GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17285 of Patrick J. Carome, pursuant to11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs. Appellant alleges that the Zoning Administrator erred by issuing a Building Permit (No. B460927, dated April 23, 2004) allowing the construction of a masonry retaining wall serving a single-family dwelling. Appellant contends that the retaining wall violates the Zoning Regulations, including the side yard requirements (§ 405), rear yard requirements (§ 404), and structures in open space requirements (§ 2503). The subject premise is located within the Wesley Heights Overlay/R-1-A District and is located at 4825 Dexter Terrace, N.W. (Square 1381, Lot 806).

HEARING DATES: March 1, 2005, March 15, 2005, April 5, 2005, May 10, 2005, and May 24, 2005

DECISION DATE: July 5, 2005

ORDER

PRELIMINARY MATTERS

On December 13, 2004, Appellant Patrick J. Carome ("Appellant") filed an appeal of the decision of the Department of Consumer and Regulatory Affairs ("DCRA" or "Appellee") to issue building permit No. B460927 ("permit") to property owners Frank and Constandina Economides ("property owners") to construct a "retaining wall" on the property that is the subject of this appeal ("subject property"). The permit, issued on April 23, 2004,[1] permitted the property owners to "Construct new retaining wall around rear yard as per plans. Entirely on owner's land." Exhibit No. 21C, Attachment No. 52. The Appellant claims that the retaining wall constructed as a result of the permit is much more than a retaining wall, and, when taken together with all its parts, is actually an impermissible platform structure occupying the rear and side yard of the subject property.

The Board heard the appeal at a hearing held on March 1, 2005, and continued on March 15, 2005, April 5, 2005, May 10, 2005, and May 24, 2005. The Appellant and DCRA participated in the hearing, as well as Advisory Neighborhood Commission ("ANC") 3D, the property owners, and the National Park Service, all three of whom participated as intervenors.

At its July 5, 2005 public meeting, by a vote of 4-1-0, the Board upheld the appeal.

[1]On September 5, 2002, the property owners had been issued an earlier permit by DCRA permitting them to "Fill rear yard and regrade rear yard." Exhibit No. 31, Attachment B. This permit, although relevant to the facts of this appeal, is not the subject of the appeal.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 4825 Dexter Terrace, N.W. ("subject property") in an R-1-A zoning district and within the Wesley Heights Overlay District.
2. The subject property is a 25,811-square-foot lot and is improved with a large, single-family dwelling, which the property owners were having constructed at the time of the hearing. Exhibit No. 21B, Attachment No. 26.
3. The subject dwelling is required to have an 8-foot side yard and a 25-foot rear yard open to the sky from the ground up, with no intervening buildings or structures, other than those specifically permitted by the Zoning Regulations. *See,* 11 DCMR §§ 405.9 and 404.1 and § 199.1, definition of "Yard."
4. The rear boundary of the subject property abuts Wesley Heights Park, which is owned and maintained by the United States National Park Service. a
5. The rear yard of the dwelling on the subject property in its natural state sloped steeply downward away from the dwelling.
6. In order to create a more useable rear yard, the property owners applied for, and were issued, on September 5, 2002, a permit to regrade and fill the rear yard. Permit No. B 422839, Exhibit No. 21C, Attachment No. 57.
7. At some point in 2003, the property owners decided to extend the fill and grading to the rear property line. Because of the steep slope at the boundary of the rear yard, and the large amount of fill dirt required to build up the slope to a level surface, a perimeter retaining wall was needed.
8. The property owners filed an application for a permit to allow construction of a retaining wall around the rear yard. The permit application documents included plans and information detailing that the wall would be of mesa block construction and up to 30 feet in height. The application documents did not indicate that fill dirt and layers of geofabric would be trucked in and compacted against the mesa blocks. Exhibit No. 21C, Attachment No. 51.
9. On April 23, 2004, DCRA issued permit No. B460927 to the property owners. The permit stated that the owners were permitted to "Construct new retaining wall around rear yard as per plans. Entirely on owner's land." Exhibit No. 21C, Attachment No. 52.
10. Construction of the mesa block wall began in June of 2004 and was completed in late October, 2004.
11. Construction of the retaining wall was monitored daily by Specialized Engineering, an engineering firm hired by the property owners. Specialized Engineering observed and inspected the construction and performed materials testing.
12. In a letter dated December 15, 2004, Specialized Engineering provided a final verification letter to the property owners stating that fill placement and compaction, foundation design bearing capacity, and geogrid lengths were "in substantial compliance with the plans and specifications." Exhibit No. 31, Attachment J. These plans and specifications had previously been approved by DCRA.
13. At DCRA's request, the property owners also had a D.C. registered professional engineer sign and seal a structural certification form certifying that the retaining wall was constructed in compliance with the BOCA Basic National Building Code, 1990,

as amended by the D.C. Construction Codes Supplement of 1992. Exhibit No. 31, Attachments K and L.

