DISTRICT OF COLUMBIA
ZONING COMMISSION

Case No. 17-18

Statement of Larry Hargrove for Kalorama Citizens Association

January 18, 2018

Chairman Hood and Members of the Commission,

I'm Larry Hargrove, speaking for Kalorama Citizens Association.

This case provides an opportunity for the Commission to take a further and important step in its efforts over the last three years or so to deal with the problem of incompatibly dense redevelopment of rowhouses – the problem of "popups" and "pop-backs" – that has caused widespread distress in the District's predominately rowhouse neighborhoods. It does so by focusing principally on the relationship to this problem of the Zoning Regulations' treatment of "basements" and "cellars", as well as their treatment of "attics". We commend the Office of Planning for its pursuit of these issues, and believe that if -- but only if -- OP's present proposal is modified in certain respects, this opportunity can be realized.

What is the "basement/cellar/attic problem" and how did it arise?

For decades, and at least since 1958, the Zoning Regulations have made quite clear that cellars and attics were regarded as unsuitable for use as living space and were thus explicitly excluded from the list of spaces that could qualify as a "habitable room". [1] Since both "apartments" and "dwelling units" were

[1] 11 DCMR B-100:

required to be a "habitable room",[2] one couldn't lawfully have an apartment or a dwelling unit in a cellar or attic. The idea was that shunting off Grandma—or anybody else -- to a dank, moldy cellar or a cramped, dusty old attic was not to be countenanced.

Accordingly, cellars, and attics without a tolerably high ceiling (6'6"or higher), were not counted against the density limits applicable to the building – i.e. we're not included in "gross floor area". (By contrast, basements, not being as far below grade as cellars, were deemed acceptable for living space, and same was apparently true for an attic with a comfortably high ceiling.) Similarly, cellars were not regarded as "stories" and thus did not count against the maximum number of stories.

At some point in the more recent past, however, a Zoning Administrator was apparently persuaded that this policy regarding non-use of cellars and attics as habitable rooms had become obsolete, perhaps in view of provisions in the housing and construction codes that aimed at correcting some of the deficiencies of cellars as living space, for example as to safety and available light and air. The effective result was a *policy decision* by the Zoning Administrator, justified at least in recent times by a highly problematic, some would say bizarre, interpretation of the Regulations, to begin allowing apartments in cellars, knowing that they must comply with the other relevant code provisions. Similarly, projects in which attics

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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 ft.^{2}) in area, nor kitchens in commercial establishments.

[2] 11 DCMR B-100:

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.

Dwelling unit - one (1) or more habitable rooms forming a single unit that is used for living and sleeping purposes, that may or may not contain cooking facilities. The term dwelling unit shall include a dwelling, apartment, bachelor apartment, or tenement, but shall not include a rooming unit.

with ceilings under 6'6" were designed to be used as living space began to be approved.

> ***The result: Rowhouse popups and pop-backs, with degraded amenities, were encouraged in vulnerable zones such as RA-1, -2, -7 and -8, RC-1 and RF -4 and -5, which provide a maximum FAR, and to a lesser extent in RF-1 -2, and -3, which have no FAR limit but do have a limit on the number of stories.[3]***

Each of these factors made it possible for a rowhouse re-developer to add as much as an entire floor, or more, to the building without paying any cost in allowable floor area or the allowable number of stories – a very valuable prize that greatly increased the likelihood of popups or pop-backs in rowhouse neighborhoods. This generated a slew of powerful incentives, mainly perverse incentives to design the building so as to *degrade* the amenities of the living space, just in order to get the "free" gross floor area. One example: an incentive to construct a false ceiling to lower what might be a pleasantly high basement ceiling, just order to transform the space into a "cellar".

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[3] The vulnerability of the zones that have an FAR limit stems from the fact that they have a height limit of 40 or 50 feet that often exceeds the built height; that two (RA-2 and -8) have no limit on number of stories; and that the four RA zones have no limit on the number of units or any zoning restrictions on pop-backs or on modification of rooftop or other architectural features such as those now applicable in RF districts.

