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A “basement” or a “cellar”? A legal case over the difference could mean less housing in DC

ZONING By Daniel Warwick (Contributor), David Alpert (Founder)
December 14, 2016 23

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Board of Zoning Adjustment
District of Columbia
CASE NO.19374
EXHIBIT NO.55

Zoning appeals at DC’s Board of Zoning Adjustment don’t usually make headlines. But in one case in Dupont Circle, an upcoming decision about the legal definition of a “basement” versus a “cellar” could mean fewer apartments in the future.

In DC people have lived in apartments that are partially below ground for over 100 years. For many it is an affordable option for living in a neighborhood that would otherwise be unaffordable.

Most of us know these places as “basements,” or perhaps the slightly less common “cellars.” It turns out the difference between those last two is very important in the zoning code. Basically, basement apartments count toward a building's allowable size, but cellar apartments don’t. That could change.

You say basement, I say cellar

The owner of the rowhouse at 1514 Q Street NW wants to turn an existing row house into a four unit building. The zoning allows a three-story building, but the owner can build four units, one on each floor, because cellars don’t count as a story. There are many buildings in Dupont Circle and elsewhere with this design.

However, the Dupont Circle Citizens' Association filed an appeal to change the interpretation of those rules.

The key provision of zoning in this case is “Floor Area Ratio” (FAR): the building’s gross square footage (which is most, but not all, of a building’s actual floor space) divided by the total size of the lot it sits on.

In the area encompassing this project, buildings can have a FAR of 1.8. That means if they take up 60% of the lot, they can be three stories tall.

Under DC’s zoning code, a floor is a **cellar** if the ceiling is no more than four feet above the ground outside (“grade level,” in technical parlance). It’s a **basement** if that distance is more than four feet.

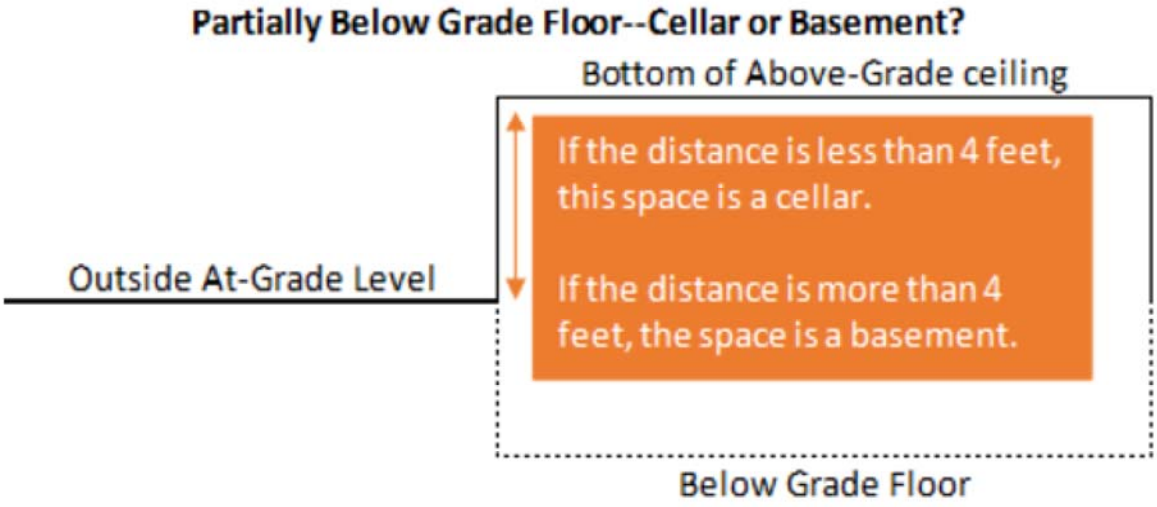

Image by the author.

A basement counts against FAR, while a cellar does not. This makes some sense, as the purpose of zoning is to regulate the visible height and bulk of a building. If someone can live below ground, they’re making good use of space that otherwise would be just storage or dirt.

