

**Statement in Support of the Appeal of Susan Lynch
of Zoning Administrator Decisions Underlying the Issuance of Building Permits
No. RW1200113, RW1200111, B1207074, and B1207072**

I. Introduction.

Susan L. Lynch (the “**Appellant**”) hereby appeals the administrative decision of the Zoning Administrator to approve the issuance of Building Permits No. RW1200113 and No. B1207072 for 2338 King Place, NW, Square 1394, Lot 23 (the “**2338 Property**”), and Building Permits No. RW1200111 and No. B1207074 for 2334 King Place, NW, Square 1394, Lot 24 (the “**2334 Property**”). (These two lots are referred to herein collectively as the “**Subject Properties**”). The two “RW” permits were issued on June 29, 2012, for the construction of what is a single elevated platform structure on both of the subject properties (the “**Elevated Platform Structure**”). The “B” building permits were each issued on April 6, 2012, for the construction of a detached one-family dwelling on each of the two Subject Properties. The Subject Properties are located within the R-1-B Zone District. The four building permits being appealed are hereinafter referred to collectively as the “**Subject Building Permits**.”

The 2338 Property is owned by SSB 2338 King LLC, an entity presumably controlled and operated by Sandy Spring Builders (“**SSB**”), the general contractor for the construction of the two houses and the Elevated Platform Structure. The 2334 Property is owned by Ben and Amy Chew, who presumably contracted with SSB for the construction of this new house on the 2334 Property as well as the portion of the Elevated Platform Structure located on the 2334 Property.

Ms. Lynch is the owner and occupant, along with her husband Roger Darling, of the property and improvements located at 2344 King Place, NW, Square 1394, Lot 811 (the “**Appellant’s Property**”). The Appellant’s Property is immediately adjacent to and contiguous with the 2338 Property. The 2334 Property is immediately adjacent to and contiguous with the 2338 Property. The relevant administrative decisions being appealed here, although involving four (4) separate building permits on two (2) separate record lots, principally involve the single Elevated Platform Structure that traverses both of the Subject Properties. The administrative decisions involving the approval of the Elevated Platform Structure must be viewed in concert

with, and *should* have been viewed by the Zoning Administrator in concert with, the approval of the two detached one-family dwellings under the Building Permits No. B1207074 and B1207072.

Appellant is aggrieved. The Zoning Administrator's decision is in violation of various sections of the Zoning Regulations, according to both the clear wording of such Regulations and interpretations given thereto by this Board and by the D.C. Court of Appeals. Issuance of these permits has led to the construction – in progress – of an elevated platform structure which causes significant negative impact to the Appellant and the Appellant's Property, and she is thus aggrieved by these incorrect decisions.

Appeal is timely filed. The "RW" Building Permits were issued on June 29, 2012. The Appellant learned of the Zoning Administrator's decisions on Friday, July 6, 2012, when Appellant's counsel met with Zoning Division staff to view the permit plans. The Appellant (despite its attempts) was not permitted access to these plans or the decisions underlying those plans until July 6, 2012. Therefore, the deadline for filing this appeal is Tuesday, September 4, 2012. The "B" building permits were issued on April 6, 2012, but must be considered in conjunction with the later-issued "RW" permits, as the critical aspects involving rear yard, side yard, lot occupancy, and the 50% yard limit, were not finally decided until issuance of the "RW" permits on June 29, and were not known to the Appellant until July 6, 2012.¹ This appeal is being filed on August 28, 2012, sixty (60) days after issuance of the RW permits, and fifty-three (53) days after the Appellant knew or should have known of the Zoning Administrator's decision, both within the sixty (60) – day filing deadline under 11 DCMR 3112.2.

II. Elevated Platform Structure; Not a Retaining Wall.

The Zoning Administrator has apparently determined (based on the type of permit application submitted and the type of permit approved) that the Elevated Platform Structure is

¹ The Board has ruled previously that "piecemeal" building permits must be considered as a whole when the full extent of construction cannot be discerned without considering all of the permits. (Appeal No. 16405 of Mildred Rodgers Crary, pages 5-6 (1999), *aff'd*, Sisson v. D.C Board of Zoning Adjustment, 805 A.2d 964 (D.C. 2002).

now a retaining wall, despite an earlier determination to the contrary. This is the first instance of Zoning Administrator error.

In notices to revoke two previous building permits for the Subject Properties, issued on April 2, 2012, DCRA Chief Building Official Mr. Sabbakhan declared:

“After additional review, the Zoning Administrator has determined that the retaining wall identified on the plans as Wall 2 is not a mere retaining wall. Wall 2 is proposed to be engineered with geogrid sheets and back filled with compacted fill dirt to create an elevated and flat backyard. Accordingly, is (sic) not a retaining wall, but is instead a wall that supports an artificially elevated platform structure that is proposed to be built in the rear yard of the Property. In Appeal No. 17285 of Patrick J. Carome (March 24, 2006), the Board of Zoning Adjustment determined that walls that serve to support an artificially-elevated surface are not retaining walls, but are part of a “platform structure,” which is subject to regulation under the Zoning Regulations.”²

So as of April 2, 2012, the Zoning Administrator had determined (correctly) that the structure at issue in this appeal was an elevated platform structure, and not a retaining wall, because it was engineered with geogrid sheets, was back-filled with compacted fill dirt to create an elevated and flat backyard, and because it served to support an artificially-elevated surface.

