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Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: Proposed Findings of Fact and Conclusions of Law

Dear Members of the Board:

On behalf of the Appellant in BZA Appeal No. 18469, I am hereby submitting proposed Findings of Fact and Conclusions of Law, as an attachment to this letter.

Sincerely,

Martin P. Sullivan

Findings of Fact

1. Appellant submitted a Site Plan (Exhibit ____) which shows a retaining wall which is part of an Elevated Platform Structure, pursuant to the Board's definition of such a structure in BZA Appeal No. 17285 of Patrick J. Carome. That site plans shows the height of the subject retaining wall to be at heights of four feet or greater at distances within a few inches of each of the four side lot lines, and within 10 feet of the rear lot line.

2. The Appellee and the Property Owner have stipulated that the structure at issue here is not a mere retaining wall, but is an elevated platform structure, although the parties differ in their interpretation of how much of the structure is an elevated platform structure.

3. Pursuant to §2503.2: "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."

4. According to the plain language of §2503.2, for a structure to be exempted from side yard, rear yard, and lot occupancy restrictions, every part of that structure must be less than four feet in height. At the hearing, the Property Owner and the Zoning Administrator argued that despite the plain language, §2503.2 had always been interpreted to mean that *portions* of a structure less than four feet are permitted in required yards, and only the *portions* four feet and higher were not permitted. But neither the Zoning Administrator nor the Property Owner submitted any actual precedent that might overcome the plain language of this Regulation.

5. Pursuant to §199.1, a Side Yard is defined as: a yard between any portion of a building or other structure and the adjacent side lot line, extending for the full depth of the building or structure." A side yard, therefore, is the area between not only the primary structure on a property, but all other structures as well, unless those structures are specifically exempted as a result of other sections of the Zoning Regulations.

6. Pursuant to §405.9, "Side yards shall be provided on lots in Residence Districts as set forth in the following table, subject to the special requirements of other provisions of this chapter:" According to the chart in §405.9, eight-foot (8 ft.) distances are required for *each* side yard on lots in the R-1-B district.

Conclusions of Law

The Appeal was timely filed by the Appellant. The Board finds that an administrative decision has not taken place unless that decision imparts the ability for a permit applicant requesting that decision to take action on that decision. For instance, even though the Zoning Administrator may have made an internal decision to approve the subject building permits, that decision was not effective until such time as those building permits were issued and the permit applicants were permitted to act upon that decision. To find otherwise would serve to provide appeal period deadlines which in many cases would be prior to issuance of the building permit,

or the permission for the permit applicant to take action. In the case submitted by the Property Owner, Appeal No. 17411 of Paul A. Basken and Joshua S. Meyer, the initial decision was determined to be made upon issuance of a building permit in December. That decision was determined to be ambiguous, but was later clarified in a written determination by the Director of DCRA in late May. The Board found that the 60-day appeal period began when the letter was issued in May, about six months after the initial decision date, or building permit issuance date. In this case, the appeal was filed within sixty days of issuance of the building permits. Since the building permits issuance date must be the date of the administrative decision, the appeal was timely filed.

[[In the alternative] Pursuant to the Board's decision in Appeal No. 17411 of Paul A. Basken and Joshua S. Meyer, an appeal period begins to run after an ambiguous situation is resolved such that an appellant's ability to file an appeal is no longer impaired. The Board finds that the appellant was not able to acquire any substantive information about the Zoning Administrator's internal decision to approve the elevated platform structure. Therefore, the appellant's ability to file an appeal was impaired until such time as she was able to acquire substantive information about the decision, such date being July 6, 2012. Since the appeal was filed within sixty days of July 6, the Board finds the appeal was timely filed.]

The Merits of the Appeal

The Property Owner proposes to effectively obliterate the Board's decision in Appeal No. 17285 of Patrick Carome. To follow their rationale, all one must do is deem a property to be a "natural grade" other than what it is, then provide less than four feet of grading over top of such "deemed natural grade" for a distance of 25 feet from the rear of the primary structure's building line. Once one gets beyond that line, according to the Property Owner and the Zoning Administrator, elevated platform structures are absolutely permitted, and at any permitted height, regardless of the Board's decision in Appeal No. 17285 of Patrick Carome.

Side Yard

This rationale ignores the plain language of the definition of side yard, and the requirement under § 405.9 that each side yard be a distance of at least eight feet from the side lot line to the building *or other structure*. The Board, in the hearing, pointed out that the plain language of the Regulations did not support the Zoning Administrator's and Property Owner's contention that an elevated platform structure is only prohibited in a "required" side yard, rather than in each side yard.

The Property Owner and Zoning Administrator argued that Elevated Platform Structures are prohibited only in "required" side yards, and that the only "required side yard" is adjacent to the primary structure on a lot. But it is the actual existence of the elevated platform structure which establishes the "required" side yard in the area adjacent to the portions of the elevated platform structure which are four feet or more in height, since §405.9 provides the required side yard distance be calculated for *each* side yard on a lot, and since §199.1 defines a side yard as the area between the side lot line and a building "or other structure."