Should cellars count?

DC’s Zoning Administrator, the official in charge of interpreting zoning rules, determined on March 22nd that a plan to build four condominium units was consistent with zoning. The Dupont Circle Citizen’s Association appealed the decision.

Here’s what they say in their appeal (go to the case page and click on “DCCA Prehearing Statement, the second item under Case Documents):

> *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 by DCCA]*
>
> *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, a habitable room that is partially below grade is no longer definable as a “cellar,” given its status as a habitable room.*

Um, actually, no.

Many of us learned basic syllogisms in high school or college (like “all snakes are reptiles; no reptiles have fur; therefore, no snakes have fur.”) If you remember any of that (or even if not), it’d be clear that DCCA is making a basic error of logic. The zoning code does not “fully define a cellar as a non-habitable room.” Rather, it defines a “Habitable Room” for the purposes of the zoning code as one of a set of places not counting cellars (or bathrooms, or halls, etc.)

DCCA has this backward. It’s somewhat like saying, “All snakes are reptiles, therefore all reptiles are snakes,” which is a logical fallacy. This is a related type of fallacy.

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How about an analogy to better understand. Let’s say a seaside town wants to prohibit driving cars on the beach, so they pass a law, saying:

> *A Motor Vehicle may not be driven on the public beach, except those operated by police, medical personnel, or lifeguards on duty.*
>
> *Motor Vehicle: A wheeled conveyance powered by an electric, combustion, or other motor.* ***The term “Motor Vehicle” shall not include toys.***

Now, if someone is driving a miniaturized toy truck on the beach, can the hypothetical Delaware Coast Citizens’ Association stop kids from playing with them?

The answer is no. The prohibition is on Motor Vehicles, and the definition specifically excludes toys. If something is a toy, therefore, it is not a Motor Vehicle for the purposes of the prohibition even if it is motorized and is a vehicle, because the second sentence excludes it.

But the hypothetical Delaware Coast Citizens’ Association appeals, saying “Taken together, this language fully defines a toy as a non-motorized vehicle” and arguing that anything with a motor can’t be a toy.

They get an F in Logical Reasoning, and the BZA should give this appeal a D for Denied.

This case has big implications for DC’s affordable housing supply

If the BZA instead falls for this same logical fallacy, many people’s ability to build on their row houses will be reduced by 25%. Projects, like this one, to make each floor into an apartment would be limited to fewer housing units, but that is not the only effect.

Some row houses, including in this area, have two 2-floor, 3-bedroom units. These are valuable because they provide large enough space for some families. But without the cellar for living space, there could only be one family-sized unit and one smaller unit, perhaps a 1-bedroom.

Many homeowners rent out their basement (or, technically, cellar) apartments for extra income. Living above ground, where there are windows and lots of open light, is more desirable, but that means people can choose to pay less for cellar with less light, perhaps being able to afford a neighborhood (like Dupont) where they could not otherwise.

A Redfin search for condominium sales including the word “basement” within DC over the past twelve months shows an average sale price of $476/square foot, while the average sale price for a condominium unit was $527/square foot. A 10% discount may not be enough for everyone to choose living in basement or cellar, but it is nothing to scoff at when the cost of housing is rising every year.

It is important to note that zoning, which is at issue here, just affects what buildings can be built. Where someone is allowed to live in a building are

entirely separate regulations in the building code and not in the zoning regulations.

Most of the areas impacted by this appeal were built before the 1958 zoning code, which set the regulations for floor area ratio and lot occupancy, was adopted in DC. Many of these areas were developed with three story rowhouses and basements or cellars. Counting the cellar in FAR would mean that most of the existing buildings could not be constructed today. That makes little sense.

With DC's population growing by 1,000 people every month, making housing illegal is not a wise decision-- especially when the relatively more affordable units are being targeted.

What’s next?

