

September 8, 2015

DC Board of Zoning Adjustment
441 4th Street, NW
Washington DC 20001

BZA Appeal No. 18980 – Facts and Findings

Dear Members of the Board:

As instructed by the BZA in the July 7, 2015 hearing, we respectfully submit to you the framework for the appeal on B1509180 and the underlying facts.

In response to a July 21, 2015 email inquiry by the Appellants, the BZA provided a July 22, 2015 email clarification on the scope of the findings of fact, which stated:

“Regarding the scope of your appeal, the Board’s motion to dismiss applies to claims based on the earlier building permit, not necessarily the facts underlying that application. To the extent that information and calculations from the prior permit are contained in the DCRA file for B1509180, they do not need to be excluded from your Findings of Fact. Based on the Board’s motion, however, the arguments and legal claims of error in your draft order should be focused on B1509180, just as the hearing was.”

B1509180 amends the approved permits B1404813 and B1409928, which together form the basis of construction and existing conditions for the project *in toto*. Therefore, please note that the facts available to the parties presented in this document include those in B1509180 (including the approved June 23, 2015 construction drawings that represent the back grade, front grade, GFA, parking conditions, interior living space for the lower level, and a FAR calculation that applies the grade plane method, utilizing rear grade and front grade measurements). Also presented are facts and findings contained within B1509180 as they reference two other permits, namely: B1404813 (Exhibit 22D) and B1409928 (Exhibit 22E). Please see the next page for a summary of this information, which we cite but do not challenge.

Respectfully,
Concerned Citizens of Argonne Place NW Appellants

Address

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Names

Deepa Venkataraman and Ajeet Vinayak
Alan Gambrell and James O’Day
Andrea Owen and Richard Ehrenberg
Cy Behoorzi and Tom Natan
Luis and Anita Canizares
Michael Russoto and Angel Torres-Cabassa
Jennifer Barger and Callan Barger
Paul Hunt

B1509180 (Exhibit 30) References Utilized in Facts and Findings

B1509180 Item	References to Permits in B1509180	Information Referenced in Facts and Findings
References to B1502210 (Exhibit 22B, 22Q, 22S)		
B1502210 Cover Sheet	"Revise B1404813 – Plans to Reflect New Grade"	B1404813 and construction drawings representing existing garage parking space, number of units, number of floors, adjacent finished grade
References to B1404813 (Exhibit 22D, 22F)		
B1509180 Cover Sheet	"Description of Work: Revision to B1404813 to Remove Approximately 73 Feet of Cellar and Install Retaining Wall"	B1404813 and construction drawings representing existing garage parking space, number of units, number of floors, adjacent finished grade
B1509180 Contract Agreement (DCRA Form per 2013 DCMR 12, 108.3)	"Description of Proposed Work: Revision to B1404813 to Remove Approximately 73 Feet of Cellar and Install Retaining Wall"	B1404813 Cover Sheet: "Change of use from single family dwelling to 4 unit condo building"
B1509180 Environmental Intake Form	"Project Description: Revision to B1404813 to Remove Approximately 73 Feet of Cellar and Install Retaining Wall"	B1404813 Zoning Data Summary Sheet (3/4/14): Number of parking spaces (9' x 19'), Existing/Proposed: 2/2
References to B1409928 (Exhibit 22E, 22B)		
B1509180 Construction Drawings: A0100	"12% grade per B1409928 – No Impact to Existing Parking Pervious Surface"	B1409928 Face Sheet: "Description of Work: Regrade Rear for future garden. Patch garage door. New retaining wall no taller than 30 inches."
B1509180 Construction Drawings: A0201	"12% grade per B1409928 – No Negative Impact to Existing Parking Pervious Surface"	B1409928 Zoning Data Summary Sheet (7/21/14): Number of parking spaces (9x19): NA / NA B1409928 Zoning Data Summary Sheet (7/21/14): Number of existing/proposed dwelling units: 1/1
B1509180 Construction Drawings: A0203	"12% grade slope per B1409928 – No Negative Impact to Existing Parking"	B1409928 Construction Drawings, A0201 (7/21/14): Depiction of garage in rear

Appellants' Proposed Order

Appeal No. 18980 of Concerned Citizens of Argonne Place, NW, pursuant to 11 DCMR 3100 and 3101, July 7, 2015, decisions by the Department of Consumer and Regulatory Affairs to issue building permit B1509180, authorizing construction of a retaining wall in the R-5-B District at 1636 Argonne Place, NW (Square 2589, Lot 0460).

HEARING DATE: July 7, 2015

DECISION DATE: September 15, 2015

Decision and Order

On February 17, 2015, Concerned Citizens of Argonne Place NW (a collective of 12 neighboring property owners, the "Appellants") filed a Board of Zoning Adjustment (the "Board") appeal of B1502210, which amended B1404813 for construction at 1636 Argonne Place NW (the "Property"). Per a subsequent Stop Work Order issued May 2015 and issuance of a new permit (B1509180) June 23, 2015 by the Department of Consumer and Regulatory Affairs ("DCRA"), the appeal was modified to challenge the decision of the Zoning Administrator to issue the new permit. B1509180 authorized construction of a "retaining wall" embedded within the rear building wall and modification of the level rear yard with construction of an elevated berm, creating a parking space with a 12% upward gradient. The intent of these modifications was to alter the lower level's current status from basement to cellar grade in order to exclude the lower level's square footage from the Floor Area Ratio (FAR) calculation.

Appellants alleged that in issuing B1509180, the Zoning Administrator incorrectly identified the "adjacent finished grade" at the Property: in the rear within the building envelope and, in the front by acceptance of a false calculation. Both conclusions are contrary to the plain meaning of "adjacent finished grade" as understood and applied in the zoning regulations. Appellants alleged that this scheme created a cascade of zoning errors, including misapplication of the grade plane method; acceptance of an illegitimate purpose for a "retaining wall" and creation of new life safety/egress violations; parking errors that involved both misidentification of grandfathered spaces and an impermissible worsening of parking conditions; and a building height/rear yard violation.

The Board convened a public hearing July 7, 2015 and dismissed as untimely the appeal of B1404813, submitted as an appeal of B1502210, but allowed the Appellants and DCRA an opportunity to be heard regarding B1509180, filed June 23, 2015.

Based on evidence in the record, extensive pre-hearing submissions, and testimony received at the public hearing, and for reasons presented below, the Board concludes that the Zoning Administrator erred in issuing permit B1509180 and upholds the appeal.

Preliminary Matters

Notice of Public Hearing

The Office of Zoning scheduled a hearing on April 21, 2015. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellants and to DCRA.

Rescheduled Hearing Dates

Due to unavailability of the Zoning Administrator, the originally scheduled hearing date of April 21, 2015 was rescheduled to May 19, 2015. On May 14, 2015, DCRA's General Counsel contacted the Appellants via phone and email requesting concurrence with rescheduling of the hearing to a later date, which appellants declined via email on May 15, 2015, with a follow-up statement on IZIS May 18, 2015. On May 19, 2015, the Board agreed to a hearing date delay to July 7, 2015.

Parties

The Appellants in this case are Concerned Citizens of Argonne Place, 12 neighbors who reside within 200 feet of 1636 Argonne Place, NW, the subject property.

DCRA was represented by its Office of the General Counsel.

As the owner of the subject property, Greg Keats is automatically a party under 11 DCMR § 3199.1 and was represented by Attorney Martin Sullivan, Sullivan & Barros, LLP (Owner's Representative).

Pre-Hearing Submissions

The Board received pre-hearing materials from the Appellants, pursuant to 11 DCMR 3112.10. The Owner submitted pre-hearing materials for the Board's consideration and DCRA submitted its pre-hearing statement.

On May 18, 2015, the Owner's Representative filed a pre-hearing statement requesting denial of the appeal as untimely and a continuation, asserting that DCRA had erred and would cause the Owner economic hardship in issuing two prior permits only to have both revoked with Stop Work Orders.

On June 23, 2015, DCRA issued a revised building permit B1509180, and, on June 25, 2015, Appellants filed Form 150 to waive the 14-day filing deadline for pre-hearing submissions in order to submit a revised pre-hearing statement in response to the newly filed B1509180. At the hearing on July 7, 2015, the Board accepted the later filing into the record.

Hearing and Closing of the Record

The Board convened a public hearing on July 7, 2015, during which time the Appellants, DCRA, and the Owner's Representative presented their respective cases. The Board received testimony from Appellants and Guillermo Rueda, AIA. Testimony was received from DCRA by General Counsel and the Owner's Representative, Attorney Martin Sullivan, Sullivan & Barros, LLP.

The Board deferred its decision on the merits of the case and closed the record, except to receive proposed Findings of Fact and Conclusions of Law from all parties to be submitted by September 8, 2015. The Board scheduled the case for decision on September 15, 2015, at which time it considered the merits of the case and voted ____ to affirm the appeal.

Findings of Fact

The Property

1. The subject property is located at Square 2589, Lot 0460, 1636 Argonne Place, NW, Washington, DC 20009 ("Property").
2. The Property was built in 1923 as a single-family house with a single car garage within the lower level at the rear of the building accessing the alley. The lower level space was converted into a 1-bedroom basement rental unit in 2002 under DCRA permits B441124-4419020, preserving the garage, as evidenced by a signed statement by the former owner.¹
3. In September 2014, the garage was demolished and incorporated within the interior as part of the conversion into a 4-unit building, as evidenced by 6/24/14 and 8/29/14 construction drawings² and a signed statements by a current abutter.³
4. The B1509180 permit and most associated documents indicate the number of units as 4, although the Zoning Data Summary Sheet states 2 units.⁴
5. The Property's rear adjacent finished grade is presented in B1509180 as:
 - 7'6 – 7'9" (existing, measured adjacent to the building) and
 - 3'11" (proposed, measured within the building).⁵
6. The Property's front adjacent finished grade is presented in B1509180 as:
 - 4'2" (existing, measured at the garden sidewalk in front of the building) and
 - 3'11" (proposed, which is a measurement error as the actual figure is 8'; this location is measured in the entryway, which is to be converted to interior space).⁶

See drawing, next page.

¹ See attached signed statement, also submitted to IZIS.

² See Exhibit 22F.

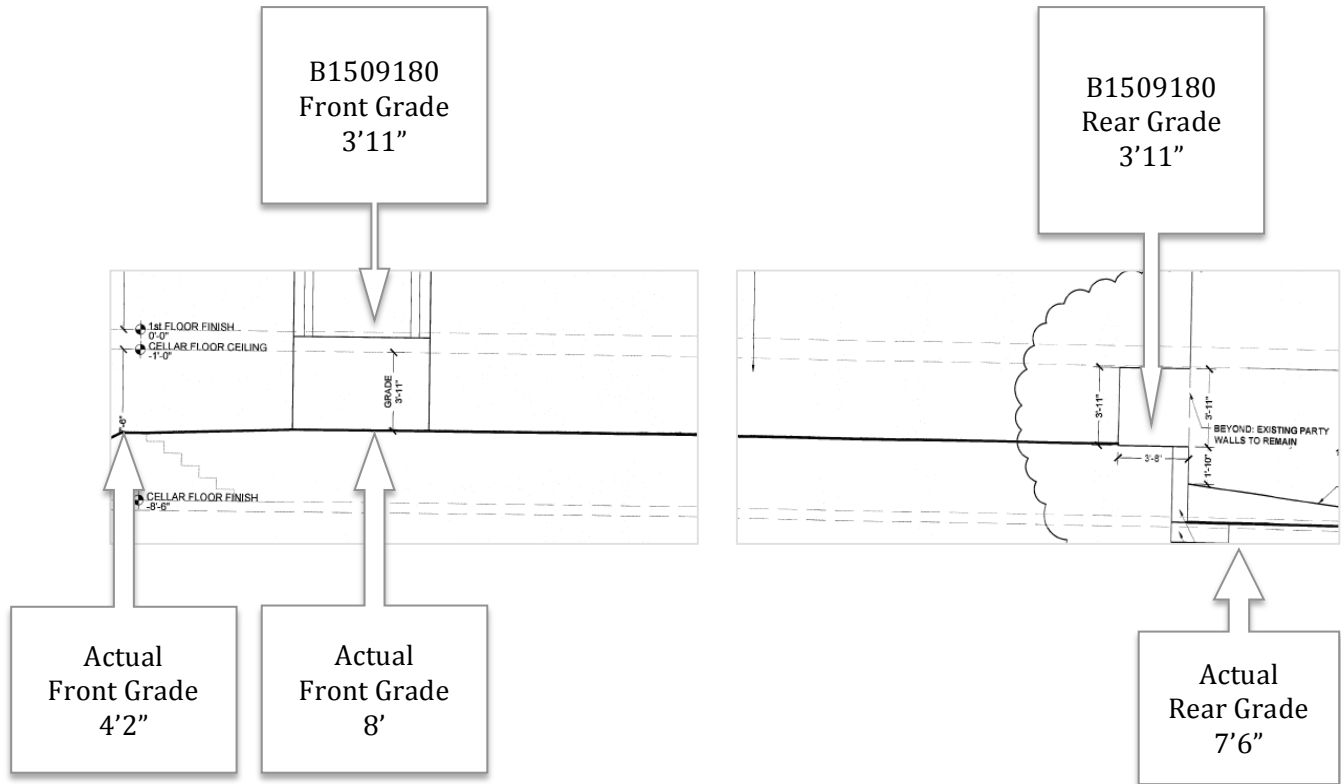
³ See attached signed statement, also submitted to IZIS.

