

Board of Zoning Adjustment for the District of Columbia

Pre-Hearing Statement of ANC1C for BZA 19115

This pre-hearing statement is filed by ANC1C as an appeal of the Zoning Administrator's (ZA) decision to issue building permit B1509180 (Exhibit 3) on June 24, 2015. ANC1C contends that the ZA erred in defining that the lower level at 1636 Argonne Place, NW as a cellar, based upon an incorrect determination of the "adjacent finished grade" (AFG) for the rear and front of the building.

- At the rear of the building, the ZA determined that the AFG exists at a point within the building envelope (Exhibit 4, pages 3-4), which is contrary to the clear meaning of the words as well as decades of precedent by DCRA and subsequent BZA and court rulings.
- At the front of the building, the ZA ignored actual measurements that exceed 4' from the AFG to the lower level ceiling (i.e., basement dimensions) (Exhibit 4, pages 3-4).

Summary of Facts

From March 2014 to June 2015, DCRA issued multiple building permits with determinations on the Floor Area Ratio (FAR) as well as other matters (e.g. parking). Two Stop Work Orders (SWOs) have been issued for violations of FAR—specifically, regarding DCRA rulings that the lower level was in whole or in part a basement and thus countable in FAR. Over this time period, the AFG has been changed in each new set of construction plans in an effort to secure FAR compliance. At first, the AFG was identified on a slope at the rear, external to the building. This slope and AFG were later deemed to be nonexistent, leading to SWO #1 (December 3, 2014), which determined that FAR was 2.07. A new permit was subsequently issued and identified AFG as on the top of a proposed "retaining wall" set up against the back of the building. Months later, DCRA issued SWO #2 (May 20, 2015), which stated that this permit constituted a "failure to comply with maximum Floor Area Ratio (FAR)...." Finally, the AFG under B1509180 was identified as a point within the building itself. ANC1C alleges that the ZA erred in issuing B1509180, as summarized below.

Permit B1509180

B1509180 is a permit to construct a "retaining wall" (un-built as of November 10, 2015), proposed to be embedded within the building envelope, after removing a portion of the masonry load-bearing wall at the rear of the lower level.

- B1509180 (issued June 23, 2015) reads: "Revision to B1404813 to turn it from a retaining wall permit to a building permit for the same scope of work."
- PIVS (June 23, 2015) reads: "revision to b1404813 to turn it from a retaining wall permit to a building permit for the same scope of work. the actual scope is a retaining wall with interior alterations and repairs for continued use as a two family flat as per prior certificate of occupancy co1300980."

Summary of ZA Errors

The top lip of this so-called retaining wall (more properly referred to as a planter) is recognized by the ZA as the AFG for the rear of the building in the grade plane method calculation for the lower level, which requires both a rear and front grade analysis. This determination is contrary to actual grade measurements and the well-established definition of AFG as a location external to the building. ZA errors include:

1. Disregard of actual AFG measurements, which are >4' at both the front and rear of the building.
2. Disregard of definitions of "adjacent," "finished" and "grade" per Webster's Dictionary (the source to turn to as instructed in 11 DCMR 199.1 for those terms that are not defined in 199.1).
3. Disregard of the meaning of AFG as determined in the grade plane method (used in this case) as well as multiple BZA, Court of Appeals and DCRA determination letters defining AFG as a point external to a building.
4. Disregard of the ZA's long-established policy of excluding from AFG determinations grades particularly proximate to a building (areaways, which are <5' from the building façade, and window wells). As such, it is clearly illogical for the ZA to determine that a point inside the building itself could represent AFG.
5. Use of an unprecedented and unsupportable definition of AFG as a point that is not only within the building's envelope but is also at the top portion of a "retaining wall," which, by clear observation, is a structure that rests upon the grade but does not represent the grade itself.
6. Permission to construct a retaining wall that lacks a *legitimate purpose*. Instead of serving to retain soil or other materials (the 199.1 definition of "retaining wall"), neither of which exist at this location, the retaining wall's sole purpose is to skew AFG calculations to allow for the lower level to be classified as a cellar rather than a basement for purposes of recalculating FAR.

On August 17, 2015, within 60 days of the issuance of B1509180, ANC1C filed a BZA appeal of the ZA's decision in issuing B1509180. The ANC1C appeal supports ANC1C concerns expressed in multiple resolutions regarding DCRA implementation of the zoning regulations, including basement/cellar designations (see Exhibit ANC1C Resolutions).

Failure to correct these errors will set a flawed precedent for at least four known properties within a 2-3 block radius of the subject property (i.e., 1630, 1632, and 1634 Argonne Place, NW, 1835 Ontario Place, NW, and 2910 and 2920 18th Street, NW). Each of these properties has either previously sought and/or secured DCRA permits recognizing AFG as either a point within the building or at the top of a "retaining wall." In each case, the purpose of these permits is to incorrectly deem lower levels as cellars so as to not count them in FAR, which would allow each project to exceed FAR limits for R-5-B.