The five-member Board of Zoning Adjustment hears appeals to Zoning Administrator decisions, including this one. There is a hearing on Wednesday, January 18th (originally scheduled for December 14th but postponed at the last minute) to decide if cellars with living space should count against FAR. Let’s hope the members of the BZA understand their elementary logic and preserve more affordable housing options in DC.

If you want to send comments to the BZA, you can do that by emailing bzasubmissions@dc.gov before January 18. You must put the case number and title (BZA #19374, Dupont Circle Citizens Association) in the subject line; say in the email whether you or oppose or support the appeal or just want to give general comments; and include your name, address, phone number, and email address (their rules require all of this).

We've just launched our brand new website and are working out some kinks. Find something that looks like a bug? Please help out by sending us an email with the details!

Tagged: dupont circle, housing, housing supply, zoning commission

Daniel Warwick is an Advisory Neighborhood Commissioner in Dupont Circle and chair of ANC 2B's Zoning, Preservation, and Development committee. His day job is with RCLCO, a nationwide real estate advisory firm.

David Alpert is the founder of Greater Greater Washington and its board president. He worked as a Product Manager for Google for six years and has lived in the Boston, San Francisco, and New York metro areas in addition to Washington, DC. He lives with his wife and two children in Dupont Circle.

23 COMMENTS

drumz on December 14, 2016 at 11:06am

Remember how people argued against pop-ups because we ought to just subdivide the existing housing we have rather than building on top?
Crazy how people work so hard to prevent having even one extra neighbor.

REPLY LINK REPORT

Peter on December 14, 2016 at 11:50am

What it comes down to is a lot of DC residents (especially those in the more expensive parts of NW) don't want "affordable housing" anywhere around them. These snobs only want to live among the rich or well off. So they are resistant to any change that might lead to any diversity in their neighborhood. They just want to live in their little exclusive bubble forever.

REPLY LINK REPORT

cmc on December 14, 2016 at 11:54am

I don't think it's a lot of DC residents, but its select minority of residents with plenty of money and time who are driven by a desire to protect the status quo at all costs, which hurts the city and the neighborhood, in the long term.

REPLY LINK REPORT

Paul W. on December 14, 2016 at 12:03pm

Another frivolous zoning appeal clogging up the system. What they're asking is to overturn decades of practice at the Zoning Administrator's office. It's another opportunity for neighborhood leaders to grandstand and rake DC officials over the coals.

REPLY LINK REPORT

Bob on December 16, 2016 at 2:05pm

Let's be honest. The only real "decades of practice at the Zoning Adminstrator's office" has been the passing of envelopes filled with cash.

REPLY LINK REPORT

Paul W. on December 21, 2016 at 9:26am

Good grief. Is there a scintilla of evidence that the Zoning Administrator or his staff is on the take? Notwithstanding DCCA's "novel" argument, they are asking to overturn decades of widely-accepted interpretation of the rules regarding cellars and basements. It's all out in the open--everyone knows the rules. This is a nuisance appeal that the BZA should swiftly deny.

REPLY LINK REPORT

DC Native on December 14, 2016 at 12:37pm

The most rediculous part of this whole thing is that the people who are waging the battle against the developer actually live in a unit in the identical house next door that the same developer sold to them a little over a year earlier, literally indentical DuPont rowhouse. They knew that the one next door was gonna be developed in the same way when they bought their unit. So by their argument the penthouse unit they live in wouldn't have been allowed to be built because it has a mezzanine level addition that would have put the building over FAR if the "cellar" of their building were to count to FAR.

This is beyond crazy!

REPLY LINK REPORT

Tom Coumaris on December 14, 2016 at 1:47pm

As I always say: No one cares how many doorbells a house has.

In my block of S we have several "houses" that are multi-unit, it's almost impossible to tell the difference and no one cares. Pop-Ups and pop-backs are extremely noticeable, offensive, and legitimately draw outrage.