⁴ See Exhibit 22F and Exhibit 27Y.

⁵ See Exhibit 27Y.

⁶ See Exhibit 27Y.

Adjacent Finished Grade Measurement: B1509180 and Actual



7. The Property's rear yard is 16' from the building to the public alley.⁷
8. The building height is 52'4".⁸
9. Certificate of Occupancy was issued June 14, 2013 for the property as a two-family flat (C01300980), lapsing in 2014 per multiple zoning regulations, including 11 DCMR 3203.4 and 12 DCMR 110.1.2.⁹ The change in ownership on 2/11/14 and change in use upon initiation of alteration of the property to a 4-unit apartment building require per 12 DCMR 110.1.3 that a new Certificate of Occupancy application must be filed, "[f]or changes in use, occupancy load or tenant floor layout."¹⁰

⁷ See Exhibit 27X.

⁸ See Exhibit 27Y, Sheet A0201. Add 38'7" as measured on drawing from "first floor finish" to "mezz. lower level" + 5' above + 8'9" grade to 1st floor finish.

⁹ 12 DCMR 110.1.2 "Change in Ownership. For changes in ownership of structures, land, or parts with an existing valid Certificate of Occupancy, a new Certificate of Occupancy shall be issued in the name of the new owner (without re-inspection), provided there is no proposed change in use, floor layout or occupancy load."

¹⁰ 12 DCMR 110.1.3. "Change in Use, Load or Floor Layout. For changes in use, occupancy load or tenant floor layout, a new Certificate of Occupancy shall be required. In the foregoing circumstances, a construction permit application must be filed pursuant to Section 105.1.4 (13) and approved by the Department; in order to confirm that the new use, load or tenant floor lay-out complies with the Construction Codes and Zoning Regulations. An application for certificate of occupancy will not be accepted for filing until a permit application has been granted, or a determination has been made that a permit application is not required under the circumstances."

Zoning of the Property

10. The Property is located in R-5-B, which allows a maximum building density of 1.8 Floor Area Ratio (FAR) per 11 DCMR 402.4 and a lot occupancy of 60% per 11 DCMR 403.2.
11. A multiple dwelling unit in an R-5-B zone requires one parking space for every two units (per 11 DCMR 11-2101.1), with such spaces to be 9' x 19' (per 11 DCMR 2115.1), and for parking spaces for the addition from a single family structure to a 4-unit building given that the intensity of use increased by more than 25% (per 11 DCMR 2100.6).
12. The Zoning Administrator reinforced the importance of 11 DCMR 2101.1 and 2115.1 parking requirements in an April 2, 2015 email to the Ward 1 councilmember.¹¹
13. In R-5-B, the minimum rear yard setback is 15', per DCMR 11-404.1.¹²
14. Per 11 DCMR 2117.8, a maximum slope of 12% is allowable for driveways.
15. Per 11 DCMR 199.1, "parking space" is defined as "an off-street area accessible and of appropriate dimensions to be used exclusively for the temporary parking of a motor vehicle"; 11 DCMR 2115.1 states "Except as otherwise provided in this section, a required automobile parking space shall be a minimum of nine feet (9 ft.) in width and nineteen feet (19 ft.) in length, exclusive of access drives, aisles, ramps..., " thus distinguishing between "parking space" and "driveways" and referencing accessibility requirements in both definitions.
16. Conversion of the Property from a single-family home to a multi-unit apartment building prompted requirements for enhanced means of egress per 11 DCMR 3203.5 as referenced by the Means of Egress Law under D.C. Official Code §§ 6-703.03.¹³
17. The zoning definitions limit mezzanine floor space to not more than one-third (1/3) of the area of the floor immediately below.¹⁴

Events Leading Up to Issuance of the Permit

18. During 2014-2015, two permits were issued to address FAR compliance for the Property (modification of B1404813 and B1502210). For each of these two permits, Stop Work Orders were subsequently issued for FAR noncompliance.

¹¹ "In order for my office to be able to approve the proposed conversion to four dwellings the Applicant is required to demonstrate that two 9' by 19' parking spaces would be provided on the property. To date he has not done so. Therefore unless the applicant can demonstrate compliance, or receives relief from the parking requirement from the Board of Zoning Adjustment [BZA], then the pending building permit application cannot be approved, and only a project [if a revision is proposed] for a two dwelling unit building could be approved."

¹² DCMR 11-404.1 reads: "4 inches per foot of vertical distance from the mean finished grade at the middle of the rear of the structure to the highest point of the main roof or parapet wall, but not less than 15 feet."

¹³ 11 DCMR 3203.5. "Where an alteration to a structure is required by law in order to effect compliance with regulations adopted pursuant to the Means of Egress Law, approved December 24, 1942 (56 Stat. 1083, as amended; D.C. Official Code §§ 6-703.03 to 6-703.09 (2001 ed.))(formerly codified at D.C. Official Code §§ 5-518 to 5-524 (1994 Repl.)), a certificate of occupancy for that structure may be issued prior to the alteration; Provided, that the use of the structure for which a certificate of occupancy is desired, if a new use, is not one that would require a greater amount of egress or fire protection facilities under the Means of Egress Law than is required for the use existing prior to the alteration."

¹⁴ 11 DCMR 199.1. "Mezzanine - a floor space within a story between its floor and the floor or roof next above it and having an area of not more than one-third (1/3) of the area of the floor immediately below. A mezzanine shall not be considered a story in determining the maximum number of permitted stories."

- For the first permit, B1404813, DCRA issued a Stop Work Order on December 3, 2014 for exceeding FAR per 11 DCMR 402.4, with a December 12, 2014 email from DCRA stating: “Our office has determined that the information and dimensions that are provided on the revised drawings, show that there are portions of the lowest level that are classified as a cellar and as a basement.”¹⁵ This Stop Work Order was lifted December 19, 2014 with B1502210, approved December 18, 2014 and issued March 24, 2015.
- The Zoning Administrator conducted a site visit to the property on May 7, 2015 and subsequently issued a second Stop Work Order for B1502210, issued on May 20, 2015, for FAR noncompliance per 11 DCMR 402.4. This Stop Work Order was lifted June 23, 2015 with issuance of B1509180.

Construction Activity During Appeals Process

19. Construction activity at the Property started September 2014 and was interrupted by two Stop Work Orders (December 3, 2014 and May 20, 2015).
20. At the July 7, 2015 public hearing, the Board chair clearly stated that the body was split 2-2 in its position on the case.
21. After the hearing date, work continued on the Property, including application of exterior siding in the rear and interior construction work, observable through open windows.
22. No construction activities for the “retaining wall” have been undertaken as of September 8, 2015.
23. The Property has not been characterized as “under roof” in relation to the timeliness of the appeal, per 11 DCMR 3112.2(b).

Inconsistencies and Errors in Permits and Construction Drawings

24. Construction drawings referenced in B1509180 present inconsistent grade measurements and measurement points, including:
 - Rear adjacent finished grade (existing) is initially shown as 3’11” (measured adjacent to the Building)¹⁶ but is later presented as 7’6 – 7’9” (measured adjacent to the Building).
 - Rear adjacent finished grade (proposed) is consistently presented as 3’11”, but the measurement point is changed from adjacent to the building to within the building under B1509180.
 - Front adjacent finished grade (existing) is consistently depicted as 4’2”, measured at the garden sidewalk in front of the building.
 - Front adjacent finished grade (proposed) is consistently presented incorrectly as 3’11”. The actual measurement is 8’. Furthermore, this measurement location is the entryway, which is proposed to become interior living space.¹⁷

¹⁵ 12/12/14 Email to Neighbors from Rohan Reid, Program Analyst, DCRA.

¹⁶ See Exhibit 22F. Measurement not provided but calculated from scaled drawings.

25. Conflicting information is provided in B1509180 on the number of units, with the preponderance of information in permit files and construction plans indicating the Property is a 4-unit condominium building.¹⁸ An August 27, 2015 telephone conversation with the realtor handling the sales and marketing of the Property's units, confirmed that the Property is a 3-unit condominium building, excluding the lower level unit.¹⁹
26. The number of parking spaces is initially stated as one space (including a 9-6-2000, plat, 1 "conc. drive") but is later stated as two 9' x 19' spaces in the 16' rear yard, described as "two grandfathered non-conforming parking spaces."²⁰
27. Variable rear yard measurements are presented in permits and construction drawings referenced in B1509180, initially stated as 16', then 15', to then later back to 16'.²¹
28. Actual built conditions in the rear contradict approved drawings in various areas including altered window arrangements (i.e., depiction of windows 42" high where installed windows are 48"), a missing 3-story wall niche at the rear wall and doors installed in lieu of the approved windows on to the 4th level roof. These drawing discrepancies also include representation of non-existent conditions of grade.²²

	June 2014 Exhibits 22F and 22D	December 2014 Exhibits 22S and 22Q	June 2015 (B1509180) Exhibits 27Y & 27X
<u>Existing</u> Rear Grade and Measurement Point	3'11" Adjacent to building	7'6" – 7'9" Adjacent to building	7'6" – 7'9" Adjacent to building
<u>Proposed</u> Rear Grade and Measurement Point	3'11" Adjacent to building	3'11" Adjacent to building	3'11" Inside building
Rear Yard	15' and 16'	15'	16'
<u>Proposed</u> Number of Units	4	4	4 and 2 figures differ on forms
<u>Existing</u> Parking Spaces	1 garage in lower level	2 in rear yard	2 in rear yard "grandfathered"

29. Section 11 DCMR 3202.1 outlines requirements that building permits be accompanied by accurate scaled drawings; 11 DCMR 3201.1 establishes penalties for violations of Title 11.

The Permit (B1509180)

30. On June 23, 2015, DCRA approved B1509180 and submitted construction drawings, authorizing two alterations. The first alteration would be construction of a "retaining wall" within the footprint of the building, achieved by first removing the lower portion of the rear exterior wall and moving it 3'8" within the building footprint, thus extending the rear yard from 16' to 19' 8", creating compliance with required parking space dimensions. The "retaining wall" would then be embedded within the building's footprint at the newly created 3'8" space, reverting the rear yard to 16'. The second alteration would modify the existing level rear yard with construction of an elevated slope, creating a 12% gradient. (See drawing below.)

¹⁷ See Exhibits 22F, 22E, 22B, 22S, 27U, 27Y.

¹⁸ See Exhibit 27Y and 27X.

¹⁹ See attached signed statement, also submitted to IZIS.

²⁰ See Exhibit 35. DCRA 7/1/15 Pre-hearing Statement. Page 6.

²¹ See Exhibits 22D, 22E, 22F, 22S, 27X and 27Y.

²² See Exhibits 22F, 22E, 22B, 22S, 27U, 27Y.

31. The purpose of the “retaining wall” under B1509180 is to relocate the rear “adjacent finished grade” to within the building envelope (i.e., at the top of the embedded “retaining wall” to be built). The result of this change in location is to alter the rear “adjacent finished grade” from 7’-9” to 3’-11”. (See drawing below.)
32. The apparent purpose of the 12% grade is to alter the building height measuring point (BHMP) at the rear yard from 52’4” to 50’6”. A building height of 50’6” exceeds the maximum height of 48’ for a rear yard of 16’ but is theoretically allowable if 10% minor flexibility is granted by the Zoning Administrator, per 11 DCMR 407.1 and 2522.1(c) for various linear requirements, including rear yards.²³
33. B1509180 drawings show an adjacent finished grade of 3’11” at the front in the entryway area. The actual measurement is 8’ at this point and is, additionally, 4’2” at the garden sidewalk in front of the entryway. (See drawing below.)
34. Approved construction drawings associated with B1509180 provide front and rear grade measurements, GFA calculations, and a basement/cellar determination for the lower level. The FAR for the property as of June 23, 2015, is incorrectly stated as 1.8 on the Zoning Data Summary Sheet and approved construction drawings. The actual FAR is 2.4.
35. The embedded retaining wall with a 3’8” depth, authorized by B1509180, triggers enhanced means of egress per 11 DCMR 3203.5, its reference to the Means of Egress Law under D.C. Official Code §§ 6–703.03²⁴ and violates IBC required egress for the ground level unit under section 1029. This constitutes an illegal modification to the Construction Code requirement for egress per 12a DCMR 102.1.1.
36. B1509180 lifted the SWO on B1502210 as of June 24, 2015.

