

# Revised Pre-Hearing Statement: BZA 19374 – 2/8/17

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## Summary

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This appeal is filed by the Dupont Circle Citizens Association (DCCA) as an appeal of the Zoning Administrator's (ZA) decision to issue building permit B1603105. DCCA contends that the ZA erred in allowing for a habitable lower level to be improperly deemed as a "cellar," thereby enabling this space to be excluded from Gross Floor Area (GFA) and the Floor Area Ratio (FAR) density formula.

DCCA contends that this is contrary to the clear meaning of the zoning definitions. DC zoning regulations are consistent in excluding "cellar" space from density limits because cellars are considered to be inappropriate for human habitation. More specifically, DC zoning regulations in 11 DCMR 199.1 define cellars on the basis of two interrelated definitions: (1) space with a ceiling that is less than 4' above the adjacent finished grade, and (2) space that is not suitable for habitation. DCCA contends that the ZA has ignored the latter definition. DC zoning regulations do clearly contemplate and provide for habitable lower level spaces, which are defined as basements and are included in the GFA and FAR density formulas.

The Board of Zoning Adjustment (BZA) has heard multiple cases regarding interpretations of the basement/cellar rule. However, there has never been a case or ruling on proper definition of "cellar" in terms of the above two-part definition.<sup>i</sup>

On this basis, we submit that the ZA has made three errors in approving this permit:

1. The permit and plans fail to achieve cellar measurement.
2. The Zoning Administrator fails to follow the clear language of the zoning regulations.
3. The Zoning Administrator fails to apply the clear intent of the density formula.

## Property Description

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### Description of Property

The property is located at 1514 Q St NW (0194 0027) in the R-5-B zone. The Property is a single-family dwelling. The instant case relates to a permit provided to 1514 Q LLC to convert a 3-story residence into a 4-unit, 5-level, condominium. The permit plans show a lower level that is partially below grade. The plans label this residential unit a "cellar." The plans show, in this "cellar," a residential unit with a kitchen, a living/dining room, 2 bedrooms, 2 bathrooms and a washer dryer.

In the R-5-B zoning district, the maximum allowable GFA density is 1.8 FAR with a maximum 60% lot occupancy. The conversion of this house to 4 condominium units totals 4,800 square feet, which equates to a 2.4 FAR and does not, as a matter of right, fall within the allowable 1.8 FAR in this district.

## **Permits and Observations**

This appeal to the BZA is to contest permit B1603105 which called for a “4 STORY REAR ADDITION TO A SFD TO BE CONVERTED TO 4 UNIT CONDOMINIUM UNITS”. The existing condition of the property’s lower level was a basement with a ceiling height of 5’4” in relation to the adjacent finished grade (see Exhibit 1).

### **Alterations to Achieve <4’ From Adjacent Finished Grade to Lower Level Ceiling**

The ZA, in issuing his zoning determination letter of March 21, 2016 (see Exhibit 2), allowed the following alterations, proposed as a way to reduce the distance between the adjacent finished grade and the ceiling of the lower level to less than 4’ in an effort to achieve a cellar designation:

- Shortening the window openings by 2 and 1/3 courses (an action contrary to the Historic Preservation Guidelines but retroactively approved by Historic Preservation Office staff);
- Raising the grade and sills in front of the shortened windows; and
- Installation of a lowered ceiling in the lower level.

These alterations are presented in Exhibit 1, which shows actual existing conditions (in red and ALL CAPS), compared to the existing conditions represented on the plans by KC/DC Architects (in black).

Similar alterations in the adjacent finished grade are seen in multiple other projects in DC, with DCRA’s permission. Lowering of the ceiling to achieve a less than 4’ measurement has not, however, been identified as a prior practice, which DCRA asserts is the case in its determination letter (Exhibit 2).

## **Zoning Administrator’s Rationale**

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The ZA sent the following March 22, 2016 email to abutters, explaining DCRA’s rationale for excluding the lower level from FAR.