The zoning rewrite should have concentrated on increasing the allowable density in existing houses instead of the extraneous fluff it pushed. Housing code already sets minimum square footage for living units and the zoning density rules are the real culprit holding back more density, not height rules. A 2 unit limit on downtown houses of 3000 sq' is ridiculous.

What we are seeing happening now is as more wealthy people pay $1.5 to $2 million for renovated huge luxury townhouses, they are extremely resistant to any adjoining or close-by house being changed to multi-unit because it may well lower their own value which is partly dependant on them being in a block of similar huge, very expensive houses for appraisal purposes.

The window for upping density is closing, but it's not because of old-style urbanists who resisted outward changes while not having problems with increased density in existing houses.

It's the wealthy newcomers worried about their next appraisal.

REPLY LINK REPORT

charlie on December 15, 2016 at 12:42pm

You may not the outcome, but worrying about your appraised value does seem like a legitimate concern.

Your points on multiunit downtown are well taken, though.

I'm not sure that is the case here. Looks like a 2 floor row house, so it they build it to 3 that is going to be a "pop-up". So this isn't about keeping an existing house and turning it multiunit.

REPLY LINK REPORT

Adam L on December 15, 2016 at 10:08am

The world is literally on fire and these NIMBYs care about their neighbor's basement. Unreal. Wait till Trump shreds the Height Act to build his new Presidential Skyscraper.

REPLY LINK REPORT

Dupont Resident on December 15, 2016 at 12:22pm

Even if it did come down to only $$ (which it doesn't, there's things called, you know, laws not being followed and density questions) when did it become so wrong to want to protect your own investment? Why do you think I'm a bad person for not wanting to give up my view so a builder can make extra money not afforded to him under the current zoning laws which were in place when be purchased the property and why should my property lose value so that someone can live in a basement unit? You're telling homeowners that we can't protect our assets because we should give some up to others. By the way, none of this would be considered "affordable" housing

REPLY LINK REPORT

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matt on December 15, 2016 at 12:53pm

Mr. Warwick - I believe you've misunderstood the logic. There is no fallacy here. Syllogisms are made of propositions. The DCCA is not making a syllogism. Rather, they are simply putting the zoning code language into categorical proposition format or its equivalent converse. The code says that the "term habitable room shall not include cellars." Putting that into standard proposition form is: "all H are non-C," or its equivalent converse: "no Cellars are Habitable rooms."

REPLY LINK REPORT

MLD on December 15, 2016 at 2:00pm

By their ridiculous reasoning, a bathroom is also not habitable space, so... this seems wrong.

REPLY LINK REPORT

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matt on December 15, 2016 at 3:07pm

Good point. However, that doesn't mean that DCCA's argument is wrong. The clear purpose of FAR maximums is to control density. Since a cellar (less than 4 feet tall) doesn't contibute to density because you can't live in a room with such a low ceiling, then it shouldn't be counted in FAR. So if the floor plans (as DCCA alleges in this case) show that the purported "cellar" is actually to be

used as living space, then it has to be counted in FAR, because if it's living space, then it's not a true cellar that's entitled to the exemption from the FAR calculation. That's the construct of the code, in my opinion. Whether local residents think that the current FAR maximums are too low and that increased density is warranted, that's a separate argument, and one that they can bring to the zoning commission.

REPLY LINK REPORT

MLD on December 15, 2016 at 3:29pm

"Since a cellar (less than 4 feet tall) doesn't contibute to density because you can't live in a room with such a low ceiling"

Not sure this is supported by the definitions in the code. A cellar is just below-grade space with a ceiling <4ft above ground. Not a space 4ft tall.

"So if the floor plans (as DCCA alleges in this case) show that the purported "cellar" is actually to be used as living space, then it has to be counted in FAR, because if it's living space, then it's not a true cellar that's entitled to the exemption from the FAR calculation. "

That's not what the code actually says.

