BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Susan L. Lynch from the Administrative Decision of the Zoning Administrator, DCRA, to issue Building Permit Nos. RW1200111, RW1200113, B1207072 and B1207074 approving the construction of two one-family detached dwellings and retaining walls in the R-1-B District at premises 2334 King Place, N.W. (Square 1394, Lot 24) and 2338 King Place, N.W. (Square 1394, Lot 23)	**BZA Appeal No. 18469** **Hearing Date: October 16, 2012** **ANC 3D**

PROPERTY OWNERS' OPPOSITION TO APPEAL

I.
INTRODUCTION

SSB 2338 King LLC ("SSB"), the owner of Lot 23 in Square 1394, and agent for Benjamin and Amy Chew, the owner of Lot 24 in Square 1394, hereby opposes Appeal No. 18469 as without merit. The Zoning Administrator did not commit error in determining that: (i) separate retaining wall permits should be issued for the "elevated platform structure;" (ii) portions of the platform/wall less than four feet in height may be located in the required rear and side yards, even though other portions of the platform/wall are higher the four feet in the *non*-required yards; (iii) the platform/wall does not count toward lot occupancy; and (iv) the platform/wall does not occupy more than 50 percent of the required rear yard. Consequently, the appeal should be denied.

II.
FACTS

On February 7, 2012, the District's Department of Consumer and Regulatory Affairs ("DCRA") issued permits to SSB and the Chews for permits to construct a new

house and retaining wall on each of their adjoining lots located at 2334 and 2338 King Place, N.W., Washington, D.C. (Square 1394, Lots 24 and 23, respectively). The property is located in the R-1-B District just off of MacArthur Boulevard in the Palisades neighborhood of the city. Both lots are rectangular in shape and slope downward at the rear of the property. In order to create a useable back yard, the proposal called for raising the level of the yard by placing retaining walls at the side lot lines and approximately 10 feet from the rear lot line, and filling the area with compacted dirt. Sheets of geogrid fabric were to be layered in the fill dirt and anchored to the wall to help stabilize the wall and keep the soil from shifting.

Construction authorized under the permits began shortly after permit issuance. Ms. Lynch immediately raised concerns with SSB and the Zoning Administrator regarding compliance of the construction with the Zoning Regulations. In response to Ms. Lynch's threats to appeal the building permits to the Board of Zoning Adjustment ("Board" or "BZA"), SSB met with the Zoning Administrator to determine if the permits had any vulnerabilities.

After a thorough review of the issued permits, the Zoning Administrator determined that the proposed retaining walls for the houses did not comport with the Board's decision in BZA Appeal No. 17285 of Patrick J. Carome, March 24, 2006, *aff'd Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A. 2d 427, 434-35 (D.C. 2008)(the underlying BZA decision is referred to as "Economides"). A copy of the decision in the *Economides* BZA appeal is attached as Exhibit G. Under *Economides*, a retaining wall constitutes an "elevated platform structure" when three elements are present: (i) sheets of geogrid fabric, layered in (ii) compacted fill dirt, and anchored to

(iii) a retaining wall. See *Economides* BZA Appeal at 4 (Finding of Fact No. 29). The Zoning Administrator determined that the retaining walls at the King Place properties were "elevated platform structures," and unlike retaining walls, such elevated structures may not be located in required side or rear yards. See 11 DCMR § 2503.3. He noted that the elevated platform structures exceeded the maximum height for structures in required yards and encroached into the required rear yard. Accordingly, on April 2, 2012, DCRA issued a Notice to Revoke Building Permit B1110274 (2334 King Place) and a separate Notice to Revoke Permit B1200230 (2338 King Place) to preclude continued construction on the retaining walls.

The permits proposed for revocation, however, authorized both the platform structure/walls and the new houses. In order to ensure that construction on the houses could continue, SSB amended both permits to eliminate the "retaining walls" from the authorized scope of work. The revised house permits were issued on April 6, 2012. A complete listing of all the permits issued for both properties is attached as Exhibit F.

