of the property already had a one story structure across part of the back of the building where the new construction would be. The building to the East extended about 15 feet beyond the end wall of the new construction and was also as tall as the new construction. The building to the West had a partial one story extension like the one being replaced by Studio and extended one foot beyond Studio's construction.

In other words, in the opinion of the ANC, the additional FAR would not be detrimental to the neighborhood in the context of the adjoining buildings. Variances are designed to give exceptions when the affected neighbors and the developers find common beneficial solutions. The solution proposed by Studio worked because all the inhabitants were part of the same community and thus would benefit from a "common area." However, in general the ANC opposed this type of solution because at some future date the modification to convert a "basement" into a "cellar" could be reversed without DCRA or the community having any input in approving the change."

Documentation

- The Studio Theater was contacted by DCCA in December 2016-January 2017 and did not have documentation of the Zoning Administrator's 2007 determination.
- Attached is an InTowner news article summarizing the case.
- The Zoning Administrator's determination for excluding the lower level from FAR was reflective of conditions outlined in a 2007 ANC2B resolution on the matter. Efforts are being made to find a copy of that resolution.

COMMUNITY

From p. 3

Those names and telephone numbers can be found through this newspaper's website (www.intowner.com) by clicking the "Neighborhood Info & City Issues" link on the home page and then clicking the link for ANC Commissioner Contacts and then selecting 'B' under the Ward 2 header.

• Wed., Jun. 14 (12noon-2pm): The DC Public Library Trustees' Finance Committee will be holding a MEETING in the 4th floor Board Room of the Martin Luther King, Jr. Memorial Library that will be open to the public (but to observe only) for the first time. This follows the first-time ever open meeting of the Trustees on May 23, which had been held at the new Tenley Interim Library. For more info, call the office of DCPL's Chief Librarian at 727-1101.

This new openness on the part of the Trustees, which appears to be getting extended beyond just the library board's own meetings, was commented on favorably by the *Washington Post* which wrote, in part, as follows: District officials have been notoriously averse to efforts requiring open meetings. As a result, members of the public too often have been excluded from discussions of their business. So it's refreshing that the city's library board has reversed a long-standing policy of closed-door meetings and is letting some sunshine in on its deliberations."

• Mon., Jun. 18 (10am): The public is invited to join with Mayor Fenty to celebrate the OFFICIAL OPENING of DCRA's (Department of Consumer & Regulatory Affairs) brand new Permit Center (941 N. Capitol St., NE). Completely revamped, the new Center, as described in a release from

DCRA, features a "sleek circular design [that] allows customers to move with ease from station to station as they meet – face-to-face – with plan review coordinators and structural, electrical and mechanical engineers. Enhanced business processes and robust web content help speed customers through the permitting process."

The new Center will open for actual business on the 18th at 11 am and remain open until 7 pm. After that, regular business hours will be Monday-Wednesday and Friday from 8:30 a.m. to 4:30 p.m. and on Thursdays from 9:30 a.m. to 4:30 p.m. For more info, visit www.dcr.dc.gov or call the Permit Center at 442-4332.

• Tue., Jul. 3: Once again, AdamsMorgan MainStreet will be hosting its FIRST TUESDAY "Shop & Dine" discounts. Sample a new restaurant and shop in Adams Morgan on a less crowded evening. Food and drink for two for \$25, plus tax & gratuity (offerings vary). Participating restaurants include: The Grill from Ipanema, Perry's, Chloe, Saki, Bossa Bistro, Left Bank, La Fourchette, Felix, Bourbon, Las Canteras, Spaghetti Garden, Duplex Diner, L'Enfant Café, and El Tamarindo. And at the following retailers sales are between 10 percent and 30 percent off select items: Fleet Feet, Miss Pixie's, Shake Your Booty, Toro Mata Art & Furnishings of Peru, Kobos African Clothiers, Brass Knob, Skynear Furnishings, Meeps Vintage, The District Line, and DeVinos. For more info, visit www.AMMainStreet.org or call 232-1960. □

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Studio Theatre Nearing Completion of Intern Residence in Time for Mid-August Occupancy; Dupont ANC to Hear Permit issuance Complaint

By P.L. Wolff

As we reported early late last year ("Studio Theatre Apprentices Will be Corcoran Street Neighbors Starting in Fall," October 2006, page 1), the house at 1736 Corcoran Street, which was renovated in 1973 to accommodate seven compact studio apartment units, had been sold to the Studio Theatre for use as a residence for their year-long theater apprentices as part of its new Artists Next Door program.