“I wanted to specifically address the matter you raised in your email below regarding the zoning treatment of “habitable rooms” and “Cellars” as per my interpretation. Although a preliminary reading of the definitions of these terms supports the exclusion of such rooms from Cellars, my office’s approval of numerous other projects with below grade dwelling units is consistent with the District’s Zoning Regulations. Although cellars and attics are excluded from the definition of “habitable room,” the regulations do not prohibit those spaces from being used for sleeping, cooking, and living. This has been DCRA’s long standing interpretation of the regulations and it is consistent with the many provisions of the District of Columbia Construction Codes (including the Building Code, Property Maintenance Code, and Fire Prevention Code) that specifically allow for the occupancy of partially below grade dwelling units. Here, as in other projects, the cellar units must be provided light, ventilation, and emergency egress required by those codes.”

“My letter yesterday addressed the lowering of basement ceiling was reviewed. I noted that the measurement dimension can be from a lowered ceiling level. This is permissible as there is no limitation in the Zoning Regulations from altering the ceiling level, and it has been this office’s long standing practice to allow changes to the bottom of the ceiling level to measure the cellar minimum dimension. I also noted the reason for lowering the ceiling level was documented by the owner. I would add that all District Columbia Construction Codes must be complied with prior to any building permit approval of partially below grade dwelling units.

## **Zoning Administrator’s Errors**

As noted, DCCA is appealing building permit B1603105 on the grounds that the lower level has been improperly deemed to be a cellar as the ZA has not applied the full and complete definition of a cellar. We submit that the ZA made three errors in approving this permit:

1. The permit and plans fail to achieve cellar measurement.
2. The Zoning Administrator fails to follow the clear language of the zoning regulations.
3. The Zoning Administrator fails to apply the clear intent of the density formula.

### **Error 1: Permit and Plans Fail to Achieve Cellar Measurement**

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A review of the approved construction plans reveals that the property does not achieve a cellar measurement of less than 4 feet. Specifically:

- Plans depict a measurement of 3’11” at the front grade.
- However, photo evidence at the front shows a measurement from the adjacent finished grade to the top of the archway (the location of the ceiling) of 52” (4’4”).
- Another photo shows the measurement from the springline of masonry to be 4’5” above grade.
- The ceiling clear height in the interior is shown as both 8’8” and 7’10”, indicating that the ceiling height is uncertain and an unlikely to be 3’11” from the grade.

For these measurements, see Exhibit 1, which highlights these contrasting measurements, as well as Exhibit 2, the determination letter and associated documentation.

It is DCRA’s responsibility to review permits and plans to insure that they comply with the zoning regulations. When DCRA fails to do so, appellants can turn to the BZA to seek enforcement.

## Error 2: Failure to Follow Clear Language in the Zoning Regulations

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The ZA erred in not following the full two-part definition of a “cellar”; moreover, the ZA’s application of the definition is imprecise, selective, and inconsistent with related regulations. What follows is a review of the zoning regulation language, which clearly explains what is meant by a “cellar” versus a “basement” and, correspondingly, what is to be included and excluded from GFA and FAR.

### Definition of a Cellar

Definitions in the zoning regulations are interdependent (e.g., the term cellar is applied under its own definition as well as in GFA and habitable room). The term “cellar” is defined in 11 DCMR 199.1 (ZR-16: Subtitle B, Chapter 1) as non-habitable space that is partially below grade, as follows:

- *Cellar*: the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade.
- *Habitable Room*: An undivided enclosed space used for living, sleeping, or kitchen facilities. **The term “habitable room” shall not include attics, cellars,** corridors, hallways, laundries, serving or storage pantries, bathrooms, or similar space; neither shall it include mechanically ventilated interior kitchens less than one hundred square feet (100 sq. ft.) in area, nor kitchens in commercial establishments [emphasis added].

Taken together, this language fully defines a cellar as a non-habitable room where the ceiling of the space is less than 4’ above the adjacent finished grade. In contrast, partially below grade space that exists as a habitable room is no longer definable as a “cellar.” This rationale is expanded upon below.

- **Law of Surplusage** - There are clearly two different definitions in DCMR 11-199.1 for partially below grade space—one being a basement and the other being a cellar. A cellar, being uninhabitable, is excluded from the definitions of GFA, which is used to calculate FAR. A basement, on the other hand, is habitable and is included in GFA. Basic principles of statutory construction call for defined terms to have meaning and their distinctions to be purposeful. The Law of Surplusage states that the regulations should not be interpreted so as to render the words meaningless. By excluding an entire floor habitable space from GFA and FAR by simply relabeling the space “cellar,” the ZA has rendered meaningless the definitional difference between a basement and a cellar in DCMR 11-199.1.
- **Lower Level Not Functioning as a Cellar** - In the instant case, the partially below grade residential condominium dwelling unit is an entire floor of multiple habitable rooms to be used for living, sleeping, or kitchen facilities. Therefore, the unit is NOT a cellar, as it is not functioning

as a cellar. Instead, it is a basement, and its floor area *must* be counted in the calculation of maximum allowable GFA and FAR in an R-5-B district.