Characteristics of the Retaining Wall

14. The retaining wall was constructed in four sections surrounding the rear yard. The four sections total approximately 370 feet in length and the longest individual section is approximately 180 feet long. Exhibit No. 21C, Attachment 51 (depiction of site).
15. The retaining wall supports an artificially-elevated flat surface which is approximately 14,975 square feet in area. Exhibit No. 21D, March 15, 2005 Transcript at 205.
16. The retaining wall is constructed of mesa blocks and ranges in height from less than one foot to approximately 30 feet. Exhibit No. 21C, Attachment No. 51.
17. The mesa block wall was constructed at the bottom of the downward slope of the subject property's rear yard before the fill dirt was placed against it; therefore for some period of time at least a portion of the mesa block wall was essentially a freestanding wall, standing with no earth against it.
18. Approximately 6,000 cubic yards of fill dirt were brought to the subject property and compacted against the mesa block wall. Exhibit No. 21B, Attachment No. 24, March 15, 2005 Transcript at 198-199, May 10, 2005 Transcript at 311-312, and 436.
19. Mesa block construction of this size requires that sheets of synthetic geogrid fabric be layered horizontally within the fill dirt compacted against the wall.
20. The fill dirt which the retaining wall is withholding contains approximately 20 geogrid sheets layered within it, varying in size from 10.5 to 27 feet long. Exhibit No. 21B, Attachment No. 23 (two pages entitled, "Retaining Wall Elevation").
21. The mesa blocks which comprise the wall itself are made of Portland Cement and are placed on top of each other, with the outer blocks of each course set back slightly from the façade, creating a tapered, or angled, wall and a minimally stepped appearance.
22. Once the retaining wall and the compacted fill dirt were in place, the rear yard of the subject property became an artificially elevated surface, with no slope, extending back from the rear of the dwelling to the top of the mesa block wall.
23. The new grade of the artificially elevated surface is anywhere from less than one foot to approximately 30 feet above the original grade, creating, at its highest point, a drop of approximately 30 feet to the grades of adjacent properties.

Impacts of the Retaining Wall

24. "Retaining Wall" is not defined in the Zoning Regulations, but is defined by Webster's Third New International Dictionary (1986) as follows: "a wall built to resist lateral pressure other than wind pressure; esp.: one to prevent an earth slide." *See,* 11 DCMR § 199.2(g).
25. Structure is defined by the Zoning Regulations, as "anything constructed, ... the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground." 11 DCMR § 199.1, definition of "Structure".
26. Both a "retaining wall" and a "platform" are specifically listed as examples of structures by the Zoning Regulations. 11 DCMR § 199.1, definition of "Structure".
27. Although no structure above 4 feet from the grade is permitted to occupy a yard, the Zoning Regulations carve out an exception to this prohibition in that a retaining wall,

with no specified height limit, may occupy a yard if it is constructed in accordance with the D.C. Building Code. 11 DCMR §§ 2503.2 and 2503.3.

28. The Board finds that the retaining wall in the rear yard of the subject property is more than just the four vertical mesa block facades surrounding that yard. The walls support an artificially elevated surface which together comprise a structure much greater than merely a "retaining wall."
29. The structure thus created in the rear yard includes all of its components -- the mesa block wall, the geogrids which are placed against it, and the "retained" fill dirt.
30. The purpose of the elevated platform structure in the rear yard is not to "resist lateral pressure," but rather to provide an artificially created surface for leisure activities. The structure in the rear yard occupies approximately 14,975 square feet of the 25,811-square foot lot, or more than the 30% of the lot permitted to be occupied in the Wesley Heights Overlay. *See,* 11 DCMR § 1543.2.
31. The majority of the structure is over 4 feet above grade and it occupies almost 100% of the rear yard, and more than the 50% of the yard permitted to be occupied by the Zoning Regulations. 11 DCMR § 199.1, definition of "Yard" and 11 DCMR § 2503.2.
32. A portion of the mesa block wall and the elevated platform structure, at least part of which appears to be more than four feet above grade, extends into the northern side yard of the subject dwelling. *See,* 11 DCMR § 2503.2.
33. The elevated platform structure looms over adjacent properties, negatively affecting the air and light available to them. *See,* 11 DCMR § 1541.3(c).