SSB then began modifications to the design of the elevated platform structures to ensure they would comply with the Board's decision in the *Economides* BZA decision. The elevated platform structure (as defined by the Zoning Administrator's Office applying the *Economides* interpretation) height was reduced along the required side yards and required rear yard area to a range of 0.0 feet to 4.0 feet. The revised design included sheets of geogrid fabric, which extended approximately 6.0 feet into the outer side yards of each house. The rear wall, which is set in from the rear property line by approximately 10 feet, had geogrid sheets that extended approximately 2.0 feet into the rear yard. Compacted dirt filled in the area to the top of the wall. On top of the wall portion of the

elevated platform structure is a 0.5 foot curb that does not retain earth but instead serves as a safety/drainage feature. The revised grading/site plan was part of an April 23, 2012, letter submitted to the Zoning Administrator by CAS Engineering on behalf of SSB. A copy of that letter, with attachments, is included herewith as Exhibit D. Satisfied that SSB had resolved the *Economides* issues, the Zoning Administrator indicated that he could approve permits for the elevated platform structure. SSB filed revised permits on May 18, 2012, the zoning review branch approved the permit on May 30, 2012, and DCRA issued permits RW1200111 and RW1200113 on June 29, 2012, authorizing construction of the elevated platform structure. This appeal followed on August 27, 2012.

III.
ARGUMENT

A. The "Elevated Platform Structure" Work Was Appropriately Authorized Under Retaining Wall Permits.

The Appellant claims that the Zoning Administrator erred in issuing zoning approval for the revised elevated platform structures because the work was presented to him in the form of a retailing wall application instead of a building permit application. This argument fails for several reasons. First, the Building Code Official, through the Permit Review Branch, determines the type of permit required for proposed work, not the Zoning Administrator. *See* 12A DCMR §§ 104.1 and 104.2. Here, the Permit Review Branch determined that the proposed work could appropriately be reviewed through a retaining wall permit application and referred it to the Zoning Review Branch to assess its compliance with the Zoning Regulations. Second, there is no indication that the Zoning Administrator reviewed the proposed work simply as a retaining wall. In fact, there is

overwhelming evidence to the contrary, most notably the Notices of Proposed Revocation of the initial house permits, that the Zoning Administrator was now analyzing the proposed work through the lens of the *Economides* decision as an "elevated platform structure." Even if the proposed work should have been prepared under a building permit application, the Appellant's complaint is with the Department of Consumer and Regulatory Affairs, not the Board of Zoning Adjustment. It is a distinction without a difference, however, since the Zoning Administrator reviewed the application in the context of an "elevated platform structure." The drawings clearly show the location of the retaining wall, the area of fill dirt and the extent of the geogrid fabric, which are the three elements that make up an "elevated platform structure." *Economides* BZA decision, at 7. In short, the Appellant has simply put form over substance and consequently her argument fails.

B. Portions of Structures Less Than Four Feet in Height May Occupy Required Yards.

Appellant similarly resorts to semantics in her claim that once part of a structure exceeds four feet in height, none of the structure may occupy a required yard, *even if the portion of the structure in the required yard has a height of zero feet.* Appellant misreads section 2503.2 as support for her argument. That section provides that

> [a] structure, not including a building no part of which is more than four feet (4 ft.) above the grade at any point, may occupy any yard required under the provisions of this title. Any railing required by the D.C. Construction Code, Title 12 DCMR, shall not be calculated in the measurement of this height.

11 DCMR § 2503.2.

Both the Zoning Administrator and the Board have historically interpreted this section to prohibit only the *portions* of structures more than four feet above grade to

occupy any required yards. In the *Economides* BZA Appeal, the Board found that only the portion of the Economides' mesa block wall and elevated platform structure that was more than four feet above grade extended impermissibly into the northern side yard. *Economides* BZA decision, at 4 (Finding of Fact No. 32); see also page 7. In that BZA decision, the Board discussed the reason for allowing some structures in required rear yards, and cited a National Capital Planning Commission report noting that the purpose of section 2503.3 and related subsections is to allow *low* structures, fences, and stairs in required yards as a matter of right. *Id.*

This is the only reasonable interpretation of section 2503: to allow *low* structures in required yards as a matter of right. The Appellant's construal, on the other hand, would only lead to absurd consequences by prohibiting *any low structure* if it were also connected to a taller structure in the non-required yard. For example, if a brick barbeque with a five foot chimney were located in a non-required rear yard but partially extended into the required rear yard by means of a small, six-inch high raised terrace, the entire barbeque would be prohibited according to the Appellant's theory. Such illogical results are to be avoided. Courts have consistently held that agencies should "not wallow in literalism where the plain language of a statute would lead to absurd consequences which the legislature could not have intended." *Parreco v. District of Columbia Rental Housing Commission,* 567 A.2d 43, 46 (D.C. 1989), *citing United States v. Brown*, 333 U.S. 18, 27, 92 L.Ed. 442, 68 S. Ct. 376 (1948); *Holt v. United States,* 565 A.2d 970, slip op. at 4 (D.C. 1989) (*en banc).*