### **Imprecise Application of the “Cellar” Definition**

In his rationale for defining habitable partially below grade space, the ZA studiously avoids using the word “cellar” and instead uses the phrases “below grade” and “partially below grade.” He states:

“Although a preliminary reading of the definitions of these terms supports the exclusion of such rooms from Cellars, my office’s approval of numerous other projects with below grade dwelling units is consistent with the District’s Zoning Regulations. Although cellars and attics are excluded from the definition of “habitable room,” the regulations do not prohibit those spaces from being used for sleeping, cooking, and living. This has been DCRA’s long standing interpretation of the regulations and it is consistent with the many provisions of the District of Columbia Construction Codes (including the Building Code, Property Maintenance Code, and Fire Prevention Code) that specifically allow for the occupancy of partially below grade dwelling units. Here, as in other projects, the cellar units must provide light, ventilation, and emergency egress required by those codes” [emphasis added].

Appellants do not contest the ZA’s assertion that partially below grade space can be habitable. However, partially below grade space that is habitable *must* be classified as a basement and, in turn, counted in GFA and FAR. In other words, the zoning regulations and definitions do not allow for such a thing as a habitable cellar.

Appellants do not contest that cellars can contain habitable rooms as per the regulations (such as a bathroom or a small kitchen); this is typically achieved by changing the grade with areaways and light wells. However, assigning the label “cellar” to an entire floor of habitable rooms in order to allow its exclusion from FAR is a gross misapplication of clear intent of the zoning regulations. The logic is clear: space that is defined as a cellar should function as a cellar.

The ZA is selectively ignoring the direct restriction on cellars being habitable rooms that are used for living, sleeping, or kitchen facilities. To selectively ignore this is to also ignore the distinction between the basement and cellar as differentiated in the zoning regulations.

The ZA implies that, since his office has previously approved cellars as habitable, it provides justification for doing so again. While we do not question the ZA’s past actions, we note that this specific issue has never been brought to the BZA for adjudication. And, as in any system of rule and law, if a violation was done historically, it does not provide a valid justification for a continued violation once the error has been questioned.

## **Zoning Administrator Does Not Apply All Relevant Zoning Regulations**

Turning again to the ZA's email of 3/22/16, he writes: "Although cellars and attics are excluded from the definition of "habitable room," the regulations do not prohibit those spaces from being used for sleeping, cooking, and living" [emphasis added].

It is notable that the ZA does not say "the zoning regulations". The reason is clear. The zoning regulations do in fact prohibit cellars from being used for sleeping, cooking and living in that cellar space is excluded from the definition of "habitable room".

In contrast, "the regulations" as a broader term do allow for habitability of partially below grade spaces. The ZA is correct in seeking to align his decisions with such "regulations," per DCMR 11-101.4(d), which states: "The provisions of any statute or other municipal regulations shall govern whenever they: Impose higher standards than are required by this title."

If the ZA seeks support from other municipal regulations, the Title 14 Housing Code and Title 12 Building Code are relevant and informative about the regulatory intent for partially below grade habitable space. Each of these codes (presented at the end of this pre-hearing statement) uses a definition of "habitability" that is clearly synonymous with what the zoning regulations call a "basement." Similarly, their definition of "non-habitable" spaces is synonymous with what the zoning regulations call a "cellar."

In the case of 1514 Q Street, the "cellar" violates the Title 12 and Title 14 requirements for a partially below grade habitable room. In particular, the wall at the front is more than 50% below ground. In the front of the property, the plans list the ceiling height as 8'8 ½", of which 3'11" is stated as the above ground space (see Exhibit 1). In this case, 55% of the exterior wall area from floor to ceiling is below ground level.

### **Review of Other Regulations with Higher Standards: DCMR 11-101.4(d)**

	<b>Title 14 Housing Codes</b>	<b>Title 12 Building Code</b>	<b>Title 11 Zoning Regulations</b>
Cellar Definition	Non-Habitable	By reference, space that is primarily below grade	Non-Habitable

## Error 3: Failure to Apply Clear Intent of Density Formula

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As explained below, the ZA has not applied the meaning and intent of the density formula in the zoning regulations.