CONCLUSIONS OF LAW

The Appeal was Timely

The intervening property owners moved to dismiss the appeal as untimely. The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. D. C. Board of Zoning Adjustment,* 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11DCMR § 3112.2(a). This 60-day time limit may be extended only if the appellant shows that: (1) there are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal. 11DCMR § 3112.2(d).

The "decision" at issue in this case[2] is the permit for the retaining wall, which was issued on April 23, 2004. This appeal was filed on December 13, 2004, approximately eight months later.

[2]There was much discussion of when the elevated platform structure was "under roof" because § 31112.2 (b)(1) states that "[n]o appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof." It was never made clear to the Board's satisfaction whether or not this appeal was filed within this 10-day period. The Board, however, concludes that the elevated platform structure did not have a "roof" as that term is meant in § 3112.2(b)(1). Structures do not necessarily have to have roofs, but a structure that does

Because of the length of the 8-month delay before the appeal was filed, the Board reviewed much evidence, both written and oral, to determine the issue of timeliness.

The Appellant contends that he did not know, and reasonably could not have known, of the decision complained of until, at the earliest, shortly after October 13, 2004, the date on which his wife visited the DCRA office and learned of the permit for the retaining wall. He further claims, that his wife did not inform him of her trip to DCRA until some time later. October 13, 2004 is precisely 60 days before the appeal was filed on December 13, 2004. The Appellant claims that he could not actually see the mesa block wall until sometime in later October or November, 2004, due to the thick foliage on the trees in Wesley Heights Park, which stand between his property and the subject property.

The intevenor property owners counter that since sometime in 2002, the community has been aware of, and even monitoring, construction activity on the subject property, and that, therefore, the Appellant reasonably should have known of the construction of the retaining wall, and that a permit had been issued to allow it. The old dwelling on the subject property was apparently razed sometime in late 2002, and between then and the filing of this appeal, various construction activities were taking place on the subject property.

While the permit for the retaining wall was issued in April, 2004, it is not reasonable to conclude that appellant had or should have had knowledge of this decision prior to the beginning of construction., Intervenor property owner's general claim that "the community" was aware of construction activity on the property since 2002, cannot suffice to impute knowledge of the specific decision regarding the retaining wall permit to appellant, particularly, without evidence demonstrating that the information was in the public domain where appellant should have learned of it. Construction began in June 2004 and continued throughout the summer and early autumn, ending in late October. This is precisely the time of year when sights and sounds are most obscured by foliage and there is a thick growth of trees in Wesley Heights Park, impeding the Appellant's view of the subject property's rear yard. Construction of the mesa block wall and the associated platform structure was not visible from the street; therefore, no matter how much construction activity was occurring with regard to the dwelling, the Board finds it reasonable that the Appellant was unaware of the construction in the rear yard until mid- to late October, 2004.

Based on the above, the Board concludes that the December 13, 2004, filing of the appeal was within 60 days of when the Appellant knew or reasonably should have known, of the existence of the permit for the retaining wall and was, therefore, timely. Accordingly, the Board denies the motion to dismiss the appeal for untimeliness.

The Appellant is Aggrieved

Intervenor property owners also moved to dismiss for lack of standing. The Zoning Regulations, at § 3112.2, state that "[a]ny person aggrieved by an order, requirement, decision, determination,

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have a roof is a building, according to § 199.1 of the Zoning Regulations. *See,* § 199.1, definitions of "Structure" and "Building." There was no claim that the elevated platform structure is a building and the Board concludes that § 3112.2(b)(1) is inapplicable here.

or refusal made by an administrative officer or body, ... in the administration or enforcement of the Zoning Regulations, may file a timely appeal with the Board." *See,* D.C. Official Code § 6-641.07(f) (2001). This language parrots similar language in the 1938 Zoning Act, 52 Stat. 799, and establishes a standard somewhat more lenient than that of traditional "standing" in a court cases.

The Appellant claims aggrievement in that the retaining wall and elevated platform structure constructed on the subject property negatively impact the air and light to nearby properties and specifically, have negatively impacted his view, and diminished his use and enjoyment of Wesley Heights Park. The Board concludes that these claims are sufficient to establish the necessary aggrievement of the Appellant and therefore denies the motion to dismiss for lack of standing.