The permit applicant then apparently lowered the wall somewhat, changed nothing of the critical aspects noted above, and submitted “retaining wall” permit applications. This time, the Zoning Administrator approved as a “retaining wall” what he had previously found so clearly to be an elevated platform structure. This re-determination was made despite the fact that the subject structure is still engineered with geogrid; is still back-filled with compacted dirt to create an elevated and flat backyard; and is still built to support an artificially-elevated surface. By any reasonable reading of BZA Order No. 17285, the *Economides* decision, and the previous notice to revoke, this is an elevated platform structure; it is not a retaining wall.

Therefore, the entire Elevated Platform Structure – including the block wall *and* the elevated yard - is a structure “subject to regulation under the Zoning Regulations”; i.e., it is not

² The Board’s definition of an elevated platform structure was affirmed by the D.C. Court of Appeals in *Economides v. BZA* (954 A.2d 427) (2008).

exempt from side yard, rear yard, or lot occupancy restrictions as a “retaining wall or fence” under § 2503.2.

III. Other Instances of Zoning Administrator Error.

A. Form of Application and Approval of an Elevated Platform Structure. Since, per the discussion above, the subject structure is an elevated platform structure, and not a retaining wall, it was error for the Zoning Administrator to accept and approve building permit applications for a “retaining wall.” The Zoning Administrator should have instead required a full permit application, and undertaken a full review of the proposed “elevated platform structure.” As a consequence, there was apparently no consideration of this structure in conjunction with the previously approved one-family dwelling on each property. This error led in part to the other specific errors detailed below.³

B. Exemptions pursuant to 11 DCMR §§ 2502.2 and 2502.3 Are Not Available.

Because the subject structure is not a retaining wall, a retaining wall and fence exemption does not apply. Therefore, no portion of the Elevated Platform Structure is exempt under § 2503.3 from side yard, rear yard, or lot occupancy requirements.

The exemption pursuant to § 2503.2 also does not apply. Section 2503.2 provides that structures “no part of which are more than four feet (4 ft.) above the grade at any point” may occupy required yards. Since a part - a large part - of the Elevated Platform Structure is “more than four feet (4 ft.) above the grade,” *no part* of the Elevated Platform Structure is exempt (under § 2503.2) from side yard, rear yard, or lot occupancy requirements.

C. Side Yard Setback (11 DCMR § 405). According to the permit plans, the Elevated Platform Structure is located within the eight-foot (8 ft.) area which is required to be “open to the sky from the ground up” pursuant to the side yard setback requirement under 11 DCMR § 405 and 11 DCMR § 199 (the definition of “Yard” and “Yard, side”). Since this is not a retaining wall, the Elevated Platform Structure is not exempt from this requirement under § 2503.3. It is

³ For example, where an application for a structure typically would be required to indicate compliance with the side yard setback requirements, these two “retaining wall” applications make no mention of side yard compliance or the fact that there is a structure higher than four feet high in every one of the four required side yard setback areas.

also not exempt under § 2503.2 because parts of the structure are greater than four feet (4 ft.) above grade. In any event, the Elevated Platform Structure is more than four feet above grade within portions of all four required side yards.

D. Rear Yard Setback (11 DCMR § 404). The Elevated Platform Structure is proposed to be located within the twenty-five foot (25 ft.) area which is required to be “open to the sky from the ground up” pursuant to the rear yard setback requirement under 11 DCMR § 404 and 11 DCMR § 199 (the definition of “Yard” and “Yard, rear”). For the same reasons noted above, the Elevated Platform Structure is not exempt from this requirement under § 2503.3 or § 2503.2.⁴

E. Maximum Permitted Lot Occupancy (11 DCMR § 403). Pursuant to 11 DCMR § 403.2, the entire area of the Elevated Platform Structure must be included in the maximum permitted lot occupancy calculation. While the term “building area” in § 199.1 mentions only “buildings” and not “structures,” the more specific provision in § 403.2 includes *all* structures - therefore including also elevated platform structures - in the lot occupancy calculation. When considering the entire area of the Elevated Platform Structure -- even considering *only* those portions more than four feet above grade -- lot occupancy for both properties exceeds the maximum permitted forty percent (40%). For the same reasons noted above, the Elevated Platform Structure is not exempt from this requirement under § 2503.3 or § 2503.2.

F. Fifty Percent (50%) Limit (11 DCMR § 199.1 – definition of “Yard”).

The Elevated Platform Structure occupies greater than fifty percent (50%) of the required rear yard, in violation of the requirement under the definition of “Yard” that no building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title. This requirement applies to all structures, whether they have portions higher than four feet or not.

⁴ Notwithstanding two previous - distinguishable - BZA decisions on the measurement of rear yards, the definition of Rear Yard in § 199.1 provides that a rear yard is the yard between Point A (a rear line of a building *or other structure* - in this case, the Elevated Platform Structure) and Point B (the rear lot line). In this case, the distance between *the other structure* - the Elevated Platform Structure - and the rear lot line is only ten feet (10 ft.), or fifteen feet (15 ft.) short of the required minimum 25-foot rear yard. Even *if* the rear yard was measured from the house out (as the permit applicant represents in the permit plans), a large portion of the Elevated Platform Structure is still illegally located within this alternative rear yard.

IV. Proof.

The Appellant will prove these alleged violations before the BZA by presenting the permit plans and other documents underlying the Subject Building Permits and applying the applicable Zoning Regulations and BZA precedent to these plans. The Appellant will also provide expert architectural or engineering witness testimony, if necessary.

On behalf of Appellant Susan Lynch,

A handwritten signature in cursive script, reading "Martin P. Sullivan", is written over a horizontal line.

Martin P. Sullivan
Sullivan & Barros, LLP