Factual Background: Subject Property

The subject property, 1636 Argonne Place NW (Square 2589, Lot 0460) is a single-family dwelling being converted into a 4-unit apartment building. It is located in an R-5-B zone, with a FAR limit of 1.8. All homes on the block are sited on an embankment approximately 10-12 feet above the street grade. Each home has a series of concrete steps leading from the public sidewalk to a front landing. At the subject property, this landing leads to both a series of declining steps to the lower level entryway (basement apartment entrance) or up a set of steps to the first level (main entrance).

- **Front Adjacent Finished Grade.** There are two grade measurement points at the front. At the concrete walk in front of the building where the Building Height Measuring Point (BHMP) is taken, the distance from grade to ceiling of lower level is at least 4'2". Secondly, the true AFG is at the below grade entryway that serves as the principal entrance to a one-bedroom basement apartment on the lower level, which is excavated to a depth of 8'.
- **Rear Adjacent Finished Grade.** At the rear, the building is set back 16' from the property line. The lower level is fully above grade. The building's rear AFG is just above the public alley level, measuring 7' 6" from AFG to the lower level ceiling. (If the ramped driveway is installed, the AFG is 5'9".)

The property is being converted to a 4-unit apartment building, contrary to notations in the Zoning Data Summary sheet with B1509180 (Exhibit 3, page 8), which states that the conversion is for 2-units. Exhibit 4, page 8, records the number of units as 4.

The ZA's Errors

In issuing B1509180, the ZA has permitted construction of an apartment building that exceeds the 1.8 FAR limit for R-5-B, with an estimated at 2.4 FAR. On the following pages, ANC1C presents six (6) errors specifically related to the incorrect AFG determination. Please note that the grade plane method was used in this case and requires an AFG determination for both the rear and front grade. ANC1C thus draws attention to errors with both the rear and front grade.

Summary of ZA's Errors

Adjacent Finished Grade Errors	
Error	Zoning Regulations and Rulings
1. Disregard of Actual AFG Measurements	101.5, 402.4 and 3202.2
2. Disregard of Meaning of "Adjacent," "Finished" and "Grade"	199.1
3. Determination of AFG at Odds with Regulatory and Court Precedent	Grade Plane Method, Prior BZA Cases, Court Rulings and Prior DCRA Determination Letters
4. Violation of Exclusion of Proximate Locations as AFG	DCRA Policy as Presented in DCRA Determination Letters, BZA Cases, Court Cases
5. Mis-Identification of Grade as Top Lip of "Retaining Wall"	101.5 as there is no basis for the ZA's determination in the zoning regulations
6. Lack of a Legitimate Purpose for the "Retaining Wall"	199.1: "retaining wall" does not retain soil and definition does not support purpose of wall as changing AFG

Error 1

Disregard of Actual AFG Measurements (101.5, 402.4 and 3202.2)

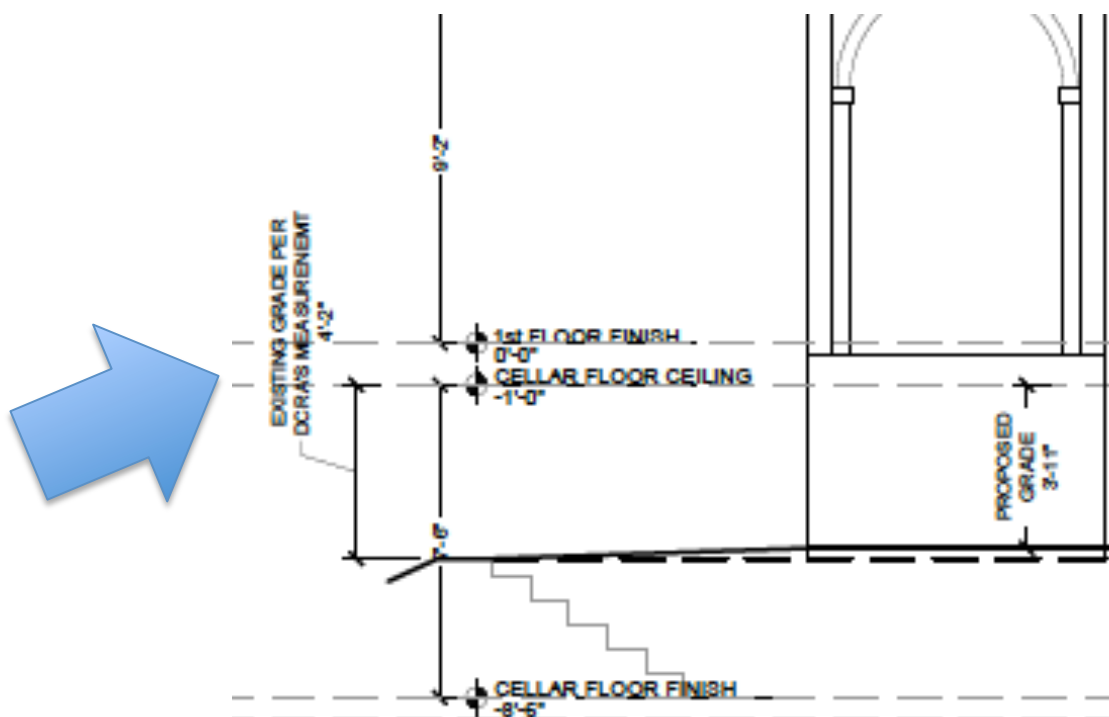
The ZA errs by not recognizing the actual AFG measurements of the building, which are >4' at both the front and rear, as presented below in photos and construction drawings as approved by DCRA and presented in Exhibit 4. The evidence is clear and should settle any debate as to whether the lower level is a basement or a cellar.