Merits of the Appeal

The Appellant contends that the "retaining wall" in the subject property's rear yard is much more than a traditional retaining wall. He contends that, taken together with all its components, it is actually an artificially elevated platform structure occupying the rear and side yards of the subject property in violation of several Zoning Regulations.[3]

First, the Appellant contends that the structure runs afoul of the requirement that no structure may occupy more than 50% of a yard. *See,* 11 DCMR § 199.1, definition of "Yard." Second, he contends that the structure, at more than four feet above grade, is not permitted in the rear yard, (whether or not occupying less than 50% of the yard) and, correlatively, that the structure does not fall within the exception to the over four-foot prohibition carved out for retaining walls, because it is not a "retaining wall." *See,* 11 DCMR §§ 2503.2 and 2503.3. Third, Appellant alleges that the structure in the rear yard occupies more than 30% of the total square footage of the lot, in violation of § 1543.2, which sets a maximum of 30% lot occupancy for any structure in the Wesley Heights Overlay. Fourth, Appellant argues that the dimensions and impact of the structure are antithetical to the purposes of the Wesley Height Overlay. *See,* 11 DCMR § 1541.3(c).[4]

DCRA's Zoning Administrator ("ZA") appears to have focused his analysis on the mesa block perimeter wall, but counters that all three components – the mesa block wall, the geogrid sheets, and the fill dirt – still equal only a retaining wall, and nothing more than a retaining wall. In issuing the permit for the retaining wall, he relied on 11 DCMR § 2503.3, which states that a

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[3]Appellant also alleges that the mesa block wall and/or associated platform structure encroach on federal parkland, have caused environmental damage, and contain unsuitable fill dirt. None of these allegations involve violations of the Zoning Regulations, and they therefore fall outside of the jurisdiction of this Board.

[4]The Appellant also repeatedly contended that the mesa block wall, even if considered only a "retaining wall" and not a greater structure, was not constructed according to the D.C. Building Code, *See,*11 DCMR § 2503.3, and therefore violates the Zoning Regulations. Section 2503.3, however, only applies to fences and retaining walls. Because the Board herein concludes that the elevated platform structure is not a retaining wall, § 2503.3 does not apply, and therefore allegations of Building Code violations do not come into play.

"retaining wall constructed in accordance with the D.C. Building Code may occupy any yard required under the provisions of this title." Section 2503.3 is, in fact, an exception to § 2503.2, which prohibits structures more than four feet above grade to occupy any required yards. Section 2503.3 puts no height limit on the retaining walls it permits in such yards. Further, the ZA stated that the retaining wall has a 0% lot occupancy (*See,* April 5, 2005 Transcript at 146-147) because it is not a building and lot occupancy calculations apply only to "building area." *See,* 11 DCMR § 199.1, definitions of "Percentage of Lot Occupancy" and "Building Area."

The Board concludes that the amalgam of the mesa block wall, the geogrid sheets, and the compacted fill dirt creates a structure which is more than a mere "retaining wall." *See,* May 10, 2005 Transcript at 365, 457-459, 461, and 510-511. It creates an artificially elevated platform structure. This platform structure is up to 30 feet high, and occupies more than 50% of the subject property's rear yard,[5] and part of its northern side yard, in violation of § 2503.2 and the definition of "Yard" in § 199.1 of the Zoning Regulations. The artificially-elevated platform does not "resist lateral pressure" and the mesa block wall itself was not built in order to resist such pressure and prevent an earth slide. Instead, the wall was built and such lateral pressure was supplied afterward by voluntarily compacting a voluminous amount of fill dirt against it. The 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.

The platform structure is more than just the mesa block perimeter walls, and it does not fit within the exception for retaining walls carved out by § 2503.3 and relied on by the Z.A. Section 2503.3, then numbered § 7602.22, was enacted in 1977 with the publication of Zoning Commission Order No. 148, dated February 2, 1977. Exhibit No. 47. The Order contains no definition of "retaining wall," nor any discussion to illuminate the Commission's intent when permitting retaining walls as an exception to the prohibition of structures higher than four feet in required yards. In commenting on the final language of § 2503.3, however, both the Municipal Planning Office and the National Capital Planning Commission ("NCPC") stated that "the thrust of the changes [*i.e.,* § 2503.3 and related changes] is to allow *low* structures, fences, and stairs in yards as a matter-of-right with a restriction on occupancy to insure that at least 50 percent of a yard is left open." (Emphasis added.) *See,* Exhibit No. 47, November 17, 1976 Letter from Municipal Planning Office and January 13, 1977 NCPC Executive Director's Recommendation.

