KALORAMA CITIZENS ASSOCIATION

July 28, 2018

Anthony Hood, Chair
DC Zoning Commission
441 4th Street NW Suite 200S
Washington, DC 20001

Subject: ZC Case no: 17-18

Dear Chairman Hood and members of the Commission,

Attached you will find the comments of the Kalorama Citizens Association, and a letter from the Dupont Circle Citizens Association, joining with our comments, which speak for themselves.

Thank you for your attention to this matter.

Sincerely,

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Founded 1919
PO Box 21311
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DCCA is a volunteer, nonprofit organization, founded in 1922 to promote and protect the Dupont Circle neighborhood.

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July 28, 2018

Anthony J. Hood, Chairperson
DC Zoning Commission
441 4th St NW # 200s
Washington, DC 20001

Dear Chairman Hood and members of the DC Zoning Commission:

The Dupont Circle Citizens Association (DCCA) is happy to join the Kalorama Citizens Association (KCA) in adopting the attached comments on ZC case number 17-18.

This matter is of great importance to our two citizens associations because as evidenced by the many recent excessively tall pop ups, the intention of the zoning code to govern and limit the densities in our rowhouse neighborhoods is being sidestepped by not including habitable 'cellars' in the calculation for allowable Floor Area Ratio (FAR).

We have provided this letter to be included in KCA's submission of their statement, which our Board has voted to support.

Sincerely,

Robin Diener
President, DCCA

DISTRICT OF COLUMBIA ZONING COMMISSION
Case No. 17-18

Statement of Kalorama Citizens Association, Joined by the Dupont Circle Citizens Association

July 28, 2018

Chairman Hood and members of the Commission:

Genesis of the case

We urge the Commission to keep clearly in mind the origins of this case: It grew out of a set of discussions between OP and a number of DC citizens from neighborhoods that were suffering, in a rapidly expanding residential real estate market, from increasing numbers of "pop-up" and "pop-back" redevelopments of rowhouses. This epidemic was being facilitated by (a) the continued exclusion of cellars in determination of the number of allowable stories, and (b) the development of cellars (and to a lesser extent, attics with relatively low ceilings) as apartment space not counted against density limits. The use of cellars and attics for human occupancy had been enabled by highly dubious interpretations of the 1958 Regulations by the Zoning Administrator and/or the BZA that nullified provisions clearly intended in 1958 to prohibit the use of cellars and attics for human occupancy -- a *de facto* enlargement of allowable density that was effected without public notice or opportunity to be heard.

The resulting problem for row house neighborhoods

It is important to understand that once these changes were in place and DCRA was issuing permits accordingly, the whole rationale for the distinction, *in the Zoning Regulations,* between basements and cellars --- and indeed for the very concepts of "basement" and "cellar" -- disappeared. The same was true of the distinction between attics with higher or lower headroom. But these distinctions and definitions, excluding cellars and

certain attics from density limits, nevertheless remained in the Regulations, with the result that a cellar became a much-coveted prize: In the R-4 (now RF-1 to -3) zone, a cellar entitled the developer to pop-up with an additional story, and in other rowhouse areas it provided the equivalent of a full story of additional allowable floor area with which to pop up or back. A top story that could qualify as an "attic" with headroom less than 6'6" would do this as well.

That is what generated the very powerful economic incentives for rowhouse redevelopers to contrive stratagems for ensuring that the lowest floor qualified as a "cellar", and that the highest floor had a headroom lower than 6' 6", in order to be allowed what amounted to an extra floor of marketable living space. The Commission is now familiar with some of the stratagems used in the past for cellars, which included artificially lowering a basement ceiling or attic headroom, piling up earth against the building to raise the grade, invoking the "perimeter wall method" to determine cellar/basement status where the perimeter wall could not be actually measured, shrinking the dimensions of an areaway to ensure a higher "adjacent grade", and always remaining alert to the possibility of extracting an OK from DCRA for some helpful fanciful solution (such as placing the "adjacent" grade within the building footprint, in a niche in the building wall[1]). (The *Attachment* to this statement summarizes the effect, if any, of the current proposal on techniques previously employed to access "free" cellar or attic space.)

This state of affairs had an additional harmful consequence, beyond generating pop-ups. This is because in order to secure the desired "free" marketable living space, the regulations *require* that the developer degrade the amenities that might otherwise be legally and physically possible for the bottom and top floors of the redeveloped rowhouse. The required cellar has less headroom and is farther below grade and less comfortably livable than a

1 BZA Case Case 18980.

basement; the required attic with 6' 5 1/2" headroom is less desirable than a loft with 7' 0" or higher headroom; an areaway projecting 6 or more feet from the building façade can be a nice private patio, while the required areaway or window well projecting only 4 or 5 feet, as currently proposed, is basically just utility space. In our view, land use regulation should aim at enabling the *optimal* possible development of one's property consistent with other publicly recognized interests. This irrational state of affairs in our own regulations does precisely the opposite. It makes no sense.

