




To: Chair Cohen  
Board of Adjustment Members

From: Brent D. Lloyd   
Development Officer, DSD

Eric Thomas  
Residential Zoning Plans Examiner Supervisor, DSD

Date: May 9, 2022

Subject: **Appeal of Staff Interpretation of “Habitable Attic” Exemption from Subchapter F’s Gross Floor Area Limitations**

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The matter before the Board of Adjustment (“BOA”) is an administrative appeal challenging staff’s disapproval of residential building plans submitted for development proposed at 2212 Trailside Drive. The issue of code interpretation before the Board is whether Development Service Department’s (“DSD”) correctly applied the “habitable attic” exemption from the gross floor area requirements of Chapter 25-2, Subchapter F (*Residential Design & Compatibility Standards*) of the Land Development Code (“LDC”).

### **Procedural Requirements for Appeal**

The Appellants represent the applicant for the building permit at issue in this case, and they timely filed their appeal on April 7, 2022. Therefore, staff believes the appeal is properly before the BOA for consideration.

In acting on the appeal, the BOA may uphold, modify, or reverse DSD’s decision rejecting the proposed building plans, as provided in City Code Sec. 25-1-192, based on whether they comply with applicable zoning regulations. The burden is on Appellant to show that staff’s disapproval of the proposed plans was based on an incorrect interpretation of the applicable code requirements.

Following resolution of the appeal, DSD will abide by the BOA’s interpretation of the applicable regulations both for the application at issue in this case and future applications involving Subchapter F’s gross floor area requirements.

### **Summary of Issues & Subchapter F Provisions**

The primary issue before the Board can be summarized as follows:

*In disapproving the proposed building plans, did staff correctly conclude that the proposed attic space is not exempt from calculation of gross floor area under Subchapter F’s exemption for habitable attic space based on measurement of ceiling height?*

### **Review History**

The initial application and plans were accepted by Residential Intake on November 16, 2021. The first master comment report was sent by the coordinating reviewer on December 8, 2021, with rejection comments from the zoning reviewer and technical building code reviewer.

The first formal update was received on December 20, 2021. The second master comment report was sent by the coordinating reviewer on January 10, 2022, with rejection comments from the zoning reviewer. The zoning reviewer met with the appellant on January 11, 2022, to discuss the outstanding comments.

The Residential Zoning Plans Examiner Supervisor sent the appellant a detailed and explanatory list of outstanding zoning discrepancies on January 19, 2022, and met with the appellant on February 18 to discuss the changes that would be necessary to resolve the zoning comments. Additionally, the Acting Chief Plans Examiner & Plans Examiner Manager and the appellant met to discuss the project on January 26, January 28, February 14, and March 11, 2022.

### **DSD's Position on Appeal**

DSD recommends that the BOA reject the appeal and vote to affirm staff's decision disapproving the proposed building plans. As discussed below, DSD maintains that staff correctly applied Subchapter F with respect to the measurement of ceiling height for exempted habitable attics.

#### **— Subchapter F Requirements and Intent**

Subchapter F is intended to minimize the impact of new construction, remodeling, and additions on surrounding residential properties by specifying an appropriate buildable area for each lot. The standards are designed to protect the character of neighborhoods by ensuring that new construction and additions are compatible in scale and bulk with existing patterns of development.

One of the methods utilized by Subchapter F to minimize the impact of residential construction is to limit development to the greater of a floor-to-area ratio ("FAR") of 0.40 or 2,300 square feet of gross floor area. Section 3.3.3 exempts certain "habitable attic" space from Subchapter F's calculation of gross floor area and floor-to-area ratio. However, to qualify as exempt, an attic must meet specified criteria intended to limit the exemption to attics of appropriate bulk and scale.

The starting point for calculating gross floor area is Subsection [3.3.1](#), which specifies that all enclosed space with a ceiling height exceeding five feet is calculated towards gross floor area and FAR unless exempted under Subsections 3.3.2, 3.3.3, or 3.3.4. For a habitable attic to be exempt, it must meet the following criteria as specified in Subsection 3.3.3:

1. The roof above it is not a flat or mansard roof and has a slope of 3 to 12 or greater.
2. It is fully contained within the roof structure.
3. It has only one floor.
4. It does not extend beyond the footprint of the floors below.
5. It is the highest habitable portion of the building, or a section of the building, and adds no additional mass to the structure.
6. Fifty percent or more of the area has a ceiling height of seven feet or less.

#### **— BOA Decision on Measuring Ceiling Height**

Item 6 in the above list of criteria is intended to prevent exempted habitable attics in exceptionally large roof masses, but it does not specify how *ceiling height* is measured. This Board, however, previously provided

guidance for staff to apply the *general height* requirements applicable under Subsection [3.3.4](#), which specifies that height is measured from the finished floor elevation, up to either:

- I. The underside of the roof rafters; or
- II. The bottom of the top chord of the roof truss, but not to collar ties, ceiling joists, or any type of furred-down ceiling.