They are also trying to conflate "habitable space" (a common-sense term referring to living space) and "habitable room" which is the specific term in the code that is used to define a living/sleeping space for the purpose of defining other kinds of dwelling units (house, apartment, hotel, etc.)

The term "non-habitable room" that they use in the appeal isn't even in the code anywhere. They are trying to conflate the defined term and a common-sense term into a completely different thing.

REPLY LINK REPORT

matt on December 15, 2016 at 4:20pm

Not sure if I quite understood your points. The code clearly defines FAR as the ratio of Gross Floor Area to the lot size. GFA in turn is defined to exclude cellars. Cellars are clearly defined as areas where the ceiling is less than 4 feet. So the definition of "habitable space" or "habitable room" isn't actually even relevant here. What DCCA is trying to say is that you only get an exemption

from FAR if the ceiling is less than 4 feet, and by pure logic, given average human height, almost no one can functionally "inhabit" such a space as a bedroom, kitchen, or whatever, which DCCA alleges the floor plans show for this cellar. But again, the use of the word "inhabit" isn't really relevant. Rather, it's that if an area is identified as being less than 4 feet tall, then given the human condition, something's amiss if that area is also being labeled as a kitchen. So while you're correct that the zoning code itself doesn't say that you can't have a kitchen or bedroom in a room where the ceiling height is less than 4 feet, there's probably some other provision in the building code that specifies that.

REPLY LINK REPORT

MLD on December 15, 2016 at 4:28pm

Straight from the DC code

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

Four feet above the adjacent finished grade, not four feet in total height. The rest of the cellar can be below grade.

"What DCCA is trying to say is that you only get an exemption from FAR if the ceiling is less than 4 feet, and by pure logic, given average human height, almost no one can functionally "inhabit" such a space as a bedroom, kitchen, or whatever, which DCCA alleges the floor plans show for this cellar. "

That's not at all what they are trying to say. They said:

"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, a habitable room that is partially below grade is no longer definable as a “cellar,” given its status as a habitable room."

They are trying to create a new term: "non-habitable room," using twisted logic. They say the term "habitable room" does not include cellars, therefore cellars are by definition "non-habitable rooms" - a term which isn't defined anywhere but they will helpfully provide a definition for. That is backwards. Bathrooms, hallways, and other

spaces that are living spaces are not "habitable rooms" either but are living spaces.

REPLY LINK REPORT

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matt on December 15, 2016 at 5:33pm

Thanks for the clarification about the 4 foot measurement above grade. But if the space is to be a separate living unit, I think it will need its own exterior door, and windows of a certain size and placement, based on the occupancy/building code. So where's the finished grade in relation to these doors and windows? How can the doors and/or windows be of the correct size and placement under the building code but still be less than 4 feet above the finished grade? You'd have to have really small, high windows, and I'm not sure how they'd meet building code.

REPLY LINK REPORT

MLD on December 16, 2016 at 8:37am

Finished grade refers to the grade of the land. It's the same measurement used for determining height for the height act.

REPLY LINK REPORT

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matt on December 16, 2016 at 9:44am

I don't think it's that easy of an answer, and the determination of finished grade may be the crux of the cellar vs. basement issue. In the case of downtown rowhouses, I would guess that the issue probably involves a berm. The scenario is probably that the basement unit is full height, but claimed to be a "cellar" because the adjacent berm is counted as the finished grade, and thus revealing only 4 feet above the level of the berm. But since you need windows and doors to get into the unit, the actual adjacent area (window wells and steps to the door) does in fact reveal more than 4 feet. So there's a trick here - you get to dig out for the windows and doors, but still call the grade the top of the berm. And what's to stop the developer from installing a berm, solely to make the "basement" into a "cellar" and then removing the berm at a later date? And where are you getting that the finished grade under the zoning code is the same as the height act (which uses the sidewalk as the measurement)?