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[5]The parties to the appeal spent much time debating the correct method of measuring the *required* "rear yard." Three methods were proffered. All three methods extended the full width of the property, from side lot line to side lot line. The difference arose in where the length measurement was begun. The Z.A. asserted that his measurement of a "rear yard" began at the rear most portion of the structure on a property and extended the required number of feet toward the rear lot line (here, that would be 25 feet) and ended at a line parallel to the rear lot line. The Appellant argues that the length measurement of the rear yard must begin at the rear lot line and extend the required 25 feet toward the rear of the structure, ending at a line parallel to the rear lot line. The third measurement method discussed would include all land area between the rear of the structure and the rear lot line. The Board need not determine which of these methods is correct, as, no matter which method is chosen, portions of the elevated platform structure higher than four feet above grade occupy more than the permissible 50% of the subject property's rear yard. Under all three methods, the platform structure occupies mote than 94% of the rear yard. Exhibit No. 87, Attachment C-6. Under the first method outlined above, approximately 63.5 % of the rear yard is occupied by portions of the platform structure more than six feet high. Exhibit No. 87, Attachment C-7. Under the second method, approximately 94.6% of the required rear yard is so occupied, and under the third method, approximately 82.1% is so occupied. Exhibit No. 87, Attachment C-7.

The Board concludes, however, that the platform structure certainly is not "low" and is patently more than a retaining wall, and that the exception for retaining walls stated in § 2503.3 was not intended to include a structure of this magnitude. The elevated platform structure is more than four feet above grade and is not merely a "retaining wall," therefore it is not permitted within a rear or side yard, and DCRA erred in issuing Permit No. B460927 allowing its construction.

The subject property is within the Wesley Heights Overlay, which the Zoning Commission established to "preserve and enhance the low density character of Wesley Heights," including its natural, open, and treed nature. *See,* Zoning Commission Order No. 718, July 13, 1992, establishing and mapping the Wesley Heights Overlay. One way the Commission chose to do this was to prohibit any *structure* within the Overlay from occupying in excess of 30% of its lot (with certain exceptions not relevant here.) 11 DCMR § 1543.2.

Section 1543.2 sets forth the most restrictive lot occupancy requirement in the whole of the Zoning Regulations. First, its 30% maximum is lower than that permitted in any other zone district. Second, unlike lot occupancy maxima in other zone districts, § 1543.2 applies to all "structures" not only to all "buildings." In all other zone districts, the lot occupancy is calculated based on the "building area" and therefore lot occupancy includes only the area taken up by a building and any accessory buildings. *See,* 11 DCMR § 199.1, Definition of "Percentage of Lot Occupancy" and "Building Area." Section 1543.2 makes the Wesley Heights Overlay's lot occupancy maximum more restrictive by including within lot occupancy not only the area taken up by a building and any accessory buildings, but also by any other structures on the lot. The Overlay's more restrictive lot occupancy provision governs in this case. *See,* 11 DCMR § 1542.3.[6]

Because the Board has already concluded that the elevated platform is a structure greater than a retaining wall, it must be included in the lot occupancy calculation for the subject property. The property has a lot area of approximately 25,811 square feet, therefore any structure occupying over 7,743.3 square feet would violate § 1543.2 by occupying more than the permitted 30% of the lot. The elevated platform structure is approximately 14,975 square feet in area, well over the permitted 30% of the total lot area of 25,811 square feet.

For the reasons stated above, the Board concludes that the Appellant has met his burden of proof, demonstrating that DCRA erred in issuing Building Permit No. B460927 allowing the property owners to construct a structure in the rear yard and side yards of the subject property, which, at more than four feet above grade, occupies more than 50% of the rear yard in violation of 11 DCMR §2503.2, occupies more than 30% of the total square footage of the lot in violation of 11 DCMR §1543.2, and is antithetical to the purposes and goals of the Wesley Heights Overlay set forth at 11 DCMR §1541. Therefore, it is hereby **ORDERED** that this appeal is **GRANTED.**

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[6]Section 1542.3 states that if there is a conflict between the Overlay and the underlying zoning, the Overlay provisions govern. It is not completely clear that there is a conflict here, however. Although the definitions of "Percentage of Lot Occupancy" and "Building Area" indicate a conflict in that they consider only the area of "buildings" when calculating lot occupancy, § 403.2, the lot occupancy provision for the underlying R-1-A zone district, uses the word "structure," and not "building." It states that "[n]o structure ... shall occupy its lot in excess of the percentage of lot occupancy set forth in the following table." This wording appears to comport with the language of the lot occupancy provision of the Wesley Heights Overlay -- § 1543.2.

VOTE: **4-1-0** (Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Kevin Hildebrand to grant; Geoffrey H. Griffis to deny)

Each concurring member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 24 2006

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 17285

As Director of the Office of Zoning, I hereby certify and attest that on MAR 24 2006, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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