### Cellar Definition: Non-Habitable, Non-Countable in Density Formulas

The zoning regulations were expressly drafted for “controlling and restricting the height, bulk, number of stories, and size of buildings [and] the density of population ... in the District of Columbia...” (DCMR 11-100.4) The regulations contain multiple provisions to enforce this goal, including density formulas and their composite parts. Below is a summary that demonstrates how “cellar” space is intended to be applied.

Cellar is defined twice in DCMR 11-199.1:

- As a rule of measurement in the definition of cellar in (i.e., “that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade”).
- As a rule of use in the definition of habitable room” and, specifically, as non-habitable space (i.e., “an undivided enclosed space used for living, sleeping, or kitchen facilities. The term habitable room shall not include attics, *cellars*....”). [emphasis added.]

These two definitions come together in the definitions related to density formulas, which are intended to set limits and to do so in relation to both measurement and use. Those definitions are: GFA, FAR, and story.

Cellar space is consistently excluded from all of the above definitions. There is no equivocation. Cellar space is non-habitable and is not counted in density formulas. Note: Not all livable space is defined as “habitable” in the definition of “habitable room” (see table below). However, the rationale is evident in that inclusion in FAR is clearly tied to the relationship of such space to being occupiable for purposes of living, sleeping and eating.

### Application of Floor Area Ratio Formula

FAR restrictions were introduced into the D.C. Zoning Regulations in 1958. Contemporaneous urban planning sources indicate that FAR was considered as a “basic bulk control”; in other words, it was considered to be a device to “regulate the volume of buildings” and thus to “limit the concentration of people and their activities ... the loads imposed on traffic, transit and service facilities” as well as to “afford access of light and air into buildings and the space surrounding them.”<sup>ii</sup>



Measures such as those proposed by the developers of 1514 Q Street NW seek to convert basement space into “cellar” space through the manipulation of grade and ceiling height, while continuing to use such space as habitable space. Doing so facilitates the construction of bulkier buildings with higher population density than that envisaged by the zoning regulations. It follows that the decision of the Zoning Administrator to permit such measures is contrary to the intentions of the regulations.

The definition in the zoning regulation of a “habitable room” as excluding cellars provides a clear indication that regulation authors did *not* envisage cellar spaces being used for human habitation. The exclusion of cellar space from the FAR is logical in this context, as such below grade space neither contributes significantly to the volume of the building, nor to the concentration of people able to live in it.

The conversion of cellar spaces into habitable spaces is allowable. Yet, it is contrary to the definitions to continue calling such a space a “cellar” as it now contributes to *both* volume and density. It follows that the Zoning Administrator’s decision to exclude a habitable below grade dwelling unit from the FAR calculation at 1514 Q Street NW is contrary to the intentions of the Regulations.

### **All Livable Space is Included in FAR**

	<b>Included in FAR</b>	<b>Defined as Habitable Room</b>	<b>Rationale or Inclusion or Exclusion in FAR</b>
Cellar	No	No	Not Viable as Living Space Given Insufficiency of Light/Air
Attic	Yes	No	Viable as Living Space Given Insufficient Height of >6’6”
Attic	No	No	Not Viable as Living Space Given Insufficient Height of >6’6”
Corridors, Hallways, Laundries, Storage Pantries, Bathrooms, Interior Kitchens Less than 100 SF, Kitchens in Commercial Establishments	Yes	No	Presence Essential to Viability of Core Living Space
Basements	Yes	Yes	Viable as Living Space
Basement areas designed and used for parking space or for recreation space shall not be counted in the floor area ratio provided that not more than fifty percent (50%) of the perimeter of that space may be comprised of columns, piers, walls, or windows, or similarly enclosed	No 11 DCMR 402.5		Not Used as Living Space

## Habitability is Relevant Across Definitions

The word “habitable” is included in 8 distinct definitions in DCMR 11-199.1: Apartment, Apartment, bachelor, Dwelling, Dwelling Unit, Habitable Room, Hotel, Inn, Motel, Rooming Unit, Tenement. Each of these terms is also included in density formulas by inference. Thus, any allowance to call a space a cellar, exclude it from density formulas, **and** make it habitable defies the purpose and intent of the zoning regulations.