Building Density

37. The grade plane method has been utilized in the District for decades to differentiate cellar space from basement space in buildings. The Zoning Administrator used the accepted “grade plane method” to determine the floor area on the lower level appropriately charged to GFA and thus FAR.

²³ 11 DCMR 2522.1. “The Zoning Administrator is authorized to permit the following deviations, if the Zoning Administrator determines that the deviation or deviations will not impair the purpose of the otherwise applicable regulations: (c) Deviations not to exceed the greater of ten percent (10%) or twelve (12) inches of the linear requirements governing rear yard....”

²⁴ 11 DCMR 3205.5: “Where an alteration to a structure is required by law in order to effect compliance with regulations adopted pursuant to the Means of Egress Law, approved December 24, 1942 (56 Stat. 1083, as amended; D.C. Official Code §§ 6-703.03 to 6-703.09 (2001)(formerly codified at D.C. Code §§ 5-518 to 5-524 (1994 Repl.))), a certificate of occupancy for that structure may be issued prior to the alteration; Provided, that the use of the structure for which a certificate of occupancy is desired, if a new use, is not one that would require a greater amount of egress or fire protection facilities under the Means of Egress Law than is required for the use existing prior to the alteration.”

38. The lower level is defined as a basement, according to the 11 DCMR 199.1. At the rear, the adjacent finished grade is from 7'-6" to 7'-9". At the front, the adjacent finished grade is 8' in the entryway and 4'-2" at the garden sidewalk in front of the building.²⁵
39. The lower level was previously designated by DCRA as a basement in 2001 in granting approval of a lower level renovation, completed in 2002.²⁶
40. The subject property's FAR is 2.4 FAR (existing and proposed) when using the actual zoning prescribed grade plane method but is represented as 1.8 FAR on construction plans approved with B1509180 on 6/23/15.
41. The Zoning Data Summary sheet is incorrect for existing FAR, identifying the lower level as a cellar with 969 Square Feet, prior to implementation of B1509180, thus under-reporting GFA as 3,067 with a FAR of 1.8, whereas the correct calculations are 4,149 GFA and 2.44 FAR.
42. The Zoning Data Summary sheet for B1509180 is incorrect in identifying the mezzanine level as 256 square feet or 29% of the floor below. The actual measurement exceeds 373 square feet or 43% when measured according to the zoning prescribed method for GFA.

Parking

43. Prior to the conversion to a 4-unit condominium building, the Property, built in 1923, had a garage located on the lower level (16' 6" x 9' 0½"), which served as a noncompliant but grandfathered parking space, as evidenced by information referenced in B1509180 and abutter statements.²⁷ Upon conversion in 2014, this parking garage space was eliminated as the space was repurposed and incorporated within the living area of the lower level unit.
44. With elimination of the garage/parking space, the existing driveway ceased to be a driveway by definition and was reclassified as a parking area. This parking area has a level grade with a finished concrete surface, measuring 16' long by 20' wide.
45. The Zoning Administrator incorrectly identified the existence of two grandfathered non-compliant 9'x16' parking spaces to satisfy the parking requirement for the Property, contrary to information referenced in B1509180 and abutter statements.
46. B1509180 authorizes demolition of the existing wall condition and installation of a new wall in the proposed parking area to allow for a berm with a slope of 12% gradient. The proposed gradient change would alter the 16' length of the parking area by adding 1.15" (approximately one inch) to the overall length and would fail to provide the required 19' available as the demolished wall is to be replaced with a 3' thick embedded retaining wall.

²⁵ The front grade was identified as a basement in DCRA-approved construction plans dated 6/4/15 and 12/17/14 in notations for the walkway space, which read: "EXISTING GRADE PER DCRA'S MEASUREMENT 4'-2". These notations were omitted from construction drawings approved 6/23/15. A grade determination by the appellants confirms the 4'-2" as minimum.

²⁶ Permits B430896 (dated 1/13/00) and B441124 (dated 12/17/01) both read, in part: "Interior renovation of basement." See Tabs K and V.

²⁷ See Exhibit 22F: B1404813 Construction Drawings, AD0101.

Arguments of the Parties

Appellants' Case

Appellants contend that Permit B1509180 is the latest in a series of proposed configurations that seek to justify additional building area that exceeds the requirements for height, density and size for buildings in R-5-B. The principal allegation of Appellants is that the Zoning Administrator incorrectly identifies the “adjacent finished grade”: in the rear, within the building envelope and, in the front, by acceptance of a false calculation. This misidentification is to redefine the lower level from a basement to a cellar in order to exclude this square footage from GFA and thus FAR. Appellants claim this is a bewildering and radical departure from the clearly understood meaning of the words “adjacent finished grade” and long-established DCRA policy and precedent in applying the grade plane method as points external to the building itself. Appellants also claim that acceptance of the incorrect front grade measurement is an inexplicable abandonment of DCRA’s responsibility to ensure the accuracy of information provided to the agency.

Additionally, Appellants claim the Zoning Administrator has authorized a so-called “retaining wall” that fails to comply with the zoning definition for this structure and lacks a legitimate purpose. Rather, its sole function is, contrary to all logic, an effort to establish the adjacent finished grade as a point within the building itself—specifically, the upper lip of the “retaining wall,” to be embedded within the building. Finally, Appellants allege that the Zoning Administrator has improperly recognized the existence of two grandfathered parking spaces and has allowed a series of parking violations to occur, along with a violation of the rear yard setback requirement.

Violation of Zoning Regulation Definitions

Appellants contend that the Zoning Administrator incorrectly applies 11 DCMR 199.1 definitions and commonly understood definitions of the phrase “adjacent finished grade” and its individual words in an effort to reclassify the lowest level as a cellar, therefore discounting its GFA from the FAR calculation.²⁸

Additionally, Appellants allege that the Zoning Administrator accepts incorrect grade measurements at both the front and rear of the Building and also fails to verify required information provided on the building permit application forms. The veracity of these data, including existing and proposed conditions, is necessary for purposes of zoning decision-making in that such facts provide a baseline and limit for proposed projects.

Violation of Policy to Exclude Areaways and Other Proximate Locations from Grade Measurements

Furthermore, Appellants allege that the Zoning Administrator disregards long-established DCRA policy to exclude from the “adjacent finished grade” definition those points that are particularly proximate to a Building’s face. Specifically, these points include areaways and window wells as their proximity to the building façade and exclusion from “adjacent finished grade” is the logical basis for likewise excluding from “adjacent finished grade” other points that are exceedingly close to, in the present case, within the actual footprint of the Building. The “retaining wall” authorized by B1509180 envisions creation of an “adjacent finished grade” at the top of this wall. This creates

²⁸ 11 DCMR. “Gross Floor Area – “The term “gross floor area” shall include basements...’ and “The term “gross floor area” shall not include cellars....”

what might be construed as an areaway but one that resides within the actual building footprint. With that image, Appellants contend that it is illogical to recognize such an embedded areaway as the “adjacent finished grade” while excluding from such a designation for an areaway that is external to the building.

Violation of Grade Plane Method

Appellants contend that the Zoning Administrator has also incorrectly applied the grade plane method by ignoring the point at which the finished grade meets the building. Specifically, Appellants contend that this misapplication is evident in that the measurement of “adjacent finished grade” is at points within the actual footprint of the Building, whereas the grade plane method clearly designates appropriate measurement points as “at the front of the building” and the grade “at the rear of the building.” In addition, the grade plane method is incorrectly calculated on June 24, 2014 construction drawings (Sheet A0202, provided by DCRA to Appellants in response to FOIA request).

Violation of Retaining Wall Regulations

Appellants also contend that the Zoning Administrator, in issuing B1509180, has authorized construction of a structure that does not meet the definition of a “retaining wall” in that it does not exist to address its fundamental role and thus serves no legitimate purpose. The retaining wall does not mitigate an existing condition, namely, a grade that requires containment to arrest lateral displacement. Appellants contend that the so-called retaining wall is instead proposed to change the “adjacent finished grade” and that, if actually constructed, will only serve to contain soil that is imported into the site. As such, the retaining wall “does not ‘resist lateral pressure’” and would only exist to serve a contrary purpose. This reasoning was the exact basis for invalidating the legitimacy of a retaining wall in BZA 17285 and later affirmed by the District of Columbia Court of Appeals in *Economides v. DC Board of Zoning Adjustment*.

Appellants additionally assert that the so-called retaining wall violates 11 DCMR 3203.5, with reference to the Means of Egress Law under D.C. Official Code §§ 6-703.03²⁹ and creates a conflict between zoning and building codes that cannot exist under 12a DCMR 102.1.1. This provision, Appellants contend, is essential for the Board to address as it mandates avoidance of conflicts between Title II and Title 12 and thus straddles the worlds of zoning regulations and building codes. In this case, Appellants argue that egress as required under IBC 1029, a fundamental element of life-safety from dwelling units, is directly affected by the new configuration of the rear wall and windows at the ground level. The new windowsill height where the “retaining wall” recess exists prevents direct access to a yard or public way. Appellants contend that accepting the new configuration to create zoning compliance for FAR and height at the rear cannot be allowed to exist in conflict with building code requirements.

²⁹ 11 DCMR 3205.5: “Where an alteration to a structure is required by law in order to effect compliance with regulations adopted pursuant to the Means of Egress Law, approved December 24, 1942 (56 Stat. 1083, as amended; D.C. Official Code §§ 6-703.03 to 6-703.09 (2001)(formerly codified at D.C. Code §§ 5-518 to 5-524 (1994 Repl.))), a certificate of occupancy for that structure may be issued prior to the alteration; Provided, that the use of the structure for which a certificate of occupancy is desired, if a new use, is not one that would require a greater amount of egress or fire protection facilities under the Means of Egress Law than is required for the use existing prior to the alteration.”

Parking Violations

Appellants also allege a series of parking violations. First, Appellants allege that DCRA has incorrectly recognized two existing grandfathered non-conforming parking spaces. Appellants have shown that prior to conversion of the property to four units, a garage served as the only required parking space for the Property. This fact is documented by building permits and associated plans as well as statements by abutters. This garage, which was part of the original 1923 construction of the building,³⁰ was removed as part of the Building conversion, leaving the Property with no parking zoning compliant spaces because the existing rear wall is set back only 16' from the rear property line. It is thus impossible for the Zoning Administrator to deem the existence of two grandfathered parking spaces as such spaces did not exist.

Zoning requirements mandate two regulation parking spaces of 9'x19' for four residential units. Demolition of the rear wall to accommodate the construction approved under B1509180 removes the existing nonconformance created by the rear wall and establishes a new rear yard of over 19' in length as a result of removal of the rear exterior wall 3'8" back from the face of the building. This new length, Appellants contend, exceeds the 19' zoning requirement by 8". However, Appellants contend, the so-called approved retaining wall, once installed in the required parking space, creates non-conforming parking conditions, contrary to the zoning regulations.

The approved permit also allows construction of a rear berm with a 12% slope from the public alley to the face of the so-called retaining wall to change the measuring point for building height at the rear. Appellants contend that a 12% grade slope is the defined maximum slope for a driveway by 11 DCMR 2117.8 but does excludes "drives from the definition a "parking space" under 11 DCMR 2115.1. Appellants claim this represents a clear distinction in the zoning regulations between "driveways" and "parking spaces." The maximum slope for accessible parking is set much lower according to Appellants: 2-5% (pedestrian ramps being limited to 8.33%). In summary, Appellants allege that both the shortened rear yard (created by the installed retaining wall) and the raised berm are disallowed in that both schemes fail to create accessible spaces of the required length.

Further still, Appellants allege that the approved drawings do not adequately describe the parking berm surface material and construction details and fail to show how the berm is contained at the adjacent property lines. In addition, drawings fail to show the impact of the new grade on the existing 30+" caliper tree that straddles the property line to the north, in potential violation of 11 DCMR 34 provisions.

