

**215-13-A**

APPLICANT – Anthony A. Lenza , owner  
SUBJECT – Application July 16, 2013 – Appeal challenging denial of the Department of Building’s determination regarding floor area (§12-10 (12) (ii)). R1-1 zoning district.

PREMISES AFFECTED – 300 Four Corners Road, Block 894, Lot 235, Borough of Staten Island.

**COMMUNITY BOARD #2SI**

ACTION OF THE BOARD – Appeal Denied.

THE VOTE TO GRANT –

Affirmative: .....0

Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez .....5

**THE RESOLUTION –**

WHEREAS, the subject appeal comes before the Board in response to a Final Determination for DOB Application No. 520079405, dated June 17, 2013, issued by the Department of Buildings (“DOB”) (the “Final Determination”); and

WHEREAS, the Final Determination states, in pertinent part:

The request to propose additional floor area deductions for insulated exterior walls complying with the conditions under the definition for “floor area” under ZR 12-10(12) that are located at the cellar, adjacent to the enclosed parking areas, and adjacent to the attic areas with less than 8 ft. of structural headroom for certain zoning districts and number of dwelling units is hereby denied.

“Floor area” is defined in ZR 12-10 as the “sum of the gross areas of the several floors of a building or buildings, measured from the exterior faces or exterior walls . . .” The definition also lists what floor area within the building includes and what floor area shall not include. Certain portions of the exterior walls that are energy efficient and meeting the conditions described in the definition in ZR 12-10 are not included in the floor area of the building. However, any areas on any floor that are not counted towards the gross floor area of the building are not allowed additional floor area deductions, such as floor spaces for mechanical equipment that are located within the cellar floor; and

WHEREAS, a public hearing was held on this appeal on March 11, 2014, after due notice by publication in *The City Record*, and then to decision on April 1, 2014; and

WHEREAS, the site had visits by Chair Srinivasan and Commissioner Montanez; and

WHEREAS, the appeal is filed on behalf of the owner of the subject site, who contends that DOB’s determination was erroneous (the “Appellant”); and

WHEREAS, DOB and the Appellant have been represented by counsel throughout this appeal; and

WHEREAS, the site is located on the south side of Four Corners Road, 163 feet from Todt Hill Road, within an R1-1 zoning district; and

WHEREAS, the site is occupied by a detached, three-story, single-family residential building (the “Building”); and

WHEREAS, on May 2, 2012, the Appellant filed an Alteration Type 1 Job Application to vertically and horizontally enlarge the cellar, first, and second floors of the Building; and

WHEREAS, DOB denied the application for its use of floor area deductions associated with energy efficient walls in areas that are not counted towards the gross floor area of the Building; and

WHEREAS, the Appellant requested a determination from DOB that the ZR § 12-10(12) definition of “floor area,” which excludes certain energy efficient exterior walls, up to eight inches, from being counted as floor area should be applied to the proposed installation of energy efficient exterior walls at the cellar level, the accessory parking garage, and in the attic; and

WHEREAS, the Final Determination held that the proposed energy efficient walls to be installed at the cellar level, accessory parking garage, and attic cannot be deducted from floor area pursuant to the definition of “floor area” at ZR § 12-10; and

**RELEVANT ZONING RESOLUTION PROVISIONS**

*ZR § 12-10 Definitions*

Floor area

"Floor area" is the sum of the gross areas of the several floors of a #building# or #buildings#, measured from the exterior faces of exterior walls or from the center lines of walls separating two #buildings#. In particular, #floor area# includes:

- (a) #basement# space, except as specifically excluded in this definition;
- (b) elevator shafts or stairwells at each floor;
- (c) floor space in penthouses;
- (d) attic space (whether or not a floor has been laid) providing structural headroom of five feet or more in R2A, R2X, R3, R4 or R5 Districts, eight feet or more in R1 and R2 Districts, other than R2A and R2X Districts, and eight feet or more for #single-# or #two-family residences# in R6, R7, R8, R9 and R10 Districts. For #buildings# with three or more #dwelling units# in R6, R7, R8, R9 and R10 Districts #developed# or #enlarged# prior to February 2, 2011, such attic space providing structural headroom of eight feet or more shall be considered #floor area#. For #buildings# with three or more #dwelling units# in R6, R7, R8, R9, and