The ZA's decision at odds with 11 DCMR 101.5¹ and a violation of the FAR limit of 1.8 for R-5-B, per 11 DCMR 402.4. This is also contrary to 11 DCMR 3202.2, which requires building permits to be accompanied by accurate scaled drawings. Specific errors include:

Misidentification of AFG: Rear of Building. The rear AFG is 7'6".

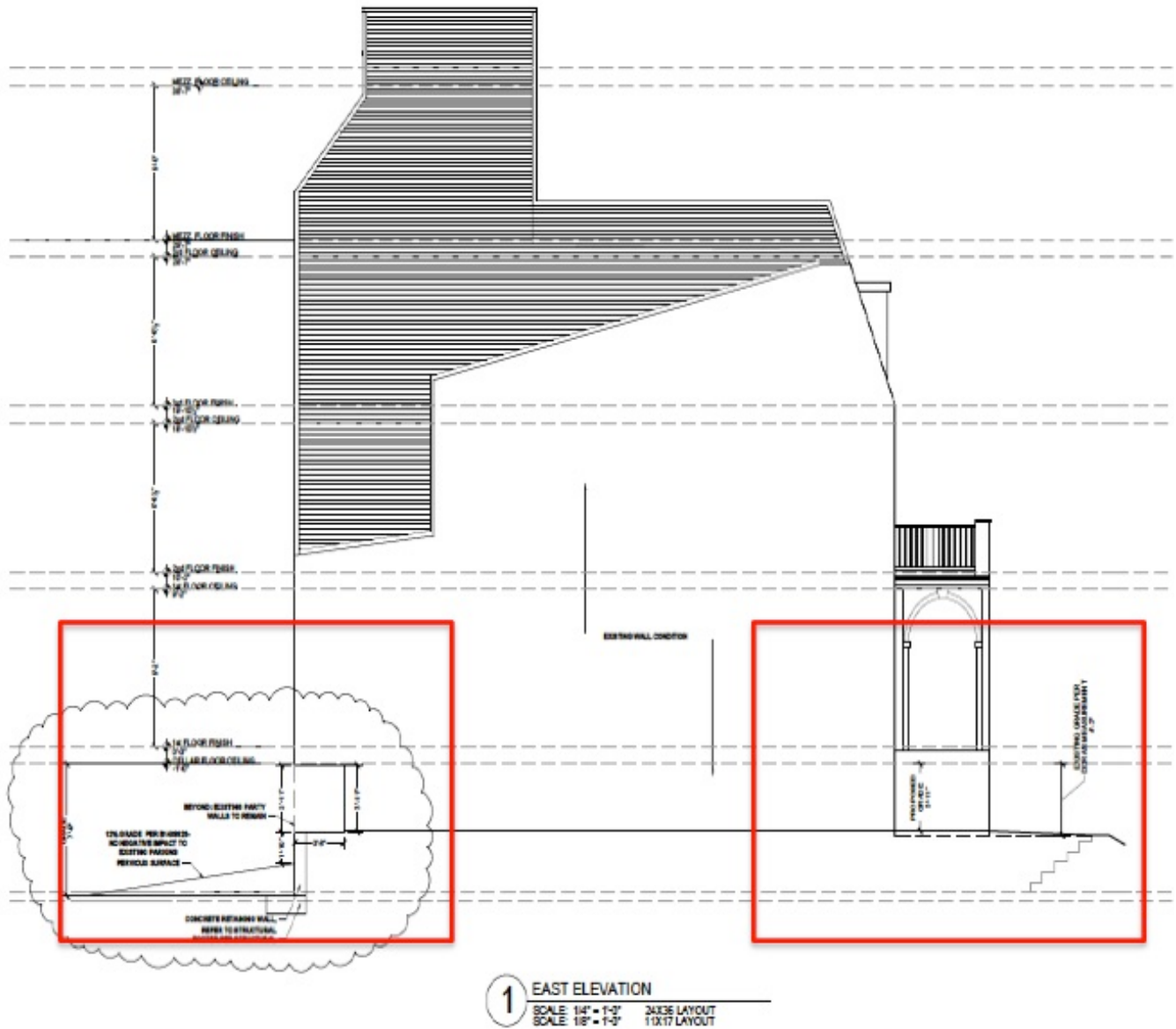
Misidentification of AFG: Front of Building. The front AFG is misrepresented on construction drawings dated June 4, 2015 as follows (see next page):

- At the entryway, construction plans dated June 4, 2015 state the front grade as "GRADE 3'11." This is inaccurate as the actual conditions at the site show an entryway with a closed gate and an AFG of ~8'. (Note: This entryway is the proper AFG as it is not an "areaway," which is excluded from AFG.)
- At the sidewalk outside of the entryway, construction plans dated June 4, 2015 identify the front grade as "EXISTING GRADE PER DCRA'S MEASUREMENT 4'2" (basement perimeter, see below).