Appellants further claim that DCRA incorrectly calculated an increase in intensity of use of 25% whereas the actual increase was much greater given the conversion from a single-family residence to a four-unit apartment building.

Rear Yard Setback Violation

Appellants contend that the purpose of the 12% grade is to alter the building height measuring point (BHMP) at the rear yard from 52'4" to 50'6". A building height of 50'6" exceeds the maximum height of 48' for a rear yard of 16' but is theoretically allowable if 10% minor flexibility is granted by the Zoning Administrator, per 11 DCMR 407.1 and 2522.1(c) for various linear requirements, including rear yards. However, Appellants contend that the 12% grade is impermissible, leaving the BHMP at 52'4", in violation of the rear yard maximum of 48' for the 16' rear yard.

³⁰ Building permits for 1636 Argonne incorrectly state the year built as 1921.

DCRA's Case

In its pre-hearing statement and public hearing testimony, DCRA stated that the conversion, from a single family home to a “four unit apartment house,”³¹ involved issuance of multiple permits, with a December 2014 permit B1502210 authorizing “a retaining wall at the rear of the property attached to the exterior of the building”³² in order to alter the adjacent finished grade for purposes of the cellar/basement determination for FAR. DCRA explained that, in May 2015:

“[i]t was determined subsequently based on a site visit conducted by the Zoning Administrator that that would make the existing non-conforming parking spaces increase their non-conformity, which is not allowed, and that was the reason for the revocation of that revised permit. The permit holder, the applicant, then came back and proposed instead to take that retaining wall and move it as it were inside the building envelope, to carve out a niche of the building itself.”

Furthermore, DCRA explained that the embedded retaining wall permitted under B1509180 “is created within the existing building footprint”³³ and “would not change the, it would not change the existing non-conforming parking spaces that were there....”³⁴ DCRA also explained that B1509180 also authorized a 12% grade in the rear yard, “the maximum slope for a driveway”³⁵ under 11 DCMR 2110.5(f)(i), for spaces designated as parking spaces.

Lower Level Correctly Recognized as a Cellar Per 11 DCMR 199.1

DCRA contended that the Zoning Administrator correctly identified the “adjacent finished grade at the front and the back of the property” as 3’11” or cellar dimension and that Appellants erred in confusing the term “adjacent finished grade” by adding the term “existing” and, furthermore, were confused in use of the words “natural grade,” “existing grade” and “finished grade” regarding their dispute over the Building’s height. Regarding the meaning of “adjacent finished grade,” DCRA asserted that Appellants incorrectly conclude that “finished grade” is synonymous with “existing grade,” adding that “‘finished’ means the grade proposed by the applicant to be established under a permit.”³⁶

DCRA also disputed Appellants claims over the importance of the Zoning Data Summary Sheet and its requirement for applicants to provide data on “existing” and “proposed” conditions for various factors, including GFA, FAR and parking. DCRA presented an interpretation diminishing the role and importance of the data presented in this form, stating:

“What the appellants are talking about is a zoning data summary that is used for a variety of metrics that come in, what is the current existing conditions for the height and so forth and

³¹ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 1.

³² Transcript. Page 61.

³³ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 4.

³⁴ Transcript. Page 61.

³⁵ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 6.

³⁶ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 4.

so on. You fill those out, you compared it. What matters here in terms of evaluating whether or not it's compliant with the zoning regulations is what is proposed, that is the key, at least as far as regards to this issue.”³⁷

Grandfathered Compliant Parking Spaces Improved

DCRA stated that the property required one parking space for each two units and that B1509180 “recognized the two grandfathered non-conforming parking spaces, which satisfied this requirement.”³⁸ DCRA also contended that the existing rear yard is not changed under the permit as the retaining wall is “created within the existing building footprint” and that as such the wall “does not change the existing grandfathered non-conforming parking spaces.”

DCR stated that the proposed 12% grade “if anything it will decrease the existing non-conformity by extending the length of the parking spaces.”³⁹ DCRA also disputed the Appellants claim in the July 7, 2015 hearing that the zoning regulations make a clear distinction between a “driveway” versus a “parking space” and that the 12% grade was disallowed as that grade applies only to driveways. DCRA disputed the existence of distinctions between driveways and parking spaces, stating at length that:

“If we're going to start to say that parking spaces and driveways are completely separate, I think we're going to create a huge amount of non-conformities and that just goes against everything that exists currently. But more importantly, I point out that's not defined separately in the zoning regulations which is what we're dealing with right here. So, under the zoning regulations, there's nothing that says that the twelve percent grade that is the maximum that's permitted under the zoning regulations which is what the Board has jurisdiction over.”⁴⁰

Owner's Case

The Owner's Representative stated the Property Owner's position in their May 2015 motion to dismiss and request for continuance and public hearing comments. Statements in the motion focused primarily on a request to dismiss all but one claim, the one related to B1509180, on the basis of timeliness. The Owner's Representative additionally expressed concerns over the expense and inconveniences incurred by the Owner as a result of the Zoning Administrator's decision to initially grant an earlier December 2014 permit for a retaining wall affixed to the back of the Building, allowing work to continue for five months, only to subsequently revoke that permit several days before an earlier May 2015 BZA hearing date (subsequently rescheduled to July 7, 2015). The Owner's Representative stated: “In reliance on all of those approvals (the first approval being granted eleven (11) months prior to this Appeal), Argonne LLC has incurred significant expenses, right up to the notice of a reversal from the Zoning Administrator's counsel last Thursday.”⁴¹

³⁷ BZA 18980. Public Hearing Transcript. July 7, 2015. Page 92.

³⁸ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 6.

³⁹ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 4.

⁴⁰ BZA 18980. Public Hearing Transcript. July 7, 2015. Page 83.

⁴¹ BZA 18980. Property Owner's Motion To Dismiss For Failure to Timely File; Request For Continuance; Argument For Laches And Estoppel. May 18, 2015. Page 2.

In the public hearing, the Owner's Representative stated a position that: "the Zoning Administrator's decision in the case regarding the rear grade I think was a reasoned decision with a basis in fact, custom and practice. He required that the depth of the retaining wall finished grade matched the height of the retaining wall and then also required a certain distance above that matching the height of the retaining wall to be cut out from the building. So I believe it's on the appellant, the burden is on the appellant to point out why that is incorrect, and I don't believe that they've met that burden."⁴²

The Appeal

A BZA hearing on the appeal was convened July 7, 2015, at which time the Board discussed the Owner Representative's statement that the appeal of the first permit revision (B1502210 revision to B1404813) was untimely. DCRA's General Counsel argued that the Owner's assertion of lack of timeliness on the first permit was correct. The Board ruled that the appeal of the first permit revision was untimely and restricted discussion to permit B1509180.

Conclusions of Law and Opinion

The Board of Zoning Adjustment is authorized by § 8 of the Zoning Act of 1938 to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2012 Repl.)) (See also 11 DCMR § 3100.2.) The decision or determination is DCRA's issuance of the Permits.

Under 11 DCMR § 3119.2, in all appeals and applications, the burden of proof shall rest with the appellant or applicant.

Appellants claimed that the permit was unlawful in that it authorized an unprecedented re-definition of "adjacent finished grade" as a point within the building interior—specifically, the upper horizontal lip of the embedded "retaining wall." Appellants claimed that this interpretation was contrary to the plain meaning of the phrase "adjacent finished grade" and its individual words as applied in the zoning regulations. In particular, Appellants alleged that the Zoning Administrator disregarded the "grade plane method" and the logic of long-established DCRA policy to not consider adjacency at locations particularly close to a building's façade: namely, areaways and window wells. Furthermore, Appellants claimed that the Zoning Administrator ignored actual measurement points at the front grade, endorsing a measurement point that was both false and within the building's interior, again contravening the plain meaning of "adjacent finished grade."

It is from the above errors that Appellants claimed the creation of a domino effect of additional errors. Among these, Appellants asserted that the "retaining wall" had no legitimate purpose as it did not exist to "resist lateral pressure" but rather served a contrary purpose (i.e., to alter the grade). Once installed, Appellants claimed that the "retaining wall" would violate life safety and means of egress requirements.

Appellants also claimed that the Zoning Administrator improperly recognized the existence of two grandfathered parking spaces (ignoring evidence that the grandfathered rear garage, removed in 2014, was the actual grandfathered space); miscalculated increased intensity of use (including

⁴² BZA 18980. Public Hearing Transcript. July 7, 2015. Pages 83-84.

acceptance of incorrect documentation on the number of units in the building); and authorized a worsening of parking conditions. On the latter, Appellants claimed that the “retaining wall” and raised berm scheme to remove the lower portion of the rear exterior wall would extend the 16’ rear yard length to more than 19’ and create newly-compliant parking conditions. However, Appellants claimed that subsequent installation of the “retaining wall” would be prohibited as it would shorten the rear yard to 16’ and thus recreate non-compliant parking spaces. Appellants also claimed that the proposed 12% gradient was impermissible as such a grade (which would add only 1.15” to the rear yard by function of its elevation) is only allowable for “driveways” but not “parking spaces.” Appellants additionally stated that the grade would further worsen parking conditions by violating regulations with regard to accessibility and practicality.

Finally, Appellants claimed that the berm authorized by B1509180 impermissibly changed the measurement of building height for purposes of determining the rear yard setback and failed to comply with Green Area Ratio documentation requirements in that the approved permit did not accurately represent existing conditions by omitting a large caliper tree that would be negatively impacted by the change in grade.

This Order will refer to DCRA as the entity that issued the Permits and the Zoning Administrator as the person whose decision is the subject of the Appellants’ complaint.

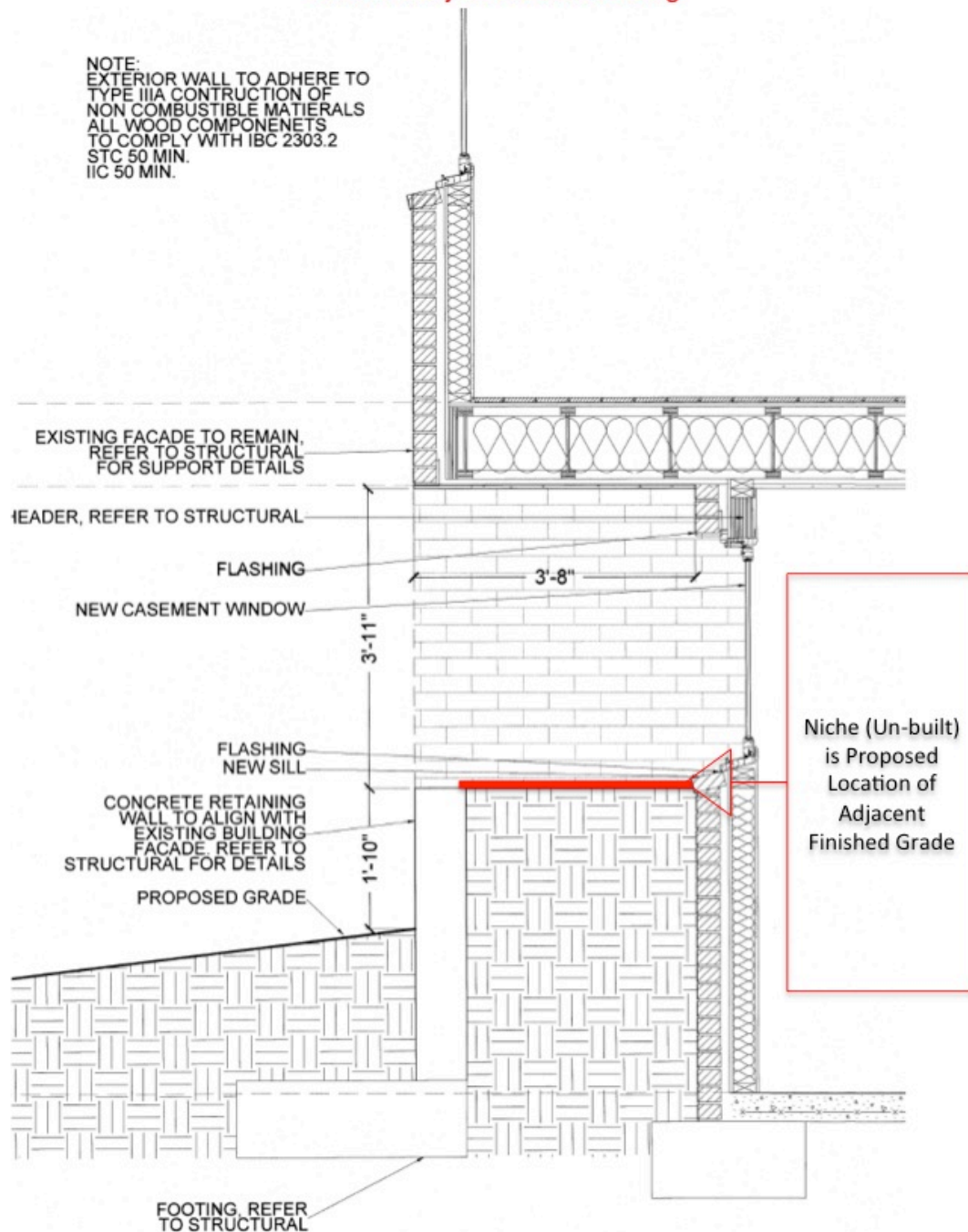
The Board addresses each of these issues in turn, based upon the record and testimony in this case.