## Witnesses

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- Brian Gelfand- DCCA member, adjacent neighbor to the permit address. He will make a presentation for DCCA.
- Don Hawkins- Architect and Historian of the planning of the District of Columbia. Accepted as an expert to testify before the BZA and several courts. He will testify to the property conditions, plans, construction, and regulations compliance.
- Alan Gambrell- Mr. Gambrell will assist with the DCCA presentation and responding to questions from the Board on DCCA submissions as well as general questions about the zoning regulations and Board and Court decisions related to the density formula under review. Mr. Gambrell will also provide a separate presentation on examples of DCRA interpretations of the basement/cellar rule.

Mr. Gambrell is a former ANC1C Commissioner and served on the ANC1C Planning, Zoning and Transportation Committee for 2 years. Mr. Gambrell has worked extensively with DCRA, the Board, the Zoning Commission and the Office of Planning on such varied matters as the zoning regulations, analysis of both the 1958 and ZR 16 regulations, policy discussions on the comprehensive plan and zoning changes, and multiple Board hearings dealing specifically with zoning density formulas. Mr. Gambrell has participated in BZA 18980 and 1915

## Attachment: Housing Codes and Building Codes

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### Title 14 Housing Codes

*DCMR 14-400.1* of the Housing Code, Titled General Provisions, reads: “400.1 No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of this subtitle.” And, *Section 14-199* definitions also clearly exclude cellars from habitable rooms:

*Habitable room* - an undivided enclosed space which has sufficient light and ventilation, protection against the elements, and of a ceiling height to comply with this subtitle, and which is properly located with reference to the ground surface to comply with this subtitle.

Habitable rooms include rooms used for living or sleeping, and rooms in dwelling units used for the preparation or eating of meals, but do not include attics, cellars, closets, corridors, hallways, laundries, serving or storage pantries, bathrooms, or similar places.

*Section 14-403* is Titled "Habitable Rooms" and reads in 14-403.1: "No room other than a habitable room shall be used for living or sleeping, or, in a dwelling unit, for the preparation of meals or for eating, except as provided otherwise in this section."

*Section 14-404* addresses the exact question of regulations for partially below grade habitable space as it is Titled HABITABLE ROOMS PARTIALLY BELOW GROUND. The regulation 14-404.1 reads: "Any room with more than fifty percent (50%) of any exterior wall area from floor to ceiling below ground level (using average level along each exterior wall) shall not be used as a habitable room, except as otherwise provided in this section."

## **Title 12 Building Code**

The Title 12 Building Code outlines general, natural light and ventilation requirements (in relationship to grade) for any space to be habitable but does not present specific definitions for basements and cellars. For example:

- 12G DCMR CHAPTER 4 LIGHT, VENTILATION AND OCCUPANCY LIMITATIONS 402 Light, Property Maintenance Code reads: *402.1.1* Any room with more than 50 percent of any exterior wall area from floor to ceiling below ground level (using average level along each exterior wall) shall not be used as a habitable space, except as otherwise provided in Section 402.
- Title 12-G DCMR § 402, Property Maintenance Code Supplement of 2013, reads: *402.1.1* Natural light. Where natural light is required, the minimum net glazed area shall be not less than 8 percent of the floor area of the room or rooms served. At least 50 percent of required glazing shall be clear glass; it is permissible for the remainder of the required glazing to be obscure glass, glass block or other *approved* translucent material.
- In addition, 1208.2 Minimum ceiling heights reads: Occupiable spaces, habitable spaces and corridors shall have a ceiling height of not less than 7 feet 6 inches (2286 mm). Bathrooms, toilet rooms, kitchens, storage rooms and laundry rooms shall be permitted to have a ceiling height of not less than 7 feet (2134 mm).

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## **END NOTES**

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<sup>i</sup> The BZA and appeals court decision on the irrelevance of the habitable room definition to attic space does not apply to the definition of cellar as the definition of attic was deemed to solely rest on its ceiling height measurement.

<sup>ii</sup> Harrison, Ballard & Allen (1950) *Plan for Rezoning the City of New York*. <https://goo.gl/2WrNz3> See also: American Society of Planning Officials (1958) *Information Report No. 111: Floor Area Ratio*. <https://goo.gl/E7jGJ0>.