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R10 Districts #developed# or #enlarged# after February 2, 2011, any attic space shall be considered #floor area#;

- (e) floor space in gallerias, interior balconies, mezzanines or bridges;
- (f) floor space in open or roofed terraces, bridges, breeze ways or porches, if more than 50 percent of the perimeter of such terrace, breeze way, or porch is enclosed, and provided that a parapet not higher than 3 feet, 8 inches, or a railing not less than 50 percent open and not higher than 4 feet, 6 inches, shall not constitute an enclosure;
- (g) any other floor space used for dwelling purposes, no matter where located within a #building#, when not specifically excluded;
- (h) floor space in #accessory buildings#, except for floor space used for #accessory# off-street parking;
- (i) floor space used for #accessory# off-street parking spaces provided in any #story# after June 30, 1989:
  - (1) within #detached# or #semi-detached single-# or #two-family residences# in R1-2A, R2A, R2X, R3, R4 or R5 Districts, except that:
    - (i) in R2A Districts, #floor area# within such #residences# shall include only floor space in excess of 300 square feet for one such space; and
    - (ii) in all R1-2A Districts, and in R3, R4A and R4-1 Districts in #lower density growth management areas#, #floor area# within such #residences# shall include only floor space in excess of 300 square feet for one such space and in excess of 500 square feet for two such spaces;
  - (2) within #buildings# containing #residences developed# or #enlarged# pursuant to the optional regulations applicable in a #predominantly built-up area#;
  - (3) in excess of 100 square feet per required space in individual garages within other #buildings# containing #residences# (#attached buildings#, rowhouses or multiple dwellings) in R3-2, R4 or R5 Districts, except that in R3-2 Districts within #lower density growth management areas#, #floor area# shall only include floor

space in excess of 300 square feet for one such space and in excess of 500 square feet for two such spaces. However, all of the floor space within any #story# in individual garages shall be considered #floor area# where, subsequent to June 7, 1989, the level of any #yard# except that portion of a #yard# in front of a garage on the #zoning lot# is lowered below the lower of:

- (i) #curb level#; or
- (ii) grade existing on June 7, 1989 . .

However, the #floor area# of a #building# shall not include:

- (1) #cellar# space, except where such space is used for dwelling purposes. #Cellar# space used for retailing shall be included for the purpose of calculating requirements for #accessory# off-street parking spaces, #accessory# bicycle parking spaces and #accessory# off-street loading berths;
- (2) elevator or stair bulkheads, #accessory# water tanks, or cooling towers, except that such exclusions shall not apply in R2A Districts;
- (3) uncovered steps;
- (4) attic space (whether or not a floor has been laid) providing structural headroom of less than five feet in R2A, R2X, R3, R4 or R5 Districts, less than eight feet in R1 and R2 Districts, other than R2A and R2X Districts, and less than eight feet for #single-# or #two-family residences# in R6, R7, R8, R9 and R10 Districts. For #buildings# with three or more #dwelling units# in R6, R7, R8, R9 and R10 Districts #developed# or #enlarged# prior to February 2, 2011, such attic space providing structural headroom of less than eight feet shall not be considered #floor area#;
- (5) floor space in open or roofed terraces, bridges, breeze ways or porches, provided that not more than 50 percent of the perimeter of such terrace, breeze way, or porch is enclosed, and provided that a parapet not higher than 3 feet, 8 inches, or a railing not less than 50 percent open and not higher than 4 feet, 6 inches, shall not constitute an enclosure;
- (6) floor space used for #accessory# off-street parking spaces provided in any #story# . . .
- (12) exterior wall thickness, up to eight inches:

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- (i) where such wall thickness is added to the exterior face of a #building# wall existing on April 30, 2012, provided the added wall thickness has a thermal resistance (R-value) of at least 1.5 per inch; or
- (ii) where such wall thickness is part of an exterior wall constructed after April 30, 2012, equal to the number of inches by which the wall's total thickness exceeds eight inches, provided the above-grade exterior walls of the #building# envelope are more energy efficient than required by the New York City Energy Conservation Code (NYCECC) as determined by the following:
  - (1) the area-weighted average U-factor of all opaque above-grade wall assemblies shall be no greater than 80 percent of the area-weighted average U-factor determined by using the prescribed requirements of the NYCECC; and
  - (2) the area-weighted average U-factor of all abovegrade exterior wall assemblies, including vertical fenestrations, shall be no more than 90 percent of the area-weighted average U-factor determined by using the prescribed requirements of the NYCECC. . .

For the purposes of calculating compliance with this paragraph, (12)(ii), the term "above-grade" shall only include those portions of walls located above the grade adjoining such wall. Compliance with this paragraph shall be demonstrated to the Department of Buildings at the time of issuance of the building permit for such exterior walls. The total area of wall thickness excluded from the calculation of #floor area# shall be reflected on the next issued temporary or final certificate of occupancy for the #building#, as well as all subsequent certificates of occupancy; and

**THE APPELLANT'S POSITION**

WHEREAS, the Appellant asserts that the Zone Green Text Amendment, adopted by the City Council on April 30, 2012 allows that up to eight inches of thickness of exterior walls that meet the energy efficiency standards of the Zoning Resolution can be excluded from floor area calculations even when the area associated with the walls is already excluded from floor area calculations; and

WHEREAS, specifically, the Appellant cites to ZR § 12-10(12)(i) and (ii), which describe the criteria for the exclusion of energy efficient exterior walls; and

WHEREAS, the Appellant proposes to install new

walls exceeding eight inches in thickness in the cellar and cellar addition, first floor, accessory garage, second floor, and attic; and

WHEREAS, the Appellant asserts that the area occupied by all energy efficient exterior walls, including those it proposes - in the cellar, accessory garage, and in areas with height less than eight feet - that meet the standards of the Zoning Resolution are deducted from floor area calculations by the Zone Green Text Amendment, regardless of whether there are other zoning provisions which already exclude the walls' thickness from floor area calculations; and

WHEREAS, the Appellant states that DOB deducted the area associated with up to eight inches of the walls' thickness on the first floor and portions of the second floor, but that it denied the request to deduct the area associated with the walls in the cellar, the accessory garage, and portions of the second floor and attic with heights less than eight feet; and

WHEREAS, the Appellant relies on (1) what he finds to be the plain language of the text; and (2) the broad intent to increase energy efficiency; and

WHEREAS, as to the text, the Appellant states that the plain reading of the Zoning Resolution supports the exclusion of any exterior wall constructed to energy efficient standards; and

WHEREAS, the Appellant asserts that there is not any distinction under the Zoning Resolution between energy efficient exterior walls with thickness that may be excluded from floor area calculations and energy efficient exterior walls with thickness that may not be excluded; and

WHEREAS, the Appellant asserts that absent a distinction between the walls granted exclusion from floor area and those not granted exclusion, all walls must be treated the same regardless of whether they are in portions of the building already eligible for floor area exclusions; and

WHEREAS, accordingly, the Appellant asserts that the space occupied by the thickness of all energy efficient exterior walls that satisfy the Zoning Resolution's standards may be excluded from floor area calculations; and

WHEREAS, as to the intent of the text, the Appellant cites to a purpose statement, which includes "to remove zoning impediments to the construction and retrofitting of green buildings" and that its focus was to promote energy-efficient building walls and reduce the City's energy use and carbon emissions; and

WHEREAS, the Appellant asserts that energy efficient walls throughout a building will increase the overall energy efficiency of the building and promote the Zone Green Text Amendment's purpose; and

WHEREAS, specifically, the Appellant states that insulated basements can help reduce energy costs, citing to the U.S. Department of Energy, and further that garages can be sources of heat loss/gain in a building; and

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WHEREAS, the Appellant asserts that DOB's reading of the text eliminates the incentive for property owners to construct energy efficient walls in cellars, garages, and portions of buildings with heights less than eight feet; and