Since the time of our 2006 report a decision was made to extend the rear of the building to allow for the individual units facing the alley to be larger; that construction is nearing completion now. In order to make meet the city's zoning floor area ratio (FAR) requirements, the English basement could no longer be utilized as living space — it is there that the original plan called

Cont., STUDIO THEATRE, p. 9



photo—Philip Froeder (1973), courtesy The John Cavanaugh Foundation. 1736 Corcoran Street as it looked shortly after restoration in 1973, including the John Cavanaugh bas reliefs which will be reinstalled when the current interior renovation and rear extension is completed.



photo—The InTowner.

This photograph, taken just a few days before we went to press, is by now out-of-date as the rear wall all the way up to the roof line and the mullioned windows are already in place.

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Dupont Circle's Emerson Preparatory School's Students Thrilled by Mayor's Visit With Them



photos—courtesy Emerson Preparatory School, Washington, DC.

Friday, May 25th was an exciting day at Emerson. Outside in the garden behind the school's 18th Street double former townhouses, just below Massachusetts Avenue, Mayor Adrian Fenty joined the students to discuss his initiatives for the District. The students, who had just completed a rigorous course in American government, were excited to have ended the school year with the visit from our new mayor.

Shown at right seated with Mayor Fenty are students (l-r) Jean-Claire Peltier of Great Falls, Virginia and Kara Goplerud of Vienna, Virginia. Standing behind the mayor is Margot Walsh, the school's Director.



STUDIO THEATRE

From p. 5

for a commons room — and was accordingly re-classified by the Zoning Administrator as a “cellar,” thereby removing the space from the FAR calculation. Further, the planned roof deck was scaled back to not exceed 10 feet by 10 feet rather than to extend fully to the rear roof line as initially proposed.

It is that decision by the Zoning Administrator, however, that has caused Dupont Circle ANC Commissioner Bob Meehan to place the issue on the commission's June 13th meeting. His position is that if the “design stratagem,” as he characterized the ability to reclassify English basement spaces such as this to allow for increasing the size of the structure, “is more or less correct, then it is an outrageous runaround of the intent of the zoning regs as currently written. A stupendous loophole that could justify a lot of additions to buildings in an historic district without any public input that otherwise would require a zoning variance if the intent of the regs were followed.”

As we were going to press, we have been assured that the project is expected to be completed and for Butler House, as it will be known, to be occupied in August. The Studio Theatre has received considerable expert advice from local developer and one-time theater board member Monte Hoffman through his PN Hoffman Construction & Development organization. In commenting to *The InTowner* of his role with the project and his reason for providing advisory support, Hoffman simply stated that “what Studio Theatre is doing is incredible” and deserves the support. □

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Exhibit

B

Attic Argument is Not Precedent

Neither the BZA nor court appeals have addressed the question of habitability and its relevance to the definition of a cellar and a basement. However, habitability was addressed in BZA 17109 and a subsequent court appeal, specific to determining the relevance of habitability to the definition of an “attic.” Below is a summary of conclusions in those cases that support our argument as to the appropriateness of considering habitability in the definition of a cellar and basement.

Definitions of Attic vs. Cellar

The zoning regulations do not define the word “attic”. Thus, the regulations require the term “attic” to be defined by referring to Webster’s Dictionary. The court found that the dictionary definition of “attic” makes no reference to habitability and, thus, found the concept to be irrelevant on that basis.

In contrast, a “cellar” is specifically and explicitly defined in the zoning regulations, on the basis of its habitability. There is no lack of clarity. There is no need to turn to Webster’s Dictionary, and certainly no cause to turn away or simply ignore the regulations’ full, clear and robust definition of a “cellar”. One can rely upon the Plain Meaning Doctrine to support this position.¹ The plain meaning in the regulations includes separate definitions for a basement and a cellar and thus clearly contemplates a distinction for these two different classifications of partially below grade space.

Habitability is Not Relevant to Attic Definition but is Relevant to Cellar Definition

There is a clear difference in the relevance of habitability in defining an attic vs. a cellar. To begin, the zoning definition of GFA includes attic space having 6’6” or more of structural headroom, while the zoning definition of Habitable Room does the opposite and excludes “attics.”