¹ 11 DCMR 101.5: "No building, structure, or premises shall be used, and no building, structure, or part of a building or structure shall be constructed, extended, moved, structurally altered, or enlarged except in conformity with this title."

Incorrect Grade Measurements



Incorrect
Rear Grade

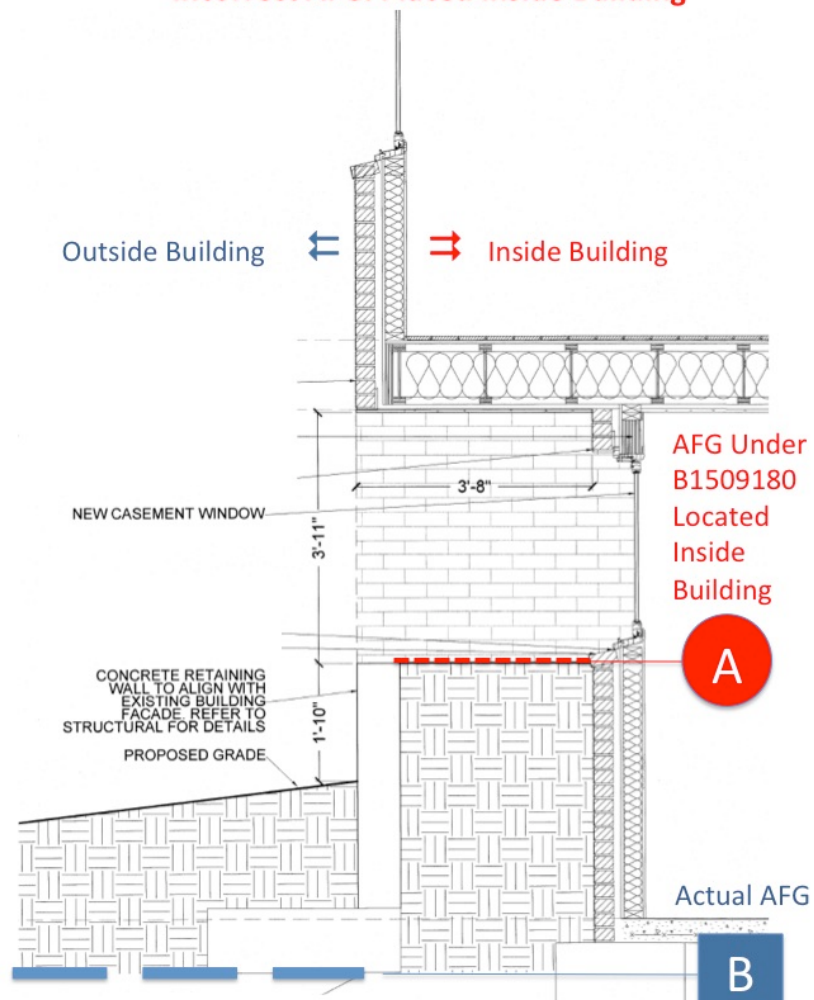
Incorrect
Front Grade

Rear Grade: 1636 Argonne Place NW



B1509180 – Rear Grade

Incorrect AFG: Placed Inside Building

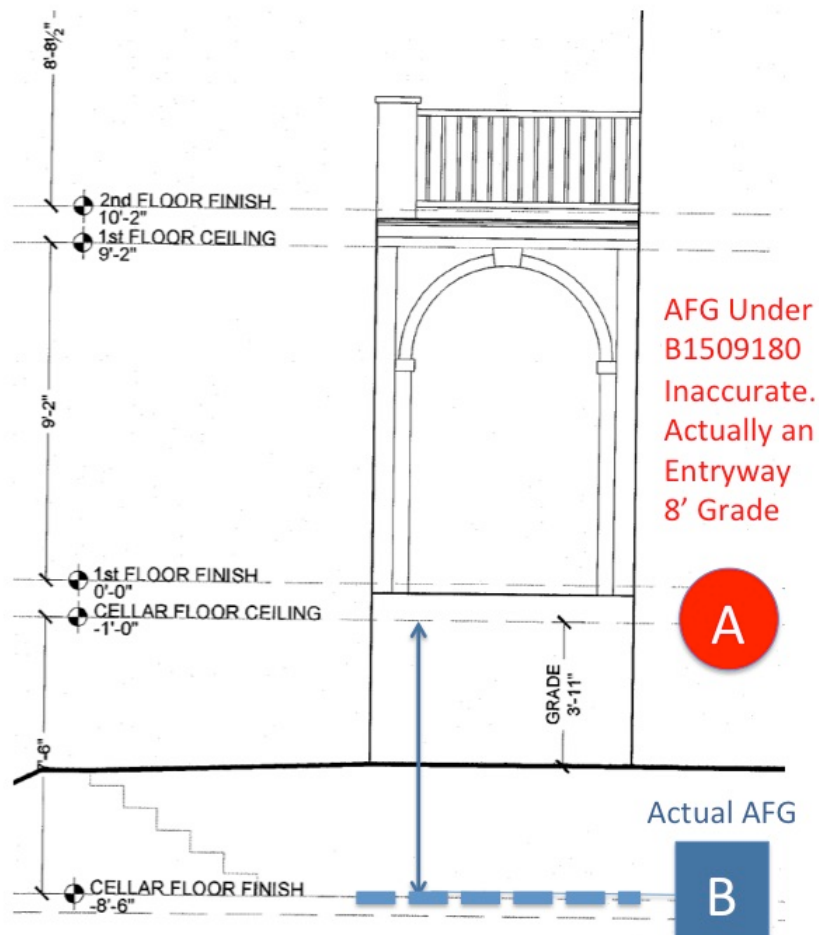


Front Grade: 1636 Argonne Place NW



B1509180 – Front Grade

Incorrect AFG: Placed Inside Entryway, Which is ~8' AFG



Error 2

Disregard of Meaning of “Adjacent,” “Finished” and “Grade” (199.1)

The phrase “adjacent finished grade” is not defined in 11 DCMR 199.1, nor are the individual words “adjacent,” “finished” and “grade.” As directed by 11 DCMR 199.2 (g), “Words not defined in this section shall have the meanings given in Webster’s Unabridged Dictionary.” ANC1C used the definitions as contained in the Office of Zoning’s copy of Webster’s, as made available to the public. An examination of these definitions demonstrates that the ZA has misapplied the phrase “adjacent finished grade” to the top of the proposed embedded retaining wall. While this location might qualify as being “finished,” it is neither “adjacent” nor a “grade.” Definitions follow, along with an examination of the use of these words in other contexts within the zoning regulations.

Adjacent

Webster’s Definition of Adjacent. Webster’s defines “adjacent” 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.”²

Use of Word “Adjacent” in Other 199.1 Definitions. The word “adjacent,” while undefined in 11 DCMR, 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.”

Finished

Webster’s Definition of Finished. Webster’s defines “finished as “brought to conclusion” and “processed.”³

Use of Word “Finished” in Other 199.1 Definitions. Additionally, the word “finished” is used in 11 DCMR 199.1 definitions for “Building, height of” (“shall be measured from the lower of the natural grade or the finished grade at the middle of the front of the building”). This definition, using the words “finished” and “grade,” clearly references a point outside of the building.

Finished is also used in the definition for “Clear Height, Floor to Ceiling” and, along with the building height definition, is used to denote the condition of the grade. In neither of these definitions does “finished” suggest its meaning is time-defined or intent-based. Rather, finished

² Webster’s Third New International Dictionary, Unabridged. Office of Zoning Copy. Accessed 10/27/15.

³ Webster’s Third New International Dictionary, Unabridged. Office of Zoning Copy. Accessed 10/27/15.

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.

Grade

Webster’s Definition of Grade. 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.”⁴

Use of Word “Grade” in Other 199.1 Definitions. 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.”⁵
- 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. Berms or other forms of artificial landscaping shall not be included in measuring building height. The term curb shall refer to a curb at grade. In the case of a property fronting a bridge or a viaduct, the height of the building shall be measured from the lower of the natural grade or the finished grade at the middle of the front of the building (EMPHASIS ADDED) to the highest point of the roof or parapet or a point designated by a specific 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.