Note, however, that rowhouse areas in RF-1, -2 and -3 districts would still have some vulnerability under the rules as proposed by OP, since (1) their limitations on the number of stories creates an incentive to do whatever is necessary to ensure that a floor partially below grade is a cellar, and thus not counted as a story, and (2) their limits on height, pop-backs and number of units and stories, as well as their protections against architectural modifications, are all subject some form of waiver by special exception. Under the proposed rules, a limitation on the number of stories in any of these zones would be as much an incentive to game the system to ensure cellar status for a story below grade as it would be a protection against popups.

The proposed amendments do not eliminate the problem

To some extent these perverse incentives would be reduced or eliminated by the adoption of OP's proposal, in combination with changes already introduced in ZR16. But unless the proposal is modified in critical respects, these incentives will remain in sufficient force to ensure that substantial pressure to re-develop row houses with popups and pop-backs will continue. Consider the following list of stratagems that have been employed to secure FAR-free dwelling space, and how each might – or might not – be affected by the proposed amendments:

- ***Install a dropped ceiling in the basement***

As OP's report suggests at page 2, this mechanism will no longer be available, since the floor above the story that is partially below grade, rather than its ceiling, is now the upper measuring point for determining basement/cellar status. But this new rule of measurements would incentivize simply gutting the rowhouse, as is often done in any event, and installing the new *floor* above the basement at a lower elevation in order to make it a "cellar" – or worse, demolishing the house in order to achieve the same result in a new building.

- ***In an attached or semi-detached house, choose a method of allocating floor area between basement and cellar that will disproportionately inflate the cellar portion.***

For a number of years a rowhouse redeveloper was allowed to do this by opting to apply the "perimeter wall method" to a building whose full perimeter could not be measured because it was attached or semi-detached. This device appears to have been finally rendered unavailable by new rules of measurement adopted in ZR 16, which have been modified in OP's proposal at pp. 5-6 to make them consistent with the proposed new definitions of "basement" and "cellar". Now the so-called "grade plane method" must again be used for this calculation –

as in fact had been the case for some years in the last century before a change in the practice of the Zoning Administrator crept in.

●***Deposit fill material next to a wall to* raise *the adjacent grade and reduce the distance between the grade and the floor above.***

ZR 16's new definitions of "natural grade" *and* "finished grade",[4] which OP's proposal incorporates by reference at various points, are a commendable but unfortunately not wholly successful effort to deal with this problem. Their effect is to say to the a rowhouse developer: If you want make changes in the grade to increase the elevation, make sure you will be able to convince the Zoning Administrator that the changes don't amount to a "manually constructed berm" or some other form of "artificial landscaping" – which terms are undefined -- and plan to wait two years before applying for your permit. The incentive for creative manipulation of the regulations remains as before, and the possibility of convincing the Zoning Administrator to accept some other imaginative stratagem, such as locating the "grade" in a niche in the rear wall, as in a recent BZA case, cannot be ruled out.

● ***Install a dropped "structural" ceiling in the attic.***

OP's proposal doesn't purport to remove this incentive or otherwise deal with rules pertaining to attics. The incentive to degrade this amenity in order to avoid FAR limits remains.

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[4] 11 DCMR B-100:

Grade, Finished: The elevation of the ground directly abutting the perimeter of a building or structure.

Grade, Natural: The undisturbed elevation of the ground of a lot prior to human intervention; or where there are existing improvements on a lot, the established elevation of the ground, exclusive of the improvements or adjustments to the grade made in the two (2) years prior to applying for a building permit; natural grade may not include manually constructed berms or other forms of artificial landscaping.

- ***Ensure that window wells and areaways project no more than four and five feet respectively from the building face, as required by the proposed definition of "finished grade".***

Window wells and areaways[5] provide light and air to interior space, and areaways can often serve as a capacious patio space for a basement apartment. But OP's proposed rules would codify arbitrary size limits that incentivize forgoing optimal use of these amenities, just in order to get the FAR-free floor space.