Definitions for Adjacent Finished Grade

The Zoning Administrator has defined the “adjacent finished grade” at the rear of the Building as a point within the envelope of the building, which Appellants claim is both unprecedented and beyond the pale of reason. As for the front grade, Appellants claim the Zoning Administrator has accepted as “adjacent finished grade” a measurement that is both incorrect and is located in an area that is intended to become interior living space. (See below illustrations.)

Elevation View of Rear of 1636 Argonne Place NW - B1509180

**Adjacent Finished Grade is Placed Within Building Interior
and Not Adjacent to the Building**



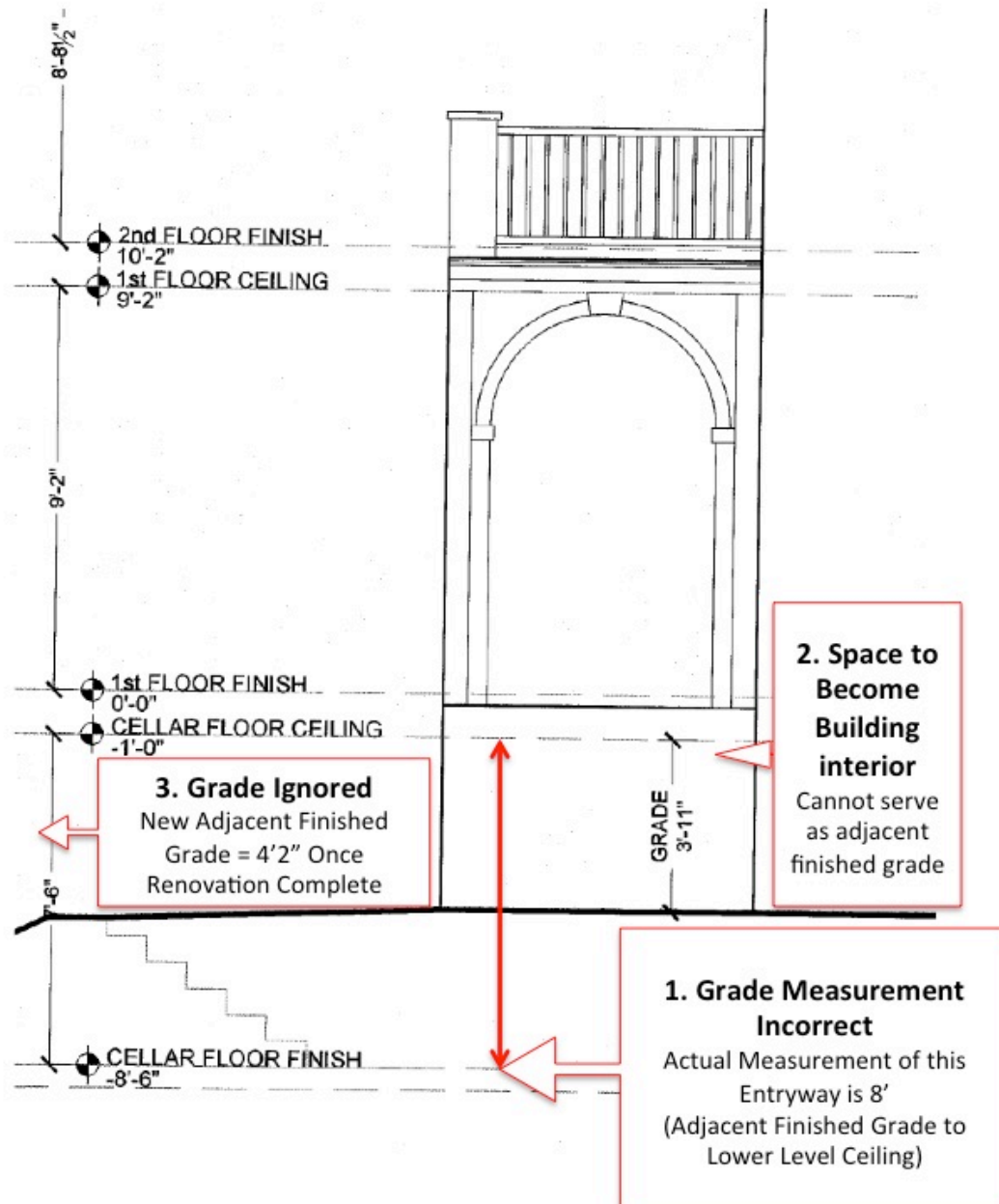
Elevation View of Front of 1636 Argonne Place NW - B1509180

Adjacent Finished Grade:

(1) Incorrect

(2) Placed Within Space Proposed as Building Interior and

(3) Disregards "New" Adjacent Finished Grade of 4'2" as Front of Building



Thus, an examination of definitions in 11 DCMR 199.1 for “basement” and “cellar” is in order to determine the meaning of “adjacent finished grade” as stated in each:

Basement - that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade.”

Cellar - that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade.

The Board starts with a review of the phrase “adjacent finished grade,” which is not defined in 11 DCMR 199.1, nor are the individual words “adjacent,” “finished” and “grade.” As directed by 199.2 (g), “Words not defined in this section shall have the meanings given in Webster's Unabridged Dictionary.” The regulations do not specify the edition to be used. Therefore, the Board reviewed the definition of these words in the editions supplied by the parties. Appellants used the definitions as contained in the Office of Zoning’s copy of Webster’s, as made available to the public. The Board also conducted an analysis of each of these words as contained in 11 DCMR 199.1 as well as their application in the DC Building Codes and analyzed their meaning.

The Board’s analysis as presented below supports our conclusion that the Zoning Administrator has misapplied the phrase “adjacent finished grade” to the top of the proposed embedded retaining wall. While this location certainly would qualify as being “finished,” it is neither “adjacent” nor a “grade.” To find otherwise would do great harm to the integrity of the zoning regulations and the authority of both DCRA and the Board of Zoning Adjustment.

Misapplication of Zoning Regulation Definitions

Webster’s does not provide a definition for the phrase “adjacent finished grade” but does define each individual word. The most important for this case is “adjacent,” which is defined as “to lie near, border on” and to additionally define as “nearby but not touching,” “relatively near and having nothing of the same kind intervening,” “having a common border,” living nearby or sitting or standing relatively near or close together.” Further clarity on the meaning of “adjacent” can be found in its synonyms as presented in Webster’s: “adjoining,” “abutting,” and “juxtaposed.”⁴³

“Adjacent” Means Next to and Not Within a Building

The Board finds additional clarity is its examination of the word “adjacent” in 11 DCMR 199.1, which is contained in five (5) definitions, including basement and cellar. The three (3) other definitions clearly present the term to mean a location that is next to, and not within, a building. These definitions include:

- “ground floor” (“the floor that is nearest in grade elevation to the adjacent surface of the public right-of-way. (48 DCR 9832)”);
- “Wall, lot line - an enclosing wall constructed immediately adjacent to a side lot line, but not a party wall”; and
- “Yard, side - a yard between any portion of a building or other structure and the adjacent side lot line, extending for the full depth of the building or structure.”

⁴³ Webster’s Third New International Dictionary, Unabridged. Office of Zoning Copy. Accessed 9/1/15.

"Finished" Means Condition of Grade, Not Intention to Alter Grade

The second word in the phrase, "finished," is contained within the definitions for both cellar and basement but is undefined. Webster's defines "finished as "brought to conclusion" and "processed."⁴⁴ Additionally, the word "finished" is used in 11 DCMR 199.1 definitions for "Building, height of" and "Clear Height, Floor to Ceiling," to denote the condition of the grade.

In neither of these definitions does "finished" suggest its meaning is time-defined or intent-based, as DCRA alleges in its pre-hearing statement that "finished" means the "grade proposed by the applicant to be established under a permit"⁴⁵ Rather, finished clearly means conditions that are altered by materials (in contrast to "natural grade"), not the time at which such alteration occurred or is proposed to occur. The importance of clarifying that "finished" is related to grade conditions, and not proposed intentions, is an important one as "adjacent finished grade" for purposes of measurement of cellar and basement definitions. Such determinations are a necessary part of a permit application process, as required under zoning regulation requirements to file a Zoning Data Summary Sheet for GFA and FAR (inclusive of a GFA determination for the lower level), as specified in an inherent reading of 11 DCMR 101.5 as well as requirements for submission of building permit data and drawings on existing and proposed structures, per 11 DCMR 3202.1, and 11 DCMR 3202.2.

"Grade" Means Ground Upon Which Building Rests, Not Point Within a Building

The third essential word, "grade," is also not defined in 11 DCMR 199.1. Webster's provides a host of definitions for grade as a verb, adjective and noun. The most relevant definitions are: "level or elevation esp. of a land or water surface: as (1): a datum or reference level (2): the contemplated level of the ground when the work of erecting a building is completed; ground level <the underpinning of the toward was above ~> (3): ELEVATION."⁴⁶

The term "grade" is used in two 11 DCMR 199.1 definitions besides basement and cellar.

- First is "natural grade": "the undisturbed level formed without human intervention or, where the undisturbed ground level cannot be determined because of an existing building or structure, the undisturbed existing grade. (50 DCR 9387)." The meaning is clear: "natural grade" refers to the ground and a point that is apart from, and thus next to or adjacent to, a building or structure. As for the meaning of "ground," that is unquestionably referring to the earth as this undefined term in 11 DCMR 199.1 is defined in Webster's as "the lowest part," "the surface that limits the downward extent of something" and "the surface on which man stands, moves, and dwells and on which objects naturally rest as a: the surface of the earth."⁴⁷
- Secondly, "grade" is also used in the definition for "building, height of," which reads in part, as: "in Residence Districts (R) the vertical distance measured at the existing grade at the mid-point of the building façade of the principal building that is closest to a street lot line to a point designated in the zone district." Again, the terms are clear in defining not only "grade" but "existing grade" as a point at the "façade," which is external to the building itself.

⁴⁴ Webster's Third New International Dictionary, Unabridged. Office of Zoning Copy. Accessed 9/1/15.

⁴⁵ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 4.

⁴⁶ Webster's Third New International Dictionary, Unabridged. Office of Zoning Copy. Accessed 9/1/15.

⁴⁷ Webster's Third New International Dictionary, Unabridged. Office of Zoning Copy. Accessed 9/1/15.

While the word “grade” is applied to the accompanying words “natural,” “building, height of” and of course “basement” and “cellar,” it is clear to the Board that the word is consistently used as a reference point to ground upon which a building rests.

For further clarity on the meaning of “grade,” one can look to the years-long Zoning Regulatory Review (ZRR) process, where DCRA has proffered its regulatory expertise. The pending ZRR does not establish a new definition for “adjacent finished grade” but does present a proposed future definition for “grade, finished” as “[t]he elevation of the ground directly abutting the perimeter of a building or structure.”⁴⁸

Any remaining uncertainty as to the meaning of “grade” can be found in Building Codes, which the zoning regulations rely upon in order to provide standards for construction projects. The District of Columbia’s Building Code and the International Building Code provide the same definition for “grade plane” as:

- “A reference plane representing the average of finished ground level adjoining the building at exterior walls. Where the finished ground level slopes away from the exterior walls, the reference plane shall be established by the lowest points within the area between the building and the lot line or, where the lot line is more than 6 feet (1829 mm) from the building, between the building and a point 6 feet (1829 mm) from the building.”⁴⁹

This definition not only clarifies that “grade” is at ground level but further establishes that this ground is “adjoining” a building. DCRA’s application of the “grade plane method,” discussed below, further supports the Board’s conclusion as to the clear meaning of “adjacent finished grade.”