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

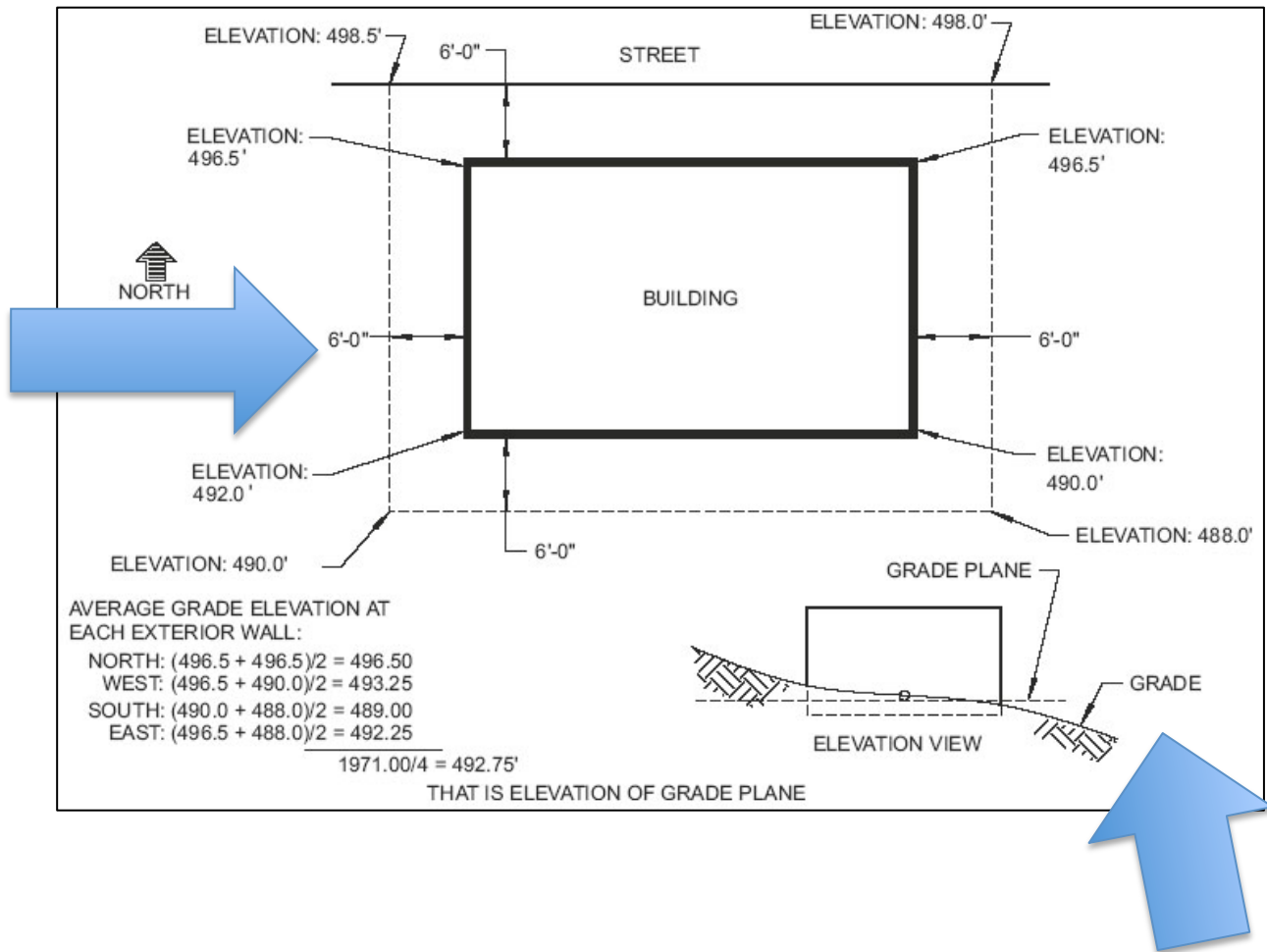
Use of Word “Grade” in Building Codes. Any remaining uncertainty as to the meaning of “grade” can be found in the Building Codes, which the zoning regulations rely upon in order to provide standards for construction projects. The 2013 District of Columbia Building Code (Chapter 2, Definitions) defines “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.”