The current proposal will not eliminate, and will likely exacerbate, the problem of rowhouse popups

What is to be done to eliminate the problem?

An obvious clean solution would be to revert to the meaning of the '58 Regulations, under which cellars and attics were not habitable space – a solution that now seems highly unlikely. Failing that, the obviously clean solution to is to include any habitable space in density allowance and number of stories, as multiple public witnesses have proposed.

The proposal now before the Commission, however, does not purport to eliminate the problem. Rather, it leaves in place the cause of the problem – the fact that a cellar or attic can serve as a ticket to "free" marketable living space to enlarge the total marketable floor area of the building. It does this by ratifying the previous dubious administrative interpretations of "habitable room" that in recent years have allowed human occupancy in cellars and attics and given birth to the problem. It then seeks to close off, or render more difficult to employ, some – but not all – of the stratagems that developers have employed in their quest for cellar status for the first floor. This approach would likely reduce the number of permit applications seeking access to "free" cellar or attic space, but it will not eliminate them, for the economic incentive to contrive ways to access the "free" marketable space in cellars and attics will remain unabated. And it will encourage projects that

inflict an even more severe level of damage on rowhouse neighborhoods. That is primarily because, in designating the floor above as the upper measuring point for determining cellar/basement status, and thus closing off the possibility of achieving cellar status by dropping the basement ceiling, the proposed change tips the economic calculus for the developer toward gutting or demolishing the rowhouse so as to have a free hand in locating the relevant floors and ceilings.

Further, this new definition of "cellar", and the exclusion of cellars from the determination of allowable stories, will also increase the likelihood of assembly and demolition of rowhouses in RF-1, RF-2 (Dupont Circle) and RF-3 (Capitol Hill) zones through resort to provisions[2] that allow an additional five feet of height for a project that constructs three adjoining new adjoining rowhouses:

> "New construction of three (3) or more immediately adjoining residential row dwellings or flats, built concurrently on separate record lots, shall be permitted a maximum building height of forty feet (40 ft.) and three (3) stories."

So long as the new rowhouses, having the additional height, are designed to have a "cellar", they can evade the three-story limit by having a fourth story at the cellar level – a powerful incentive to assemble, and demolish, three adjoining rowhouses in one of these RF zones.

Also, the proposed definition of "natural grade" with its five-year timeline, intended to prevent artificially elevating the grade, is likely to prove highly problematic. It looks fine on paper, but in its implementation in actual practice, it promises to be a wellspring of evidentiary dispute. It requires DCRA to make a determination, before issuing a permit, of historic soil conditions five years previous – a determination probably heavily dependent on oral declarations which DCRA is ill-equipped to evaluate. To many in neighborhoods that are grappling with pop-ups, it will seem ready-made for

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2 Sections E-303.2, E-403.3, and E-303.3.

the sort of creative development-prone work-arounds that regrettably they have come to expect from DCRA.

Finally, the current proposal perpetuates, but makes no effort at all to address, the problem of pop-ups resulting from "free" marketable space in attics.

So the applications for permits awarding extra marketable floor area in cellars and attics will continue to come in, possibly in diminished numbers.

And each time DCRA approves such a permit, someone's neighborhood will be confronted by another project that (a) very probably will be an offensive pop-up or pop-back incompatible with its neighbors, and (b) will contain needlessly sub-optimal living space that is *required* by the Regulations.

As to the root cause – the exclusion of cellars and attics from density allowances – OP has indicated that this subject, at least as to cellars (no mention is made of the identical problem relating to GFA and attics), will be taken up in a later case.[3] We find this deferment both baffling and disappointing. Such a later case could only in good faith include serious consideration of the position taken by multiple public witnesses and commenters: that any floor area authorized for human occupancy should be included in the calculation of allowable density and counted as a story. If that principle were to be adopted in a subsequent case, substantial portions of the current proposal could be rendered obsolete – irrelevant relics cluttering the Regulations – and other portions would require significant modification.[4]

So we are at a loss to understand the reason for having brought the proposals to the point of a Proposed Rulemaking without having addressed the issue of density allowances. Doing so would have made possible a clean solution decisively eliminating the problem that generated this case. That

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3 OP Supplemental Report of May 14, 2018, pp. 2, 16.
4 Potentially obsolete provisions would include the definition of "basement" (B-10.2), definition of "cellar" (B-100.2), use of the perimeter wall method (B-B-404.4), and use of grade plan method (B-404.5).

seems obviously preferable to the current proposal, which would enshrine in the Regulations a set of patch-ups that at best will only somewhat moderate the problem and at worst will exacerbate it, and may have to be immediately discarded or altered in the promised additional case.