Incorrect Determination of Adjacent Finished Grade for Cellar/Basement Classification

All parties agree that the building density maximum for the site is 1.8 FAR, which is calculated from an examination of Gross Floor Area (GFA). Cellars are excluded from GFA but basements are included.⁵⁰ Appellants claim that DCRA erroneously defined the lowest habitable level as a “cellar” rather than a basement, thus excluding this square footage from GFA and thus FAR calculations, which they claim is 2.4 FAR if properly tabulated with inclusion of basement GFA.

The zoning regulations distinguish “cellar” from “basement” by measuring the “adjacent finished grade” in relation to the ceiling of the lower level, with less than 4 feet being cellar distance and greater than 4 feet deemed basement distance.⁵¹ The Zoning Administrator has the option of using either the perimeter wall method or grade plane method to determine which portion of the lower level area is located four or more feet above the adjacent finished grade and therefore included within the computation of GFA and thus FAR. In this case, the Zoning Administrator chose to use the grade plane method.

The Board reiterates its prior position in agreement with DCRA that the term “adjacent finished grade” connotes the ability to adjust the grade as compared to keeping “natural” or “previously existing grade.” However, the Board does not agree with the position of DCRA and the Owner’s Representative that the issue for the Board’s deliberation is to address alleged semantic confusion

⁴⁸ ZRR, Proposed Action. Dec 2014.

⁴⁹ 2013 District of Columbia Building Code, Chapter 2, Definitions, and International Building Code, 2012, Chapter 2, Definitions.

⁵⁰ See 11 DCMR § 199.1, definition of “Gross floor area.”

⁵¹ See definitions for “basement” and “cellar” in 11 DCMR 199.1

on the part of Appellants regarding use of the words “natural grade,” “existing grade” and “finished grade.”⁵² In fact, no such confusion is evident in the documentation provided by Appellants. Rather, the central question before the Board is the meaning of “adjacent finished grade.”

The Board concludes that the Zoning Administrator has inappropriately determined the location of the “adjacent finished grade” at points that are within the envelope of the building—at both the rear and front of the building. It has long been established that “adjacent finished grade” is not only outside the envelope or footprint of a building but also at some distance away. The above analysis of definitions found within the zoning regulations and building codes clearly establish this fact. The following examination further serves to dissuade adoption of the radical notion that “adjacent finished grade” can exist within the footprint of a building. There is simply no precedent to set a point within the building as the adjacent finished grade, nor should there be.

Failure to Correctly Measure Grade

DCRA states in its July 1 2015 pre-hearing statement that “the retaining wall is created within the existing building footprint.”⁵³ Appellants disagree with the appropriateness of this reference point and further contend that the Zoning Administrator ignores actual measurements of the rear grade of 7’6”. As discussed above, the Board dismisses DCRA’s contention that “adjacent finished grade” can be a point “within the existing building footprint.”

As for the front grade, Appellants argue that the Zoning Administrator has accepted a measurement for “adjacent finished grade” of 3’11” that is flawed in two respects: that it is incorrect and is measured from a point within the actual building envelope. As for the former, the Board concludes that the “adjacent finished grade” is in fact 8’ as it is measured from the front entryway, whose width extends 7’ from the face of the building and is thus not definable as an areaway. (An areaway would be excluded as an appropriate measurement point.) Construction drawings from a 2001-2002 renovation confirm the existence of a lower level entryway with a grade of 8’⁵⁴. This is additionally substantiated by an affidavit by the property owners who carried out this renovation.

On the second point, a cursory examination of 6/23/15 construction plans for B1509180 clearly shows the intent to convert the entryway into interior living space.^{55 56} Upon completion of the renovation, the incorrect 3’11” measurement would become moot for purposes of measuring the front grade as it would be subsumed during the build-out of the area. The new “adjacent finished grade” would become the front garden sidewalk in the front of the building. Given that this grade is 4’2”, the front grade remains basement grade, under all proffered scenarios. However, this grade of 4’2” has been inexplicably changed to “proposed grade 3’11” on construction drawings.

In summary, the Board recognizes that the front grade and rear grade are basement perimeter measurements. The Board therefore cannot uphold the Zoning Administrator’s determination of

⁵² Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 4 and BZA 18980 Transcripts. Page 91.

⁵³ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 4.

⁵⁴ See Exhibit 22C: 2000 Construction Plans, Marc Doswei, DC Architect #369.

⁵⁵ The intention to incorporate the entryway as interior living space is evidenced in calculations for the lower level at 969 square feet on Sheet C0000 and the calculation of GFA for the lower level as presented in the 6/22/15 Zoning Data Summary sheet. This square footage calculation is arrived at when measuring GFA from the front of the entryway the backside of the proposed “retaining wall.”

⁵⁶ See 6/23/15 construction drawings, Sheet A0101.

grade as it fails the test in *Wallick v. D.C. Board of Zoning Adj.*, 486 A.2d 1183, 1184 (D.C. 1985): that it be “neither erroneous nor inconsistent with the Zoning Regulations as a whole.” Thus, the Board concludes that existing FAR for the property is 2.4 FAR, exceeding the 1.8 limit for R-5-B, based upon a correction in the miscalculation of the lower level as a cellar. Furthermore, the Board recognizes that the integrity of the zoning application process is proscribed in 11 DCMR 101.5 and 11 DCMR 3201.1, 3202.1 and 3202.2, which require parties to submit zoning data on existing GFA and existing FAR—meaning prior to the initiation of construction.⁵⁷ Logically speaking, one must calculate existing FAR by using the existing adjacent finished grade. This clear point is further driven home in that 11 DCMR 199.1 definitions for basement and cellar use the present tense form “is” (e.g., “that - portion of a story partly below grade, the ceiling of which is four feet....”) not the future tense form “will be.”⁵⁸ It is vitally important for applicants to accurately complete zoning application forms, and for DCRA to use and scrutinize such information—all of it—in making zoning determinations. This error or misinterpretation is abundantly evident in this case, where the calculations for GFA and FAR for B1509180 present identical calculations for GFA and FAR for both existing and proposed conditions. Those calculations are clearly counter-intuitive as the purpose of B1509180 is to bring the Building into FAR compliance by redefining the lower level from cellar to basement. As Appellants have documented, existing FAR is 2.4, well above the 1.8 cap for R-5-B.

Disregard of Precedent and Policy to Measure “Adjacent Finished Grade” In Locations Proximate to Face of Building

The Zoning Administrator has stated in multiple BZA cases and determination letters that cellar/basement designations specifically exclude from the meaning “adjacent” specific locations that are directly proximate to a building. Using this basis, it is reasonable to conclude that a location within the building itself would also be excluded as an adjacent finished grade measurement point. Spaces excluded as adjacent finished grade measurement points include: areaways, defined as spaces that are less than 5 feet in width from a building;^{59 60}; areaways that serves as a passageway for pedestrian traffic⁶¹; and window wells. The basis for these determinations can reasonably be established as being based upon International Building Code’s grade plane analysis, which defines the “true” point for which to establish a story above and below grade as 6’ beyond the exterior wall for buildings where grades fall away from the exterior walls.

In BZA 18615, discussions were held over the definition of “adjacent finished grade” for an un-built building, with a vigorous debate over whether this definition included areaways, window wells, and the top of retaining walls—all being located external to the building. In Findings of Fact No. 48, the

⁵⁷ See Exhibit 22M.

⁵⁸ 11 DCMR 199.1.

⁵⁹ In its 9/20/13 pre-hearing statement for BZA 18615, DCRA states: “The Zoning Administrator has never considered the bottom of a window well or an areaway to be the adjacent finished grade.”

⁶⁰ March 19, 2014 DCRA Matt LeGrant Determination Letter for “703-707 Newton Place, NW. The Cellar square footage does not contribute to FAR in that is determined by using the ‘horizontal grade plane method,’ and as such, the grade outside of the areaway, not at the bottom of the areaway, is considered the adjacent grade for cellar determination purposes.”

http://dcra.dc.gov/sites/default/files/dc/sites/dcra/release_content/attachments/Det%20Let%20re%20703-707%20Newton%20Pl%20NW%20to%20Schneck%203-19-14.pdf

⁶¹ May 17, 2015 DCRA Matt LeGrant Determination Letter for 1825 13th Street, NW. “The areaway is shown is 4.0’-wide and is not considered a sunken patio as this is proposed as a minimum width to allow for pedestrian ingress and egress. The finished grade for story determination will be the grade immediately outside of the areaway entrance towards the street and not at the areaway grade....”

http://dcra.dc.gov/sites/default/files/dc/sites/dcra/release_content/attachments/Det%20Let%20re%201825%2013th%20St%20NW%20to%20Landsman%205-18-15.pdf

BZA concluded that “The Zoning Administrator has never considered the bottom of an areaway as the adjacent finished grade” (BZA Appeal No 18615, 10/29/13).⁶²

The Zoning Administrator has additionally affirmed the reasonableness of excluding these areas as “adjacent finished grade” in multiple determination letters, such as a 2011 Determination Letter, stating, “light wells or areaways are exceptions at the cellar level are exceptions to grade. That is, such areas do not alter a building’s adjacent grade provided when they do not logically create a new grade.”⁶³ Additionally, the Board previously confirmed, in BZA 17109, that adjacent finished grade is a point external to the building, and visibly so, affirming that the perimeter wall method could reasonably disregard from the perimeter wall method calculation those areas external to the building “when the adjacent grade cannot be determined...bounded on either side by row dwellings and the finished grade is not apparent.”

Building on the logic of excluding areaways and window well as “adjacent finished grade” measurement points, the Board cannot fathom that the “adjacent finished grade” could be at the top of the proposed retaining wall, a space that would not only be within the building itself but would also be much smaller in dimension than an areaway, at only 3 feet wide.

In summary, the Board’s intent to raise the exclusion of areaways and window wells is not to attempt to define the space above the retaining wall as such, as areaways are prohibited in an alley setting per 11 DCMR 2020.9.1.5.⁶⁴ Rather, the point of this discussion is to illustrate the precedent of not measuring “adjacent finished grade” directly against a building, with the Board’s application of that logic to necessarily also exclude as “adjacent finished grade” a location within the building itself, as the Zoning Administrator proposes.

Incorrect Application of the Grade Plane Method

The Zoning Administrator has chosen to use the “grade plane method” to calculate the lower level’s proportionality as basement versus cellar. The plain language in the grade plane method, its application by DCRA, and interpretations in prior BZA cases, have each clearly established that the clear meaning of “adjacent finished grade” means the space external to a building.

In BZA Order No 17109 from 2005, the Board states: “Under the ‘grade plane’ method, a plane is established between the grade “at the front of the building” and the grade “at the rear of the building.” The point at which this plane intersects at the a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered cellar.” (emphasis added)⁶⁵ In 2007, the DC Court of Appeals affirmed the BZA’s decision in BZA 17109, stating at length:

⁶² BZA 18615 was silent on the matter of window wells and retaining walls, both of which were to be built external to the building itself, although neither of these points were under discussion as adjacent finished grade.