WHEREAS, the Appellant asserts that the absence of an incentive is inconsistent with the Zoning Resolution and will prohibit reductions in energy costs and carbon emissions in the City; and

WHEREAS, the Appellant submitted a letter to the Department of City Planning (DCP) seeking a response to its assertion that the purpose and effect of the Zone Green Text Amendment is to maximize energy efficiency of the entire building so there is a cumulative effect on the City's overall energy usage and efficiency and that, accordingly, the text allows for floor area deductions for all energy efficient walls; and

WHEREAS, by letter dated March 27, 2014, DCP submitted a response to the Appellant's letter, which states that the Zone Green Text did not specify that there was a bonus increase in floor area for insulation and that the intent of the text was to encourage the retrofit of existing buildings, that would as a result of the additional insulation exceed the floor area permitted, and would therefore be prevented from installing additional insulation and to encourage the use of highly efficient insulating materials in new construction without penalizing the property owner for the amount of space the thicker insulation occupies; and

WHEREAS, accordingly, DCP states that it agrees with DOB that allowing the requested deduction would be the equivalent of double-dipping, which was not the intent of the Zone Green Text; and

**DOB'S POSITION**

WHEREAS, DOB asserts that energy efficient exterior walls may not be deducted from floor area calculation in portions of the building that are already excluded from floor area calculations (1) pursuant to the ZR § 12-10 definition of floor area; and (2) because to do so would constitute double-dipping; and

WHEREAS, DOB states that a property owner cannot exclude an area from floor area under the exclusions from floor area in the ZR § 12-10 definition of floor area and then seek to deduct the same area again, based on a separate exclusion from floor area in the ZR § 12-10 definition; and

WHEREAS, DOB cites to the Appellant's proposed plans, which do not identify any floor area for the cellar level or accessory garage and thus completely exempts those spaces, and which deduct 442.65 sq. ft. of attic floor area from the proposed 442.65 sq. ft. of attic floor area, which results in a net 0 sq. ft. of floor area for the attic; and

WHEREAS, DOB agrees with the Appellant that cellars, accessory garages, and certain attic floor area are properly excluded from floor area calculations, per the

ZR § 12-10 definition of floor area<sup>1</sup>; and

WHEREAS, DOB notes that ZR § 12-10 defines floor area as "the sum of the gross areas of several floors of a building or buildings, measured from the exterior walls..." and then identifies particular areas that are included in the floor area calculation; and

WHEREAS, DOB notes that when calculating the floor area of spaces that are included in the floor area calculation, property owners must include the exterior walls of the areas that are included in the ZR § 12-10 floor area calculation; and

WHEREAS, DOB states that exterior walls are counted in spaces that are included as floor area, but when excluding a space from the floor area calculation, the exterior walls of that space are also excluded from the floor area calculation; and

WHEREAS, DOB states that a cellar level may be excluded from floor area because the ZR § 12-10(1) definition of floor area excludes "cellar space, except where such space is used for dwelling purposes;" and

WHEREAS, DOB notes that as indicated on the proposal's zoning analysis, the Appellant excluded the cellar space from floor area and as such, did not include the exterior walls of the cellar space in the floor area calculations; and

WHEREAS, DOB states that an accessory parking garage may be excluded from floor area because the ZR § 12-10(6)(iv) definition of floor area excludes "floor space used for accessory off-street parking spaces provided in any story...located not more than 23 feet above curb level, in any other building...;" and

WHEREAS, DOB notes that the Appellant did not include the exterior walls of the accessory parking garage in the floor area calculations; and

WHEREAS, DOB states that the attic space may be excluded from floor area because the ZR § 12-10(4) definition of floor area excludes "attic space (whether or not a floor has been laid) providing structural headroom of...less than eight feet in R1 and R2 Districts;" and

WHEREAS, DOB notes that the Appellant did not include the exterior walls of the attic space; and

WHEREAS, DOB states that since the Appellant has already excluded the exterior walls from the floor area calculation in the cellar, accessory garage, and attic, the Appellant cannot then exclude (or deduct) the exterior walls a second time, effectively, based on the ZR § 12-10(12) definition of floor area which excludes certain energy efficient "exterior wall thickness, up to eight inches;" and

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<sup>1</sup> DOB notes that it is currently reviewing the plans to confirm whether the proposed cellar and attic include space that should be included in floor area calculations and if the proposed use is consistent with DOB regulations. However, the Final Determination was based on plans that excluded the entire cellar from floor area calculations.