The BOA's decision was issued on January 9, 2012, in an appeal involving development at 3704 Bonnell Drive (Case No. C15-2011-0110) and has governed how ceiling height is measured for purposes of calculating gross floor area since that time. The decision provides as follows:

- (1) *To qualify for the "attic exemption" from Gross Floor Area under Section 3.3.3.C of Subchapter F, a habitable portion of an attic must meet each of the following requirements:*
  - A. *As measured in accordance with Subsection 3.3.4, fifty-percent (50%) or more of the exempted portion of an attic must have a height of less than 7 feet, but more than 5 feet.*
  - B. *The exempted portion of an attic must be limited to rooms used for human occupation, including but not limited to spaces used for living, (sleeping, eating, or cooking and all bathrooms, toilet rooms, circulation spaces and laundry rooms), working (home office, studio), and recreation (entertainment, exercise).*
  - C. *Consistent with the staff memo by Daniel Word, dated July 29, 2008, the exempted portion of the attic must be fully contained within the roof structure and cannot extend beyond the footprint of the floor below.*

In response to the decision, Section [4.4.5.2](#) of the administratively-adopted Building Criteria Manual (BCM) was amended to specifically reference the BOA's 2012 decision and ensure that ceiling height would be measured consistent with the BOA's interpretation.

### — ***Specifics of Appeal***

The plans submitted to DSD for this project requested exemptions for at least three attic areas on the second-floor level: (1) a media room and nook (2) a bedroom/office (including a full bathroom and storage area), and (3) a mechanical room. The combined floor area of all of the requested exemptions was roughly 1,000 square feet, none of which would be counted towards gross floor area.

The largest portion of the proposed exemptions, and the area that DSD determined is not exempt, is marked as "BR4/Office" on the proposed plans. The "BR4/Office" accounts for approximately 440 square feet of the requested exemption. The included storage room opens to the mechanical room with a full-sized door. (For context, it should also be noted that the remainder of the second story, which was not requested for exemption from gross floor area, is roughly 740 square feet.)

In the plans submitted by Appellant, the ceiling height of the "BR4/Office" was measured to the finished ceiling. This is in direct conflict with the above-quoted BOA interpretation, which aligns with Subsection 3.3.4 of Subchapter F, and with the referenced provision of the BCM. Specifically, when these provisions are applied, the height in some areas of "BR4/Office" reaches fifteen feet, and the area of the attic having a height of less than 7 feet, but more than 5 feet, is far below fifty-percent (50%) of the total floor area which is a requirement of the habitable attic exemption.

### — ***Technical Code Requirements***

A larger issue raised by this appeal is the relationship between the technical codes, in particular the International Residential Code (IRC), and the zoning regulations of the Land Development Code. The

principle that DSD adheres to is that both apply, but serve different purposes. Zoning regulations (like Subchapter F) regulate things like the density, scale, and intensity of development, while the IRC is focused more on ensuring that construction, design, and occupancy adhere to appropriate health and safety standards.

As we understand the appeal, Appellant is arguing that provisions related to habitable attics under the 2021 IRC should control over the 2012 BOA interpretation for purposes of determining when an attic is exempt from the gross floor area requirements of Subchapter F. Appellant argues, in essence, that the 2021 IRC for the first time specifies what constitutes a “habitable attic,” thereby negating the need for the prior BOA interpretation.

DSD disagrees with this argument for two reasons. First, as mentioned above, zoning regulations apply separately from technical codes, so terms used in the zoning regulations do not always have the same meaning under the technical codes. Secondly, the specific IRC section that Appellant references (Sec. R326.3) establishes criteria for when a habitable attic does not count as a “story” for purposes of IRC construction standards. So the two provisions are not serving the same purpose.

If the BOA reverses DSD’s decision, and accepts Appellant’s proposed interpretation, it would conflict with how DSD has applied the habitable attic exemption in Subchapter F since the BOA issued its interpretation in 2012. Additionally, staff believes this approach would incentivize building designs that consolidate attic space to smaller floor areas, at greater ceiling heights, which undermines what staff understands to be one of purposes of Subchapter F’s form controls—i.e., minimizing the impact of roof masses on surrounding properties in residential neighborhoods; and

### **Conclusion**

For the reasons stated above, DSD recommends that the BOA affirm staff’s decision disapproving the proposed building plans and find that staff has correctly applied the habitable attic exemption for purposes of determining gross floor area under Subchapter F. That said, staff appreciates the Board’s guidance in this matter and will be available at the public hearing to answer any questions.

cc Susan Barr, Acting Chief Building Plans Examiner, DSD  
Jennifer Verhulst, Acting Assistant Director, DSD  
Kelly Stilwell, Building Official, DSD