⁶³ 12/13/11 DCRA Matt LeGrant Determination Letter for 700 Constitution Avenue, NE, to Goulston and Storrs.
http://dcra.dc.gov/sites/default/files/dc/sites/dcra/release_content/attachments/Det_Let_re_700_Constitution_Ave_NE_-_Parking_to_Epting_9-24-12.pdf

⁶⁴ 3202.9.1.5 Alley location prohibited. Areaways shall not be located in an alley.
http://dcra.dc.gov/sites/default/files/dc/sites/dcra/publication/attachments/12_DCMR_A_-_2013_Building_Code_Supp.pdf

⁶⁵ BZA 17109 Findings of Fact No. D36 and Conclusions of Law, D: FAR Calculations, Page 15.
http://dcra.dc.gov/sites/default/files/dc/sites/dcra/release_content/attachments/ExhibitB-BZA17109.pdf

“[i]n a sworn statement submitted to the BZA former Zoning Administrator Jim Fahey, who, the record indicates, served as the District's Zoning Administrator from 1970 to 1986, stated that his predecessor Zoning Administrator devised and began using the 'grade plane method' in 1958, for the purpose of distinguishing between a basement and a cellar 'in the case of a row house or other building where the grade on either side could not be observed because the building was directly abutted by other buildings on either side.' Mr. Fahey explained that the grade plane method involves drawing on the building plans a line, *i.e.*, 'a grade plane line[,] from the grade at the front of the building to the grade at the rear of the building.' Any portions of the lower level where the ceiling is "four or more feet above the average grade plane" line would be treated as basement space and included in gross floor area.”⁶⁶ (emphasis added)

This position was recently and unambiguously reiterated in the 6/13/11 Zoning Administrator Matt LeGrant Determination Letter, which cites the following language from BZA 17109: “‘Under the ‘grade plane’ method, a plane is established between the grade at the front of the building and the grade at the rear of the building....”⁶⁷ (emphasis added)

The Board long ago clarified what is meant by the word “front” in BZA 16764 from 2001. In that decision, the Board heard the definition of “front” as contained in Webster’s (“the foremost part or surface of anything”⁶⁸) and determined “[t]he Zoning Regulations use the word ‘front’ in contexts that indicate that the word refers to that part of a building that abuts the street.”⁶⁹ The Board went on to refine its conclusion to exclude from the definition of the front of the building a wing of the structure set back from the street, stating, “[t]his conclusion is consistent with the other pertinent dictionary excerpts introduced by the parties, including the front as the foremost part of anything, the part of a house that seems to look or be directed forward, and the face of a building that contains the principal entrance.” (emphasis added)

Likewise, DCRA has continuously and consistently supported its position that “adjacent finished grade” is a point exterior to a building. More recently, in its 9/20/13 pre-hearing statement for BZA 18615, DCRA provides narrative clearly indicating that “adjacent finished grade” is exterior to the building. To illustrate, DCRA writes: “Owner has included an areaway along the cellar units. Similar to a window well, this areaway is a narrow space between the grade and the building (emphasis added) to provide additional light to the cellar units,” language clarifying that a distinction exists between a building and the grade. DCRA’s pre-hearing statement goes on to reference and support the pre-hearing statement by CMK Development in this case, which reads: “[a]djacent finished grade is that area immediately outside the areaways or window wells.”⁷⁰

Looking to future interpretations of the “grade plane method,” the draft ZRR provides the following diagram depicting the calculation of grade plane method, clearly presenting “finished grade” as points not only external to the building but at some significant distance from its facades or

⁶⁶ Kalorama Citizens Association, Petitioner, v. District Of Columbia Board Of Zoning Adjustment, Respondent, Advisory Neighborhood Commission 1C and Montrose LLC, Intervenor. No. 06-AA-486. Decided: October 25, 2007. <http://caselaw.findlaw.com/dc-court-of-appeals/1055237.html>

⁶⁷ 1421 Florida Avenue, NW, Determination Letter, Sassan Gharai. 6/13/2011. http://dcra.dc.gov/sites/default/files/dc/sites/dcra/publication/attachments/Determination_Ltr_re_1421_Florida_Ave_NW_to_Gharai_6-13-11.pdf

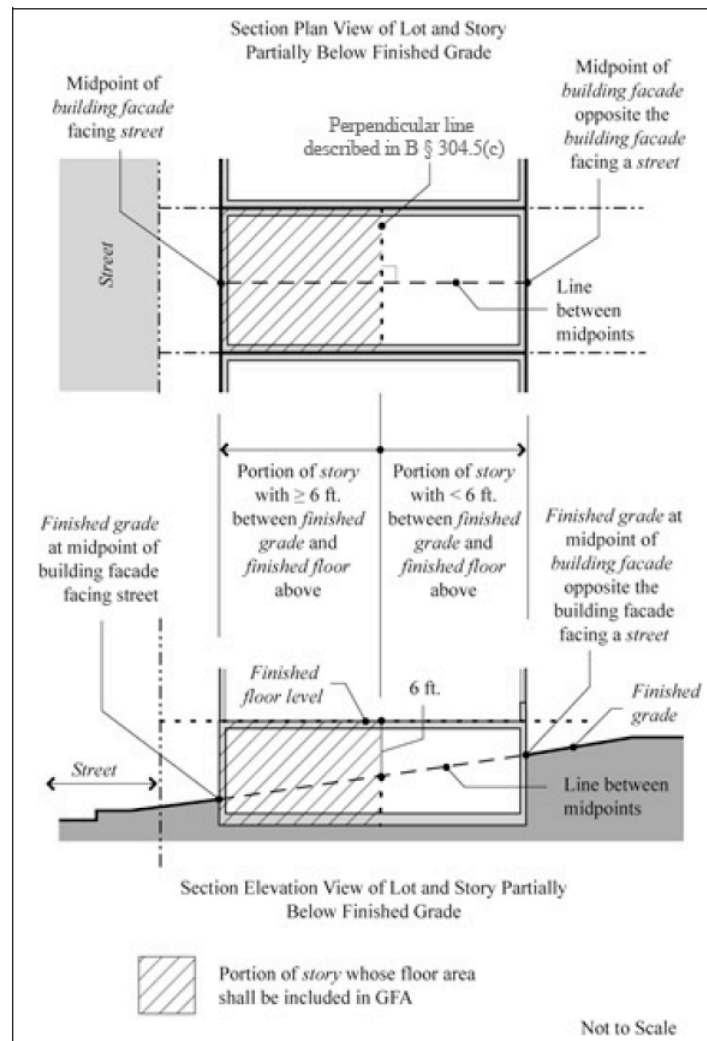
⁶⁸ BZA 16764. Decision and Order. Findings of Fact #36. May 22, 2002.

⁶⁹ BZA 16764, p.14. http://www.dcoz.dc.gov/orders/16764_2256-30.pdf

⁷⁰ CMK Dev LL Pre-hearing statement for BZA 18615, 9/19/13. Pages 4-5.

footprint, in line with current DCRA practice to not consider proximate areas like areaways as “adjacent finished grade.”⁷¹

FIGURE B § 304.5: DETERMINATION OF GFA FOR THE STORY OF AN ATTACHED BUILDING LOCATED PARTIALLY BELOW GRADE



ZC Proposed Action, Dec. 2014
Subtitle B-55

⁷¹ ZRR, Proposed Action. Dec 2014. Subtitle B-55.

Purpose of Retaining Wall

The structure permitted by B1509180 proposes to remove the lower portion of the rear wall of the building, carving out and creating an additional three feet of rear yard, lengthening this space to 19'8", only to subsequently remove this newly gained length by installing a retaining wall, embedded within the envelope of the building and importing unspecified materials to fill this newly created space.

Without equivocation, the Board concludes that this structure does not meet the DCMR 11-199.1 definition of "retaining wall" as:

"a vertical, self-supporting structure constructed of concrete, durable wood, masonry or other material, designed to resist the lateral displacement of soil or other materials."

No Legitimate Purpose for Retaining Wall

The proposed retaining wall does not serve to retain soil from inside or outside the building. "Soil or other materials" would in actuality need to be imported. There is no need for such materials at this location as the adjacent grade is a level and stable ground plane. As such, there is no legitimate purpose for the proposed retaining wall as there is nothing to retain nor any need to retain "soil or other materials." The fact that the retaining wall would remove part of the building's structurally sound wall, which has a clear legitimate purpose, and replace it with something far less viable forces the Board to conclude that the retaining wall, being contrary to structural integrity, is actually illegitimate in nature.

The Board's finding in this case is consistent with BZA 17285, from 2005,⁷² later upheld by the District of Columbia Court of Appeals in *Economides v. DC Board of Zoning Adjustment*,⁷³ in which the Board questioned whether a retaining wall served a "legitimate purpose,"⁷⁴ "with the Board's analysis that such lateral pressure was supplied afterward" (emphasis added) and "[t]he purpose of the wall itself was not to prevent an earth slide, but to shore up the artificially-elevated platform which serves the appellant as a new level surface on which to engage in leisure activities."⁷⁵

The Board realizes that the ruling in BZA 17285 invalidating a retaining wall pre-dated the definition of retaining wall added to DCMR in 2014,⁷⁶ and that the retaining wall in that case was contested in part on the basis that it was a prohibited "structure" in a rear yard and upwards of 30 feet in height. Regardless, the underlying rationale disallowing the wall in BZA 17285 is consistent with 1636 Argonne Place: that the retaining wall "does not 'resist lateral pressure'"⁷⁷ but rather has a contrary purpose. Whether that contrary purpose was to create "a new level surface on which to engage in leisure activities" (BZA 17285) or alter the adjacent finished grade so that the lower level can be defined as a cellar rather than a basement in order to exclude its square footage from FAR

⁷² BZA 172815. "The purpose of the elevated platform structure in the rear yard [retaining wall] is not to 'resist lateral pressure,' but rather to create an artificially created surface...." Page 30. http://www.dcoz.dc.gov/orders/17285_1381-806.pdf

⁷³ DC Court of Appeals. *Economies v. DC Board of Zoning Adjustment*, Carome and NPS. 2008.

<http://cases.justia.com/district-of-columbia/court-of-appeals/06-aa-1381-5.pdf?ts=1396116132>

⁷⁴ See July 7, 2015 Transcript. Pages 81-82.

⁷⁵ BZA 172815. Page 7. http://www.dcoz.dc.gov/orders/17285_1381-806.pdf

⁷⁶ ZC Case 13-06.

⁷⁷ BZA 17285. Page 7. Conclusions of Law. Merit of the Appeal. http://www.dcoz.dc.gov/orders/17285_1381-806.pdf

(the Appellants position in BZA 18980) is immaterial. In neither case does the retaining wall exist to address its fundamental role.⁷⁸ In the present case, the retaining wall has an illegitimate purpose: subversion of 11 DCMR 402.4 for R-5-B, which is meant to set a FAR cap of 1.8. Again, this supports the finding in *Economies v. DC Board of Zoning Adjustment*, et. al.

Furthermore, the Board concludes that the height of the retaining wall as a criterion against which to judge its legitimacy (e.g., the retaining wall in BZA 17285 was upwards of 30 feet) is irrelevant as the fundamental purpose of a retaining wall must be met, regardless of its height or the tonnage of soil or other materials that must be imported into the site.

Retaining Wall Violates Life Safety and Means of Egress Requirements

Finally, the retaining wall cannot be considered legitimate as it violates a primary life safety tenet of the zoning regulations by preventing required and emergency egress from the bedroom in the lower level. The change in the Property from a single-family home to a multi-unit apartment building requires enhanced means of egress per 11 DCMR 3203.5 and its reference to the Means of Egress Law under D.C. Official Code §§ 6-703.03.⁷⁹

Life safety protections are further detailed in building codes, which are not the purview of the Board but merit reference in this case given the risk presented to life safety. In particular, the proposed retaining wall creates exceptional egress barriers that violate multiple District of Columbia Building Code (and parallel International Building Code) provisions as the building elements used to raise the grade plane prevent emergency escape and rescue because the openings do not open directly into a public way or a yard or court that opens to a public way as required under 1029.1; the openings are not shown to comply with 1029.2 or 1029.4; and the sill of the windows exceeds the maximum 44" per 1029.3.⁸⁰

In summary, the retaining wall would compromise and worsen the means of emergency egress as it exists under current conditions. Additionally, similar to the finding in *Economies v. DC Board of Zoning Adjustment*, et. al., public safety has been placed in question given the uncertainties regarding the lack of specificity and omissions in the retaining wall and foundation design.

Finally, the proposed scheme for installation of the retaining wall interferes with a legitimate purpose, which is to create compliant parking spaces. Removal of the essential loadbearing wall at the rear of the building would lengthen the rear yard by 3'8", expanding its length from 16' to 19'8" and thus achieving compliant parking spaces. However, installation of the retaining wall would negate this solution.

⁷⁸ BZA 172815, Pages 7-8. http://www.dcoz.dc.gov/orders/17285_1381-806.pdf

⁷⁹ 11 DCMR 3205.5: "Where an alteration to a structure is required by law in order to effect compliance with regulations adopted pursuant to the Means of Egress Law, approved December 24, 1942 (56 Stat. 1083, as amended; D.C. Official Code §§ 6-703.03 to 6-703.09 (2001)(formerly codified at D.C. Code §§ 5-518 to 5-524 (1994 Repl.))), a certificate of occupancy for that structure may be issued prior to the alteration; Provided, that the use of the structure for which a certificate of occupancy is desired, if a new use, is not one that would require a greater amount of egress or fire protection facilities under the Means of Egress Law than is required for the use existing prior to the alteration."

⁸⁰ 2013 DC Building Code. 1"029.3 Maximum height from floor. Emergency escape and rescue openings shall have the bottom of the clear opening not greater than 44 inches (1118 mm) measured from the floor."

Parking

This case presents differing information on the Property's parking conditions. Facts not in dispute include concurrence that the Property requires one parking space for every two units for a multiple dwelling unit in an R-5-B zone per DCMR 11-2101.1. Additional facts not in dispute include the original condition of the Property, a single-family dwelling with a single vehicle garage on the lower level and a rear yard of 16' in depth. In 2002, the lower level was converted into a 1-bedroom basement rental unit under DCRA permits B441124-4419020, while preserving the existing garage. In 2014, as part of the conversion to a multi-unit property, the Owner demolished the garage, capturing and repurposing that space for interior living area for the basement unit. The rear yard with a depth of 16' remains.