The question is not whether an elevated platform structure is permitted in a side yard or in a "required" side yard. The question is: Is there 8 feet of space between the side lot line and

the edge of the Elevated Platform Structure. Clearly there is not, and so the permit applicant must either move the Elevated Platform Structure a full eight feet away from all four side lot lines, or it must reduce the height of the Elevated Platform Structure to less than four feet in height above the pre-existing grade (not a deemed grade) so as to afford the structure the benefit of relief under §2503.2 for structures less than four feet in height.

At the hearing, the Property Owner and the Zoning Administrator cited § 2500.2 as the controlling provision that overrules the plain language regarding the definition of side yard and the side yard requirement for all structures on a lot pursuant to §405.9. But §2500.2 is a specific exception from side yard requirements for "accessory private garages." An elevated platform structure is not an accessory private garage, and is therefore not availed of this exception. And in fact, citing that there are specific exceptions to side yard requirements for structures other than the primary residence on a property, in fact proves the rule that side yard requirements apply not only to the principal structure, but to "all other structures" as provided in the Zoning Regulations.

This indirect reasoning is entirely compatible with the plain language of the definition of side yards in the Zoning Regulations. If the Zoning Commission had intended that side yards are only to be required adjacent to the primary structure on a lot, and not to other accessory structures, then it would not have provided the language "*or other structure*" within that definition. It also would not have needed to provide any specific exceptions to the side yard requirement for accessory structures, as the Property Owner pointed out that the Commission has done regarding accessory private garages.

It is clear that there is no exception similar to the accessory private garage exception granted to elevated platform structures. This may be because the concept of elevated platform structures came about by the interpretation of this Board in Appeal No. 17285 of Patrick Carome, rather than through the amendment of the Zoning Regulations. So we look to our decision in that case to determine whether or not the Board, when it created the concept of elevated platform structures, also created an *exception* for such structures from the side yard requirements of §405.9. Clearly the Board did not create such an exception. To the contrary, the Board found that portions of the elevated platform structure in that case were in violation of the applicable side yard requirements.

For these reasons, the owner must either move the elevated platform structure at least eight feet away from all four side lot lines, or reduce its height above pre-existing grade to less than four feet at its highest point. To find otherwise, the Board would have to completely ignore the language in the definition of "side yard" that the side yard is the distance between the building "or other structure" and that an eight –foot distance is required for each side yard on a lot.

Rear Yard Measurement

Regarding rear yards and the measurement therof, the plain language of the definition of a rear yard requires that a rear yard is the distance between a building *or other structure* and the rear lot line. If the other structure is beyond the building, then the rear yard must be measured from that other structure. To find otherwise would be creating a fiction better termed a middle

yard and leaving neighbors to the rear of a property to deal with possible elevated platform structures potentially 50 feet or higher. The Board did not reach the rear yard measurement question in Appeal No. 17285, but in this case it is made clear that to ignore the plain language of the Regulations regarding the measurement of rear yards would have the effect of allowing massive elevated platform structures to tower over neighbors facing an owner's rear yard, provided the homeowner has a long enough yard to provide 25 feet between the house and the elevated platform structure.

Therefore, the Board concludes that the elevated platform structure must be moved at least twenty-five feet away from the rear lot line, or reduced to a height of four feet or less above the pre-existing natural grade in that 25-foot rear yard area.

The §2503.2 exception.

Appellant asserts that in order to benefit from the exception from the open space requirements of the Zoning Regulations, an *entire structure* must be less than four feet above the pre-existing natural grade, pursuant to the unambiguous language in §2503.2 that the exception only applies to structures "**no part of which** is more than four feet (4 ft.) above the grade **at any point**." It is not for this Board to adopt rulings completely contrary to the language duly adopted by the Zoning Commission. If the Board were to adopt the Zoning Administrator's/Property Owner's theory, it would be doing just that. The Board cannot merely ignore the phrases "no part of which" and "at any point" and their context within this case. Particularly when the Zoning Administrator and the Property Owner have not provided any precedent to the contrary other than citing an example of a fictional barbecue grill.

Conclusion

The Zoning Administrator erred in not finding a side yard violation because the permit applicant failed to provide eight feet of space between the elevated platform structure and each of the four side lot lines. The Zoning Administrator erred in not finding a rear yard violation by allowing the applicant to provide only ten feet of space between the rear lot line and the elevated platform structure, rather than the required twenty-five feet. The Zoning Administrator further erred in finding that only the four-foot or higher portions of the elevated platform structure counted against lot occupancy and against the rear yard and side yard requirements, rather than all portions of that structure. The plain language of the Regulations provides that if any part of a structure is four feet or higher, at any point, that the entire structure is not exempt, under §2503.2, from open space requirements in the Zoning Regulations.

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2012, a copy of this Proposed Findings of Fact and Conclusions of Law was delivered to the following, via e-mail:

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