How the basement/cellar/attic problem can be eliminated

One effective way to eliminate the problem would be for the Commission to affirm that the Regulations are to be applied consistently within their plain meaning, and that consequently apartments and other habitable rooms cannot be located in cellars or attics. Arguing in favor of this solution is the fact that any *de facto* amendment of the regulations by fiat of an official in the executive bureaucracy, without study and without public airing and opportunity for comment, is obviously not acceptable and undermines the integrity of the whole system. Further, the design of living space in our rowhouses and other dwellings should be guided by what will, to the maximum extent possible, enhance the amenities that the space has to offer, not by how density limits can be evaded by design gimmicks that are otherwise pointless and from a design point of view irrational.

At the same time we recognize that there are now strong pressures *not* to remove these spaces from the inventory of available housing space. Indeed, OP's report proposes simply ratifying the *de facto* amendment by deleting "cellars" and "attics" from the list of spaces that cannot be habitable rooms. The alternative, then -- and the only other effective way to eliminate the problems

[5] 11 DCMR B-100: Areaway: A subsurface space adjacent to a building open at the top or protected at the top by a grating or guard that includes window wells and passageways accessing basement/cellar doors.

outlined above -- is to eliminate their root cause: the perverse incentives generated by the possibility of securing FAR-free marketable living space. This can be cleanly done by requiring that that any floor area, or in any event any cellar or attic floor area, that is used for habitable space be included in the calculation of the permissible gross floor area of the building, and that any cellar so used be counted as a story.

We see no reason why this requirement as to gross floor area should not apply in any zone district that is subject to an FAR limitation. But in any event it should apply to those districts that comprise rowhouse neighborhoods most vulnerable to the threat of popups and pop-backs, which as noted above would include RA-1, -2, -7 and -8, RC-1, and RF-1 through 5.

This is the general approach that OP itself suggested in an earlier draft Setdown Report dated December 2, 2016, circulated in the course of discussions of basement/cellar problems with members of the community. It stated:

Recommendation 2: Change definition of "Gross Floor Area" to include cellars in RA-1 and RA-2 zones

> Gross Floor Area (GFA): The sum of the gross horizontal areas of the several floors of all buildings on a lot, measured from the exterior faces of exterior walls and from the center line of walls separating two (2) buildings. See Also: Subtitle B §§ 304 and 305.
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> GFA 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**, and habitable rooms in cellars in the RA-1 and RA-2 zones**.
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> GFA shall not include ~~cellars,~~ exterior balconies that do not exceed a projection of six feet (6 ft.) beyond the exterior walls of the building, all projections beyond the lot line that may be allowed by other Municipal codes, vent shafts, and pipe chase shafts above the ground floor, atriums above the ground floor, ramps on the ground floor leading down to areas of parking on a lower level; and in residential zones, the first floor or basement area designed and used for parking or recreation spaces provided that not more than fifty percent (50%) of the perimeter of that space may be comprised of columns, piers, walls,

or windows, or similarly enclosed. **GFA shall not include cellars except for habitable rooms in cellars in the RA-1 and RA-2 zones.**

In the same draft OP recognized that this would imply amending the definition of "story", and so included a further recommendation:

Recommendation 4: Change definition of "Story" to clarify a cellar is counted as a story

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 or~~ penthouses **or cellars that do not qualify as habitable space as defined in this title**.

These provisions did not survive into the current draft now before the Commission. **Accordingly, we strongly urge that, if cellars and attics are to be permitted to continue to be used as habitable rooms, the Commission adopt OP's Recommendations 2 and 4 from the December 2, 2016 draft, with three necessary changes:**

(1) expand the list of zones in which the provision applies to include at least RA-1, -2, -7 and -8, RC-1 and RF-1 through 5,

(2) *insert "or attics" after "cellars", in each instance in the underlined portions of Recommendation 2, and*

(3) amend the rules of measurement for number of stories (§B-310) so as to provide that a cellar used as a habitable room is counted as a story.