There are several reasons for this apparent contradiction. The most fundamental rationale for the term attic to be included in both definitions is that the only distinction is the measurement point of 6’6” of structural headroom. This distinction gave the court further cause to exclude habitability’s relevance to the definition of an attic as the only distinguishing factor in the definitions is the measurement point of 6’6”.

¹ The D.C. Court of Appeals has frequently turned to the “plain meaning” doctrine of statutory construction to analyze a disputed interpretation of a statute or regulations. In *1618 Twenty-First Street Tenants’ Association v. The Phillips Collection*, the court described the plain meaning doctrine when it considered the meaning of “bona fide offer of sale” under D.C. Code §42-3404.02: “As a threshold matter, we acknowledge the often stated axiom that ‘the words of [a] statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.’” *E.R.B. v. J.H.F.*, 496 A.2d 607,609(D.C. 1985) (quoting *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979); see also *United States v. Goldenberg*, 168 U.S. 95, 102-03, 42 L.Ed. 394, 18 S.Ct. 3 (1897); accord *Gallagher*, 734 A.2d at 1090. “When the plain meaning of the statutory language is unambiguous, the intent of the legislature is clear, and judicial inquiry need go no further.” *Id.* at 1091. *1618 Twenty-First Street Tenants’ Association v. The Phillips Collection*, 829 A.2d 201, 203(D.C. 2003).

In contrast, a cellar is excluded from the definition of GFA and excluded from the definition of Habitable Room. There is no contradiction to explain. Thus, a habitable room is not definable as a cellar.

Definitions	Defined	Referenced in GFA	Referenced in Habitable Room	Distinguishing Factor in Inclusion v. Exclusion
Cellar	Yes	Yes: Excluded	Yes: Excluded	Habitability
Attic	No	Yes: Included and Excluded	Yes: Excluded	Measurement Point of 6'6"

In issuing its final order on remand from the court to clarify uncertainties, the BZA uses the phrase “evidence of habitability” in BZA 17109-C to explain why potential habitability of an attic “is not relevant to the Board’s determination” of whether the space in question was an attic. In contrast, it is entirely relevant as a matter of “evidence of habitability” to define what constitutes a cellar as a cellar is defined, in the zoning regulations, on the basis of being non-habitable.

ZA Should Consult Provisions with Higher Standards

The court review of BZA 17109 further supported its exclusion of habitability’s relevance to the definition of an attic by turning to other regulations as provided for under DCMR 11-101.4(d) (i.e., other regulations with higher standards). The court found that the housing code requires a habitable headroom height of greater than 6’6” (i.e., 6’8” and 7’ under various provisions).² In other words, habitability is not set at 6’6” in the zoning regulations or in any other codes.

Turning to DCMR 11-101.4(d), one can find multiple provisions that define the conditions under which lower level space is habitable and is not definable as a cellar. As described above, Title 12 building codes and Title 14 housing codes clearly define what constitutes habitability in a way that neatly aligns with what is meant by “basement” in the zoning regulations.

Definition of Attic Remains Unresolved

A clear definition of “attic” remains to be determined by the BZA. The court in the appeal of 17109 remanded to the BZA a directive to clarify the definition of an attic as the definition of an attic as a finding of fact in 17109-C did not reflect actual conditions as depicted on approved plans.

² From KCA v. DC BZA, FN 27: We note, moreover, the District of Columbia housing regulations contain general restrictions that require a habitable room to have a ceiling height greater than the ceiling six feet five and a quarter inch height of the sixth-level space in issue here. See 14 DCMR §§ 405.1 (“In any room that is otherwise a habitable room only that portion of the room area that has a clear ceiling height of not less than seven feet (7 ft.) shall be counted as habitable room”) and 405.4 (“All habitable room area shall have a minimum clear head room of six feet eight inches (6 ft. 8 in.) under beams . ”). See also 11 DCMR § 101.4(d) (zoning regulation providing that the “provisions of any other municipal regulations shall govern whenever they . (d) [i]mpose higher standards than are required by this title”). <http://caselaw.findlaw.com/dc-court-of-appeals/1055237.html>

January 13th 2017

Certificate of Service

I hereby certify that, on January 13th, 2017, I served the foregoing document via email on the following persons:

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