REPLY LINK REPORT

Neil Flanagan on December 19, 2016 at 2:09am

I see what you're saying, but I think you are trying to make it more complicated than it really is. The cellar exception is about the floor-to-area ratio (FAR) and nothing else. It's fundamentally about the perceived height and bulk of the building, which those carve-outs into the street don't affect on a flat street like Q.

The "areaways" and stair "projections" that carve up the grade to make cellars habitable existed long before zoning. The size of those carvings is regulated separately (DCMR 12A). It's part of the classic DC rowhouse, as much as bay windows and porches in public space are. I'm not going to say huge swaths of what makes DC beautiful are illegal.

Sidenote: in "residential" zones, mostly R, RA, and the property in question's RF, height is now measured from the "existing grade," not the curb. And the code makes a clear distinction between "existing grade" and "adjacent finished grade." Plus, in this particular zone, the definition of a "cellar" has a more generous ceiling height, so none of this matters.

I think the DCCA's argument does point to really unclear language in the zoning code that should be fixed. The *term* "habitable room" seems to only apply to a few criteria. The logical response is that cellars aren't governed by those light and ventilation rules, which should be corrected. But not that cellars can't be lived in, which is the DCCA's claim.

In general, the building code takes care of light and ventilation issues much better than zoning. The International Building Code is evidence-based, whereas, the zoning is shot through with guesswork, sprawl-hungry 1950s assumptions, and NIMBY politics.

REPLY LINK REPORT

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jorge on December 15, 2016 at 5:48pm

The logical argument here relies on a dubious analogy. It gets an F for logic. Or maybe a C, truthfully. I think the analogy may point to a logical fallacy in DCCA's argument, but the fallacy is incorrectly identified. And the analogy, by being so absurd, obscures the point.

A better argument might be to say that the function of defining "habitable room" is not to define cellars as non-habitable rooms.

That takes a little more work than to say the argument fallaciously states that a statement implies its inverse (which I think is what this article tried to say). Traditionally in logic, definitions are "if and only if" which means that a definition DOES imply its inverse ("A" is "B" means "not A" is "not B"); in this case that if something is a habitable room, that implies it is not a cellar. [This could also be framed as a situation where they say the converse is true; again, definitions mean that the converse is also true.]

However, definitions in legal codes don't typically work like logical definitions, unfortunately (for clarity's sake). I don't know much about statutory interpretation, but I would say the function of a definition needs to be taken into account.

The biggest vulnerability here may be: what is it called when a habitable, partially underground room has a ceiling less than four feet above the adjacent finished grade? If habitation is not prohibited in cellars (is it?), then the absence of a definition for such a scenario probably suggests that the definition of "habitable room" is not actually intended to define cellars as rooms that are uninhabitable--infuriating as that is from a logical standpoint.

Anyway, I don't know enough to argue either side, I was just annoyed by the analogy and kind of a mean-spiritedness to the argument.

REPLY LINK REPORT

Dcnats on December 19, 2016 at 12:50am

please attend and bring your comments, this was circulated in a DuPont Circle forum. Cellar vs. basement rule has needs clarity, been long abused, and subject to interpretation by BZA. Don't represent them, just concerned citizen about long term implications.

From DC for Reasonable Development

Public Property Advocate, Former ANC Commissioner (2008-2010), 2006 Mayoral Candidate (www.otten06.com), Homeless Services Proponent, DC Zoning Expert

202 810 2768

dc4reality@gmail.com

3) The Zoning Regulation Changes (ZRR)

DC for Reasonable Development has organized and is preparing to sue the city for ignoring fundamental impacts to the built environment with the ZRR. There is a court hearing in mid-January. We will get an update on the case and discuss ways to plug in.

We will have 30 minutes for each topic, so most of the tasks identified will be done as homework over the holidays and as we enter the new year.

The idea is to bring potential goals, tactics and strategies to our various connected groups so they may incorporate into their efforts starting in the new year as well.

Hope you can attend. Tuesday Dec. 20, 6:00PM arrival; 6:30PM meeting start.

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