⁴ Webster’s Third New International Dictionary, Unabridged. Office of Zoning Copy. Accessed 10/27/15.

⁵ Webster’s Third New International Dictionary, Unabridged. Office of Zoning Copy. Accessed 10/27/15.

This definition (depicted on the below graph) not only clarifies that “grade” is at ground level but further establishes that this ground is “adjoining” a building.



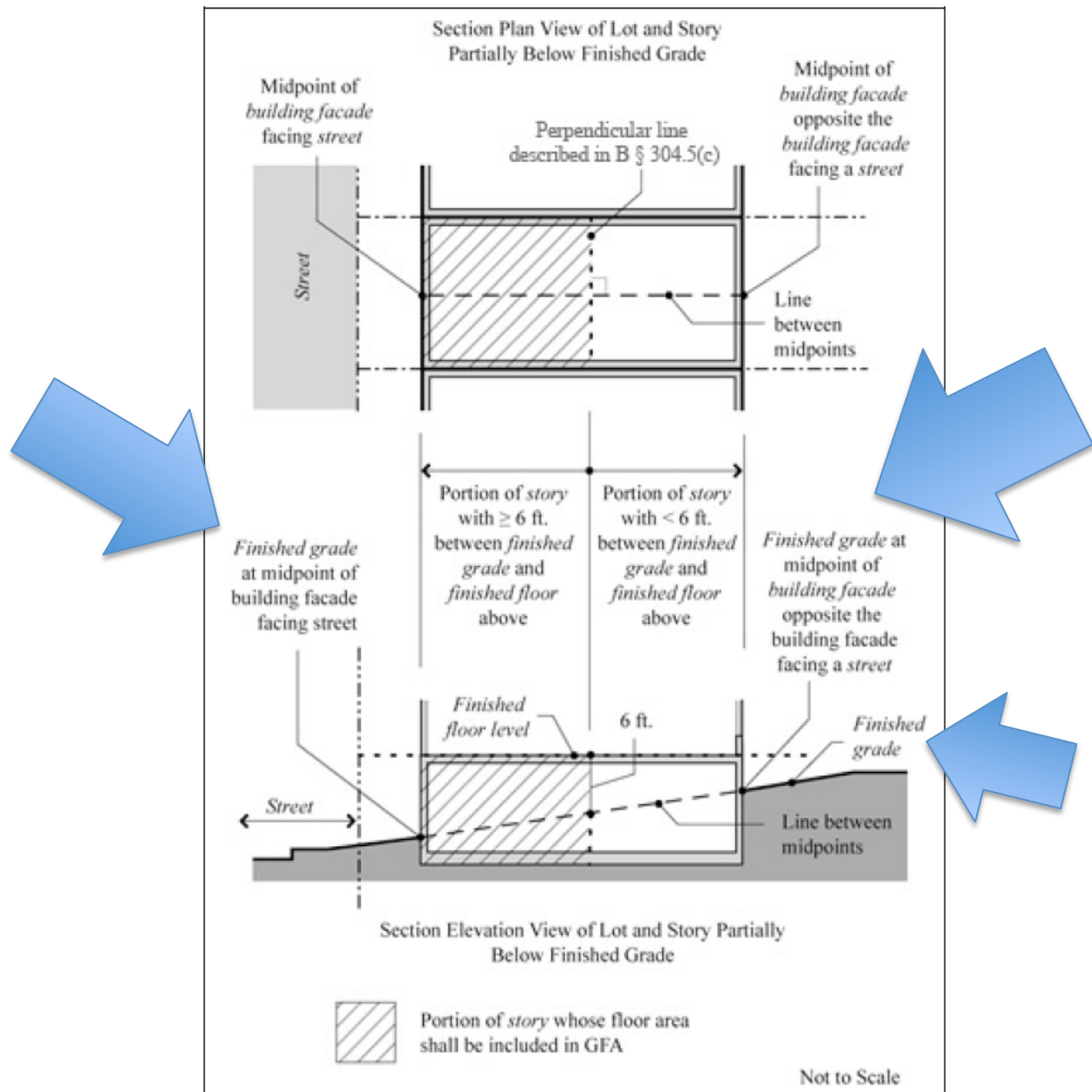
To further drive the point home, the International Building Code provides the following definitions:

- Grade: “The vertical location of the ground surface” and
- Grade, Finished: “The grade of the site at the conclusion of all grading efforts.”⁶

⁶ Appendix J IBC, Section J102 Definitions.

Use of Word “Grade” in Proposed ZRR. 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.”⁷

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



⁷ ZRR, Proposed Action. Dec 2014.

Error 3

Determination of AFG at Odds with Grade Plane Method, Prior BZA Cases, Court Rulings and Prior DCRA Determination Letters

The Zoning Administrator has chosen to use the “grade plane method” to calculate the lower level’s proportionality as basement versus cellar. The clear meaning of “adjacent finished grade” means the space external to a building, according to the plain language in the grade plane method, its application by DCRA for many decades including explanations offered in ZA determination letters, and interpretations in prior BZA cases (see Exhibit DCRA and BZA on Adjacent Finished Grade, summarized below).

The grade plane method definition and case examples follow. Notably, no BZA cases or DCRA determination letters on record recognize AFG as a point within the envelope of a building or, for that matter, as a point on the top of a retaining wall.

Grade Plane Method. DCRA defines the grade plane method as follows: 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 a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered a cellar.” (emphasis added)⁸

Example 1: BZA 18615 (2013). DCRA has continuously and consistently supported its position that “adjacent finished grade” is a point exterior to a building. 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.”⁹

Example 2: BZA 17109 (2005) and DC Court of Appeals Affirmation (2007). 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)¹⁰ In 2007, the DC Court of Appeals affirmed the BZA’s decision in BZA 17109, stating at length:

“[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

⁸ As defined in BZA Order 17109, Findings of Fact #36 (November 8, 2015).

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

¹⁰ 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

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."¹¹ (emphasis added)

Additionally, the Board previously confirmed, in BZA 17109, that AFG 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."

Example 3: BZA 16764 (2001). 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"¹²) 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."¹³ 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)

Example 4: 2011 DCRA Determination Letter (1421 Florida Avenue NW). DCRA 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....'"¹⁴ (emphasis added)

Example 5: DCRA Determination Letter for 703-707 Newton Place (March 19, 2014). DCRA ZA Matt LeGrant stated in this determination letter the following: "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." (emphasis added)

¹¹ Kalorama Citizens Association, Petitioner, v. District Of Columbia Board Of Zoning Adjustment, Respondent, Advisory Neighborhood Commission 1C and Montrose LLC, Intervenors. No. 06-AA-486. Decided: October 25, 2007. <http://caselaw.findlaw.com/dc-court-of-appeals/1055237.html>

¹² BZA 16764. Decision and Order. Findings of Fact #36. May 22, 2002.

¹³ BZA 16764, p.14. http://www.dcoz.dc.gov/orders/16764_2256-30.pdf

¹⁴ 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

Error 4

Violation of Exclusion of Proximate Locations as AFG (Areaways and Window Wells)

The ZA 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 AFG measurement point. Spaces excluded as AFG measurement points include: areaways, defined as spaces that are less than 5 feet in width from a building;^{15 16}; areaways that serves as a passageway for pedestrian traffic¹⁷; and window wells. The basis for these determinations can reasonably be established as being based upon, in part, the 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 AFG 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 BZA concluded that “[t]he Zoning Administrator has never considered the bottom of an areaway as the adjacent finished grade” (BZA Appeal No 18615, 10/29/13).¹⁸

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.”¹⁹ In another example, in the Zoning PDRM for 2012 Kalorama Road, NW (December 12, 2012), the ZA stated: “In the case of a limited areaway to access the level, the top of the grade adjacent to the areaway shall be used.”

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 and a height equivalent to a crawl space.

¹⁵ 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.”

¹⁶ March 19, 2014 DCRA Matt LeGrant Determination Letter for “703-707 Newton Place, NW.” 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

¹⁷ 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

¹⁸ 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.