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WHEREAS, DOB asserts that a property owner may not take a deduction twice for the same building condition and to do as the Appellant proposes would be to "double-dip" by subtracting floor area that was not included in the floor area calculations; and

WHEREAS, DOB states that if the noted energy efficient walls had not already been excluded from the floor area calculation, then they could be excluded from floor area; and

WHEREAS, DOB states that, in contrast, up to eight inches of thickness of energy efficient exterior walls would be excluded from floor area if the energy efficient exterior walls were added to a second floor bedroom as the bedroom would be included in the floor area calculation, but the eight-inch exterior wall would be excluded (or deducted); and

WHEREAS, DOB provided the following example of what would be considered "double dipping" in the context of floor area deductions: in certain districts, the ZR § 12-10 definition of floor area excludes 50 sq. ft. of space used for mechanical equipment from the first dwelling unit; when that mechanical space is located in a 1,000 sq.-ft. cellar which is not used for dwelling purposes, the entire 1,000 sq. ft. cellar is excluded from floor area, but not the 1,000 sq. ft. and the 50 sq. ft. mechanical deduction, which is subsumed in the cellar exclusion; and

WHEREAS, therefore, DOB contends that it properly determined that the space occupied by the thickness of the noted walls cannot be deducted from the floor area calculations; and

**CONCLUSION**

WHEREAS, the Board agrees with DOB and the Department of City Planning that the thickness of the proposed cellar, accessory garage, and attic walls cannot be deducted from the floor area calculations for the building; and

WHEREAS, the Board finds that, according to the plain text of the ZR § 12-10 definition of floor area, those portions of the Building are already excluded from floor area calculations; and

WHEREAS, specifically, the ZR § 12-10 definition of floor area identifies exclusions from floor area calculations for cellars (at sub-paragraph (1)); certain attic space (at sub-paragraph (4)); and certain accessory parking garages (at sub-paragraph (6)); and

WHEREAS, the Board finds that pursuant to the Zone Green Text Amendment, energy efficient walls to a

thickness of eight inches were noted (at sub-paragraph (12)) as an additional, but separate, building element that can be excluded from floor area calculations; and

WHEREAS, the Board does not find any support in the text for the Appellant's conclusion that multiple exclusions can apply to the same building condition; and

WHEREAS, the Board recognizes the intent of the Zone Green Text Amendment to promote energy efficient construction, but does not see any basis in the text that allows for a reduction in floor area from portions of buildings that are already excluded from floor area calculations; and

WHEREAS, the Board notes that the Zoning Resolution does not contemplate double-counting of exclusions and cites to DOB's cellar mechanical space example and its conclusion that if cellar space is already excluded from floor area calculations it cannot also have a deduction for mechanical space within it; and

WHEREAS, the Board finds that such double-counting of floor area deductions or the practice of deducting floor area from portions of the building that do not actually generate floor area leads to absurd results from a zoning perspective; and

WHEREAS, the Board finds that the Appellant's reading, although it may promote a broader incentive for energy efficient construction, is simply not supported by the text; and

WHEREAS, the Board limits its decision to the Final Determination and the plans associated with it, which reflect portions of the building that DOB concludes are not included in the floor area calculations, such as the cellar, garage, and portions of the attic with heights less than eight feet; and

*Therefore it is Resolved*, that the Board denies the appeal and affirms DOB's determination that the sum of the space occupied by the cellar, garage, and attic walls cannot be deducted from the building's total floor area.

Adopted by the Board of Standards and Appeals, April 1, 2014.

**A true copy of resolution adopted by the Board of Standards and Appeals, April 1, 2014.**

**Printed in Bulletin No. 14, Vol. 99.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