It is from this point that parties differ. Appellants assert that the Property is a conversion from a single-family home to a 4-unit apartment building, requiring two parking spaces but with no spaces given the removal of the garage space. While DCRA concurs in its pre-hearing statement that the Property is a "four unit apartment house,"⁸¹ DCRA additionally contends that B1509180 recognized "two grandfathered non-conforming parking spaces."⁸² The Owner contends that the Property is a 2-family unit with a Certificate of Occupancy.

Misidentification of Grandfathered Non-Conforming Parking Spaces

The Board is persuaded that the preponderance of documentation is that the Property is a 4-unit building with no parking spaces. Permit B1509180 provides information that inconsistently defines the number of units as both four units and two units, with the overwhelming amount information documenting this as four and then later two and then back again to a 4-unit building. Additionally, DCRA also characterizes the Property as a 4-unit building in its pre-hearing statement.⁸³ The Zoning Data Summary for B1509180 is the sole document stating otherwise, with "4" units written under existing and proposed with these figures subsequently lined through with the number "2" added and initialed.

The Board additionally concludes that the recognition of two non-conforming grandfathered parking spaces is incorrect as the Property only possessed a single non-conforming grandfathered parking space, the garage, which was removed in 2014 as part of the renovation, leaving no grandfathered non-conforming spaces. The fact that the Property had a single car garage is well documented in construction drawings dated 8/29/14. In addition, an abutter provided a signed statement affirming that the Property possessed a single family garage up until the Fall of 2014, at which time the current renovation project removed the garage and incorporated this space with the interior of the lower level unit.⁸⁴ The Board therefore cannot uphold the Zoning Administrator's designation of two grandfathered parking spaces as it fails the test in *Wallick v. D.C. Board of Zoning Adj.*, 486 A.2d 1183, 1184 (D.C. 1985): that it be "neither erroneous nor inconsistent with the Zoning Regulations as a whole." Clearly, the Zoning Administrator's decision to recognized two grandfathered spaces is an error, based upon a wealth of evidence presented for the Board's consideration.

⁸¹ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 1.

⁸² Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 6.

⁸³ Respondents Pre-Hearing Statement and Partial Motion to Dismiss for Failure to Timely File. Appeal 18980. Exhibit No. 35. July 1, 2015. Page 1 and Page 6.

⁸⁴ See attached statement, also submitted to IZIS.

Incorrect Calculation of Increase in Intensity of Use

The Board also concludes that the intensity of use was miscalculated by DCRA at no more than 25%. Conversion to a 4-unit apartment building represents a much larger increase, requiring an increase to accommodate the increased intensity of use per 11 DCMR 2100.6.⁸⁵ The Certificate of Occupancy classifying the Property as a 2-family unit was rendered invalid, per multiple zoning regulations. Thus, the intensity of use must be calculated as well above 25% on the basis of an increase from use as a single-family unit to a proposed 4-unit building. The first Certificate of Occupancy invalidation occurred given subsequent alteration of the property to a 4-unit apartment building, at which time 11 DCMR 3203.4 was triggered as “a certificate of occupancy for that structure shall not be issued until the erection or alteration is completed to the point of availability of occupancy for use.”⁸⁶ Furthermore, use was not “established and continued” within six months “of the date on which the certificate is issued” per 11 DCMR 3203.8(b).⁸⁷ Several building codes also invalidated the prior Certificate of Occupancy. With a change in ownership as of 2/11/14, 12 DCMR 110.1.2 applies as “a new Certificate of Occupancy shall be issued in the name of the new owner (without re-inspection), provided there is no proposed change in use, floor layout or occupancy load.”⁸⁸ In addition, per 12 DCMR 110.1.3, a new Certificate of Occupancy application must be filed, “[f]or changes in use, occupancy load or tenant floor layout.”⁸⁹

Parking Conditions Worsened

The Board also finds that parking has been made worse rather than corrected, in violation of 11 DCMR 2100.10,⁹⁰ as the existing and compliant garage space⁹¹ (16’ 6” x 9’ 0½”) was eliminated during the current project and the 16’ rear yard is non-compliant with the standard 9’ x 19’ space requirements found in 11 DCMR 2115.1. The new parking area is smaller and thus less compliant

⁸⁵ 11 DCMR 2100.6 reads: “Except as provided in § 2120.3, when the intensity of use of a building or structure existing before May 12, 1958 is increased by an addition of employees, dwelling units, gross floor area, seating capacity, or other unit of measurement specified in § 2101, parking spaces shall be provided for the addition, subject to §§ 2100.7 through 2100.9.”

⁸⁶ 11 DCMR 3203.4: “If the erection or alteration of a structure is contemplated, a certificate of occupancy for that structure shall not be issued until the erection or alteration is completed to the point of availability of occupancy for use, except as provided in § 3203.5.”

⁸⁷ 11 DCMR 3203.8. “Any use that is authorized by a certificate of occupancy may be established and continued pursuant to the terms of the certificate and the provisions of this title in effect on the date that the certificate is issued, subject to the following conditions: (b). The use shall be established within six (6) months of the date on which the certificate is issued.”

⁸⁸ 12 DCMR 110.1.2 “Change in Ownership. For changes in ownership of structures, land, or parts with an existing valid Certificate of Occupancy, a new Certificate of Occupancy shall be issued in the name of the new owner (without re-inspection), provided there is no proposed change in use, floor layout or occupancy load.”

⁸⁹ 12 DCMR 110.1.3. “Change in Use, Load or Floor Layout. For changes in use, occupancy load or tenant floor layout, a new Certificate of Occupancy shall be required. In the foregoing circumstances, a construction permit application must be filed pursuant to Section 105.1.4 (13) and approved by the Department; in order to confirm that the new use, load or tenant floor lay-out complies with the Construction Codes and Zoning Regulations. An application for certificate of occupancy will not be accepted for filing until a permit application has been granted, or a determination has been made that a permit application is not required under the circumstances.”

⁹⁰ 11 DCMR 2100.10 “In the case of a building or structure for which the Zoning Regulations now require more parking spaces than were required when the building or structure was built, the following shall be required: (a) If the existing number of parking spaces now provided is less than or equal to the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced.”

⁹¹ 11 DCMR 2116.2. “Parking spaces, including car-sharing spaces, shall be located in one (1) of the following ways: (a) Within a permitted garage or carport....”

than the “grandfathered” garage from the original building dating from 1923. The garage should therefore have been kept or parking provided in another location, per 11 DCMR 2117.9.⁹²

The Board additionally concludes that the proposed alteration of conditions—installation of a parking area with a 12% gradient in the current level rear yard and removal of the bottom portion of the building and installation of a retaining wall—does not improve parking. This proposal, in fact, worsens conditions with an inaccessible and impermissible slope.

Inaccessible and Impermissible Parking Spaces Created

The Board finds that the zoning regulations make a clear distinction between “drives,” and “parking spaces,” thus invalidating DCRA’s determination that parking spaces can be simultaneously defined as a driveway in order allow a maximum grade slope of 12% as authorized by 11 DCMR 2117.8.

- A driveway is defined in 11 DCMR 2117.8 as an area that “provides access to required parking spaces.”
- In contrast, 11 DCMR 199.1 defines “parking space” as “an off-street area accessible and of appropriate dimensions to be used exclusively for the temporary parking of a motor vehicle” (emphasis added). Furthermore, 11 DCMR 2115.1 excludes in its definition of the dimensions for a parking space driveways, as follows: “a required automobile parking space shall be a minimum of nine feet (9 ft.) in width and nineteen feet (19 ft.) in length, exclusive of access drives.”

The Board does recognize that the Property’s rear yard formerly existed as a “driveway” for the portion leading to the former garage space. However, its status as a “driveway” ceased upon removal of the garage space in 2014.

At the Property, the rear yard is only 16’ in length, thus making it impossible meet the 11 DCMR 2117.8 definition of a driveway as providing “access to required parking spaces” as the 16’ does not even constitute the required length for regulation 9’ x 19’ parking space. Rather, the 16’ length dictates that the rear yard, at best, can only exist exclusively as compact parking spaces that would require a Board of Zoning Adjustment exception. Simply put, there is no room for a driveway to exist.

As for the 12% grade, the Board finds that the slope creates impracticalities in parking, contrary to language in 11 DCMR 2116.2 that dissuades parking in locations with “unusual topography, grades,” which would most certainly be the result of modifying a level existing grade to a steep 12% grade.⁹³ Parking in this location, which has no driveway and rather serves as a stationary spot to park a vehicle, with a 12% grade would become infeasible as a matter of being “accessible” as found in the definition of a “parking space.” While the zoning regulations are not explicit in further defining “accessible” for purpose of a parking space in a private residence, the zoning regulations provide ample references to standards of accessibility for parking, that range from 2% to a high of 8%.⁹⁴

⁹² 11 DCMR 2117.9 (c) The Board of Zoning Adjustment may allow the parking spaces required for one (1) or more row dwellings to be located on a separate lot in accordance with the requirements of § 3104 for special exceptions....”

⁹³ 11 DCMR 2116.6 “The Board shall determine that it is not practical to locate the spaces in accordance with § 2116.2 for the following reasons: (a) Unusual topography, grades, shape, size, or dimensions of the lot.”

⁹⁴ DCMR 11-2115.1 references a 2% slope (“Parking shall also be in compliance with the requirements of the District of Columbia Architectural Barriers Act of 1980, effective July 1, 1980 (D.C. Law 3-76; 12 DCMR art. 15).” Interpretation of the slope

Furthermore, the Board is not persuaded by DCRA's argument that the proposed 12% grade for the parking spaces in the rear yard would improve parking nonconformity by lengthening the rear yard. The 12% grade and all of its attendant complications would add only 1.15" to the 16' long rear yard. This proposed new length is also insufficient in that it is 5" shorter than the prior lawfully existing non-conforming but grandfathered garage space, which measured 16'6" x 9' 0½", and thus contrives to pose as a remedy. In reality, this proposed berm space is a violation of 11 DCMR 2100.10 in that a non-conforming condition, parking, has been made worse rather than corrected.

The Board additionally finds that the effort to remove the rear of the building in order to install a retaining wall represents a missed opportunity to correct the above-outlined violations—namely, to create standard size parking spaces of 19' in length. That would be possible under B1509180, which permits removal of the rear existing exterior and interior load-bearing wall in order to create space for a retaining wall. Stopping short of installation of the retaining wall (proposed as 3'8" in depth) would extend the parking space length from the non-compliant 16' length to 19' 0'8" and avoid the added costs of both constructing the retaining wall and building the 12% grade slope.

A concluding observation by the Board on the slope regards the unstated purpose of the slope, which is to create a new slope so that the rear yard setback requirement in relation to the building height is met, per 11 DCMR 404.1.⁹⁵ Without the slope, the building height at the rear yard measures 52'4", whereas the maximum building height for a 16' rear yard is 48'. The slope, however, reduces the building height by 1'9" to 50'6" or a point where the rear yard setback is brought into compliance when combined with the 10% minor flexibility afforded the Zoning Administrator under 11 DCMR 2522.1(c). The Board finds that this motivation does not convey legitimacy on the purpose of the slope in relation to parking as it does not enhance or improve parking. To the contrary, the slope creates significant and impermissible parking violations in the course of subterfuge to seek compliance with the rear yard requirement.

Decision

For reasons discussed above, it is hereby ORDERED that the appeal is GRANTED.

limitation in this provision can be found in reference to the federal ADA Act, which references ANSI 117.1 (American National Standard. Accessible and Usable Buildings and Facilities. 2003), which reads: "502.5 Parking Spaces. Floor Surfaces. Parking spaces and access aisles shall comply with Section 302 and have surface slopes not steeper than 1:48 [2%]." The Americans with Disabilities Act accessibility rules place a walking ramp slope maximum at 8.3% for ramps on an accessible surface and an allowable access slope as 5% (1:20). The IBC 2009, 406.2.5 Ramps, states: "Vehicle ramps shall not be considered as required exits unless pedestrian facilities are provided. Vehicle ramps that are utilized for vertical circulation as well as for parking shall not exceed a slope of 1:15 (6.67 percent)."

⁹⁵ DCMR 11-404.1: "4 inches per foot of vertical distance from the mean finished grade at the middle of the rear of the structure to the highest point of the main roof or parapet wall, but not less than 15 feet."