¹⁹ 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

Error 5

Mis-Identification of AFG as Top Lip of “Retaining Wall” (101.5)

The ZA’s recognition of the top lip of the embedded retaining wall as the AFG is not sustainable, as outlined in the above definitions, BZA cases and court decisions, and DCRA determination letters. However, the basis for this conclusion merits reinforcement as follows:

- The retaining wall, if built, would be within the actual building. As documented above in a review of definitions, the retaining wall is in its entirety not “adjacent” to the building. Rather, the “retaining wall” is inside the building envelope. Directly above this retaining wall is, to state the obvious, multiple levels of building space.
- AFG is a point that is not occupied by a building. However, the retaining wall, the proposed new AFG, is a structure that rests upon the grade. Thus, the retaining wall cannot be definable as AFG as it sits upon the very ground that is occupied by the building itself.
- There is no precedent or regulation for establishing a retaining wall’s top as AFG. Neither the zoning regulations nor prior rulings (including BZA, court cases, and DCRA determination letters) have endorsed a “retaining wall” as AFG. The determination in B1509180 is simply a fabrication. Thus, the ZA’s ruling is in direct violation of 11 DCMR 101.5, which states: “No building, structure, or premises shall be used, and no building, structure, or part of a building or structure shall be constructed, extended, moved, structurally altered, or enlarged except in conformity with this title.”

Error 6

Lack of a Legitimate Purpose for the “Retaining Wall” (199.1)

Failure to Meet Definition of Retaining Wall. The so-called “retaining wall” does not meet the DCMR 11-199.1 definition of “retaining wall” (as well as Construction Code 1807.2) as it does not serve to “resist the lateral displacement of soil or other materials” as required in this definition. Simply put, no soil or other materials exists at this location and thus no such retention need exists.

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 AFG is a level and stable ground plane. Rather, this structure will only add this soil, after construction occurs, and is thus properly defined as a “planter.”

Lack of a Legitimate Purpose. The sole purpose of this so-called “retaining wall” is to change the existing AFG, which is not reflected in the definition for “retaining wall.” As such, there is no legitimate purpose for the proposed retaining wall as there is no “soil or other materials” to retain. The fact that the retaining wall would remove part of the building’s structurally sound wall, which has a legitimate purpose, and replace it with something far less viable, forces one to conclude that the retaining wall, in posing a threat to structural integrity, is actually illegitimate in nature.

In BZA 17285 (2005)²⁰ later upheld by the District of Columbia Court of Appeals in *Economides v. DC Board of Zoning Adjustment*,²¹ the Board questioned whether a retaining wall served a “legitimate purpose”²² “by posing a two-part analysis to deem the structure illegitimate. The Board ruled that:

1. One, such lateral pressure was supplied afterward” (emphasis added) and
2. Two, “[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.”²³ (See Exhibit *Economides v DC BZA*)

ANC1C recognizes that the ruling in BZA 17285 invalidating a retaining wall pre-dated the definition of retaining wall added to DCMR in 2014.²⁴ ANC1C also recognizes that the retaining wall in BZA 17285 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 height of the retaining wall as a criterion against which to judge its legitimacy 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 would be imported into the site. Thus, the underlying rationale disallowing the wall in BZA 17285 is consistent with 1636 Argonne Place: the retaining wall “does not ‘resist lateral pressure’”²⁵ but rather has a contrary purpose. It is immaterial as to the specific nature of the contrary purpose.

²⁰ 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

²¹ 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>

²² See July 7, 2015 Transcript. Pages 81-82.

²³ BZA 172815. Page 7. http://www.dcoz.dc.gov/orders/17285_1381-806.pdf

²⁴ ZC Case 13-06.

²⁵ BZA 17285. Page 7. Conclusions of Law. Merit of the Appeal. http://www.dcoz.dc.gov/orders/17285_1381-806.pdf

- In BZA 17285, the contrary purpose was to create “a new level surface on which to engage in leisure activities.”
- In BZA 19115, the contrary purpose is to attempt to alter AFG so that the lower level can be defined as a cellar rather than a basement in order to exclude its square footage from FAR.

In neither case does the retaining wall exist to address its fundamental role.²⁶ In the present case, the retaining wall has an illegitimate purpose: subversion of 11 DCMR 402.4 for R-5-B. Again, this supports the finding in *Economies v. DC Board of Zoning Adjustment*, et. al.

Interference with Legitimate Purpose: Life Safety and Means of Egress Requirements. The retaining wall also 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 §§ 6-703.03.²⁷

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 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 1029.3.²⁸

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.

Interference with Legitimate Purpose: Compliance with Parking Requirements. 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. In fact, in its ruling in BZA 18980, the Board defined the rear yard as a “driveway” (for purposes of allowing installation of a 12% grade) and ruled that this space could not serve the dual purpose of a “parking space.” However, removal of the lower portion of the rear wall, and non-installation of the embedded retaining wall, could achieve a rear yard that could fully serve as regulation parking spaces. Furthermore, this solution would negate the need for a BZA exemption for parking requirements, as is being sought in BZA 19154.

²⁶ BZA 172815, Pages 7-8. http://www.dcoz.dc.gov/orders/17285_1381-806.pdf

²⁷ 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.”

²⁸ 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.”