Here, no portions of the elevated platform structure – that is, the amalgam of the block wall, the geogrid sheets and the fill dirt – that are located in the required rear yard

or side yard are more than four feet in height, as shown in the Revised Proposed Grading/Site Plan included with the revised retaining wall permits and attached hereto as part of Exhibit D. The diagram shows the walls of the platform structure along the outer sides of Lots 23 and 24, and the rear of the wall located approximately six feet beyond the required rear yard. Along the wall are spot measurements. Those portions of the platform structure located in the *required* side yard are even with the grade and have a wall curb height of 0.5 feet. Those portions of the required platform structure located in the *required* rear yard have a height of four feet, with a wall curb height of 0.5 feet. The portion of the platform structure located in the *non*-required rear yard varies in height from approximately 5.0 feet to 7.6 feet.

C. The Platform/Wall Does Not Count Toward Lot Occupancy.

The Appellant also erroneously claims that the platform/structure should have been counted toward the lot occupancy of the property. In fact, the platform/structure does not count toward lot occupancy. The maximum percentage of lot occupancy is keyed to the term "building area," which is defined as follows:

> Building area - the maximum horizontal projected area of a *building* and its accessory *buildings*. The term "building area" shall include all side yards and open courts less than five feet (5 ft.) in width, and all closed courts less than six feet (6 ft.) in width. Except for outside balconies, this term shall not include any projections into open spaces authorized elsewhere in this title, nor shall it include portions of a building that do not extend above the level of the main floor of the main building, if placed so as not to obstruct light and ventilation of the main building or of buildings on adjoining property. (Case No. 62-32, May 29, 1962)

11 DCMR § 199.1 ("building area") (emphasis added).

That is, only *buildings,* and certain side yards, open courts and closed courts, count toward lot occupancy. Because the retaining walls, their geogrids and fill dirt are not buildings, -- *i.e.,* they do not have a roof supported by columns or walls -- they do not count toward lot

occupancy. *See* 11 DCMR § 199.1 ("building"). Similarly, they do not constitute open or closed courts, and do not extend above the level of the main floor of the houses. Even as elevated platform structures, defined under the *Economides* decision as an amalgam of masonry walls, geogrid fabric and fill dirt, they do not count toward lot occupancy. Only in the Wesley Heights Overlay are structures included in building area calculations.

This conclusion is supported by the Board's decision in the *Economides* BZA appeal case:

> 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.

BZA Order No. 17285, at 8 (emphasis added).

This decision makes crystal clear that the "elevated platform structure" at the King Place residences *does not* count toward lot occupancy. Based on the calculations prepared by CAS Engineering, the house at 2334 King Place (Lot 24) has a lot occupancy of 34.8 percent. Similarly, the house at 2338 King Place (Lot 23) also has a lot occupancy of 34.8 percent. Thus, both houses fully comply with the 40 percent lot occupancy limitation for the R-1-B District under section 403 of the Zoning Regulations.

D. The Platform/Wall Does Not Occupy More Than 50 Percent of the Required Rear Yard.

Finally, the Appellant asserts, without any evidence whatsoever, that the platform/wall occupies more than 50 percent of the required rear yards. In fact, the

platform/wall occupies only 46.8 percent of the rear yard at 2334 King Place and just 42 percent of the rear yard at 2338 King Place, in full compliance with the definition of "Yard" under section 199.1 of the Zoning Regulations.

IV.
CONCLUSION

Ms. Lynch has failed to meet her burden of proof that the Zoning Administrator committed any error in issuing the amended permits for the house construction or the new permits for the elevated platform structure. The appeal is meritless, and accordingly, Intervenor SSB 2338 King LLC respectfully requests the Board to deny the appeal in the above-referenced case.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Mary Carolyn Brown

October 12, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Opposition to the Appeal was served this 12th day of October, 2012, via email or first-class mail, postage prepaid, upon the following:

Stuart Ross, Chair
Advisory Neighborhood Commission 3D
P.O. Box 40846 Palisades Station, N.W.
Washington, D.C. 20016
Stuart.Ross@troutmansanders.com

Jay Surabian, Esq.
Assistant Attorney General
Office of the General Counsel
D.C. Department of Consumer and
Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024
Jay.surabian@dc.gov

Matthew LeGrant
Zoning Administrator
D.C. Department of Consumer and
Regulatory Affairs
1100 4th St., S.W., 3rd Floor
Washington, D.C. 20002
matthew.legrant@dc.gov

Martin P. Sullivan
Sullivan & Barros, LLP
1990 M Street, N.W.
Suite 200
Washington, D.C. 20036
msullivan@sullivanbarros.com

Mary Carolyn Brown