Recommendations

Our position remains as stated at the February 22, 2017 hearing:

1. If cellars and basements are to be permitted to be used for human occupancy, we support including any habitable room in the calculation of allowable floor area. Accordingly we support eliminating, in the Zoning Regulations, the obsolete distinction between cellars and basements, and also the distinction between different attics on the basis of height of headroom, for purposes of calculating allowable density, leaving the setting of standards for allowable configuration of these spaces to the Building Code.

"Recommendation 2" contained in the draft Setdown Report circulated by OP on December 2, 2016, in the course of discussions of basement/cellar problems with members of the community, adopted the foregoing approach as to GFA but would have applied it in only two zones -- RA -1 and -2. We recommend adoption of that Recommendation, with certain additions expanding its applicability that are indicated below in italics:

> **Recommendation 2**: Change definition of "Gross Floor Area" to include cellars in RA-1, ~~and~~ RA-2, ***RA-7, RA-8, RC-1, RF-4 and RF-5*** **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.
>
> 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 *and attics* in the RA-1, ~~and~~ RA-2, *RA-7, RA-8, RC-1, RF-4 and RF-5* zones**.

> 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 *and attics* except for habitable rooms in cellars *and attics* in the RA-1, ~~and~~ RA-2, RA-*7, RA-8, RC-1, RF-4, and RF-5* zones.**

(Note that as to inclusion of cellars in GFA, the Commission has already taken this step in the 2016 Inclusionary Zoning rules, by including cellars used as dwelling space in the total gross floor area used in calculating set-aside requirements.[5])

2. We recommend the adoption of "Recommendation 4" of the same draft Setdown Report, which would count cellars used as habitable rooms as a story in determining the number of stories permitted:

> **Recommendation 4**: Change definition of "Story" to clarify that 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**.

We are not aware of any reason why the distinction between basements and cellars could not be beneficially discarded as to all zones. In that event, the final clause of this provision could read: "or partially below grade floors that do not qualify as habitable space."

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5 C-1003.9. An 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

Attachment

Effect of the current proposal on techniques previously employed to access "free" cellar or attic space.

The current proposal deals with certain devices that developers have historically employed to access the "free" dwelling space. Some of these it effectively eliminates, some it eliminates while simultaneously incentivizing alternative, more damaging devices; some it makes more difficult, and others it simply leaves in place, as explained in the following list of such devices:

●In an attached or semi-detached house, choosing 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, absurdly, to do this by opting to apply the "perimeter wall method" to a building whose full perimeter could not be measured because the building was attached or semi-detached. This device appears to have been finally rendered unavailable by new rules of measurement adopted in ZR 16, which would be modified by the current proposal 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.

●Installing a dropped ceiling in the basement

This mechanism would 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 in practice this "cure" will be worse than the disease. This new rule of measurement will incentivize gutting the rowhouse and installing the new *floor* above the basement at a lower elevation in order to make it a "cellar", and making similar adjustments regarding treating the top floor as an attic – or simply demolishing the house in order to achieve the same results in a new building.

Additionally, the new definition of "cellar", and the exclusion of cellars from the determination of allowable stories, will increase the likelihood of assembly and demolition of rowhouses in RF- 1, RF-2 and RF-3 zones through resort to provisions that allow an additional five feet of height for a project that constructs three adjoining new adjoining rowhouses.

●***Berming up 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", which the current proposal proposes to amend by extending the "waiting period" for natural grade from two to five years, is a perhaps commendable but problematic effort to deal with this problem. It looks fine on paper, but in its implementation in actual practice, it places a burden on DCRA to serve as a finder of historical fact that it is ill-equipped to discharge competently, and promises to generate protracted evidentiary disputes with diminished likelihood of a resolution persuasive to all parties.

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

The current proposal doesn't purport to remove this incentive or otherwise deal with rules pertaining to attics except to validate the earlier administrative determination that attics are to be treated as habitable rooms. The incentive to degrade this amenity in order to avoid FAR limits remains.

●***Ensuring that window wells and areaways do not project too far from the building face.***

The current proposal leaves this device in place. Window wells and areaways provide light and air to interior space, and areaways can often serve as a capacious patio space for a basement apartment. But the practice developed that if an areaway projected more than four feet, its floor could not be considered an "adjacent grade" for purposes of determining basement/cellar status. The current proposal, by means of its proposed "exceptions to grade" would codify this arbitrary size limit for window wells and establish a five-foot limit for areaways, forgoing optimal use of these amenities just in order to get the free floor space in a cellar.