INTERVENOR'S PROPOSED ORDER
ON MERITS OF APPEAL
(in the event Intervenor's Motion to Dismiss is Denied)

Appeal No. 18469 of Susan L. Lynch, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), to issue Building Permit Nos. RW1200113, RW1200111, 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).

HEARING DATE: October 16, 2012
DECISION DATE: November 7, 2012

DECISION AND ORDER

Susan Lynch filed this appeal with the Board of Zoning Adjustment (the "Board" or "BZA") on August 28, 2012. Ms. Lynch challenged the administrative decision of the Zoning Administrator to approve the issuance of Building Permit Nos. RW1200113 and B1207072 for 2338 King Place, N.W, Square 1394, Lot 23, and Building Permit Nos. RW1200111 and B1207074 for 2334 King Place, N.W., Square 1394, Lot 24. The "RW" permits were issued on June 29, 2012, and authorized the construction of a retaining wall comprised of a masonry wall, geogrid fabric and fill dirt. The Zoning Administrator granted zoning approval of the RW permit applications approximately a month earlier on May 30, 2012. The "B" permits authorized construction of one single-family dwelling on each lot. Those permits were issued on February 7, 2012, and revised on April 6, 2012, to remove the retaining wall structures from the scope of work. With respect to the "RW" permits, Ms. Lynch claimed that the Zoning Administrator erred in (i) issuing a retaining wall permit instead of a building permit for the masonry wall, geogrid fabric and fill dirt structure; (ii) finding that the structure was exempt from the side yard, rear yard and lot occupancy requirements under section 2503; (iii) finding that that structure complied with the side yard requirements of section 405; (iv) finding that the structure complied with the rear yard setback requirements of section 404; (v) finding that the structure did not exceed the maximum percentage of lot occupancy under section 403; and (vi) finding that the structure did not exceed the lot occupancy limitation of 50 percent for any required yard, as established in the definition of "yard" under section 199.1. With respect to the "B" permits, Ms. Lynch did not claim any specific zoning error in their issuance.

On October 12, 2012, the owners of 2334 and 2338 King Place, N.W., filed a motion to dismiss the appeal as untimely filed. The property owners alleged that the decision complained of was the Zoning Administrator's approval of the RW permits on May 30, 2012, thereby necessitating the filing of any appeal within 60 days thereafter, or by July 30, 2012. The evidence of record showed that Ms. Lynch's attorney had notice of the Zoning Administrator's decision no later than June 1, 2012. Ms. Lynch argued, however, that she was unable to obtain copies of the drawings for the permit until July 6, 2012, and thus there were extenuating circumstances that prevented her from filing her appeal by July 30, 2012. Alternatively, Ms. Lynch argued that the decision complained of was permit issuance on June 29, 2012, and that the appeal period ran until August 28, 2012.

[Vote on Motion to Dismiss]

With respect to the merits of the appeal, based on the evidence of record and for the reasons set forth below, the Board denies the appeal as without merit.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on October 16, 2012. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the appellant, Advisory Neighborhood Commission ("ANC") 3D (the ANC in which the property is located), the property owners, and to DCRA.

Parties

The appellant in this case is Susan L. Lynch ("Appellant"), the owner-occupant of the single family house at 2344 King Place, N.W., which is immediately adjacent to and contiguous with the property at 2338 King Place, N.W. The Appellant was represented by the law firm of Sullivan & Barros, LLP, Martin P. Sullivan, Esq. The Appellee, DCRA, was represented by its Office of the General Counsel, Jay Surabian, Esq., Assistant Attorney General for the District of Columbia. SSB 2338 King LLC, the owner of 2338 King Place, N.W., and Ben and Amy Chew, the owners of 2334 King Place, N.W., ("Property Owners") were automatic parties to the proceeding under 11 DCMR § 3199.1. The Property Owners were represented by the law firm of Holland & Knight, Mary Carolyn Brown, Esq. ANC 3D, also an automatic party in the case, did not participate in the proceeding or otherwise take a position on the appeal.

Motion to Dismiss

On October 12, 2012, the Property Owners filed a motion to dismiss the appeal, contending that the appeal was untimely filed. (Exhibits 1-5). DCRA filed its opposition to the appeal, in which it stated its support for the Property Owners' motion to dismiss. (Exhibit 19). By a separate pleading, Appellant filed her opposition to the motion dismiss on October 16, 2012. (Exhibit 20). [The Board voted ____ to [grant/deny] the motion to dismiss.]

Hearing and Closing of the Record

The public hearing took place on October 16, 2012, during which time the Appellant, DCRA and the Property Owners presented their respective cases. The Board deferred its decision on the merits of the case and closed the record, except to receive certain specified submissions. These were (i) an affidavit from the Appellant attesting to her efforts to obtain plans and records associated with the "RW" permits, due by October 23, 2012; (ii) a counter-affidavit from DCRA regarding the availability of those materials to the public and to the Appellant, in particular due by October 29, 2012; and (iii) proposed findings of fact and conclusions of law from all parties by October 29, 2012. The Board scheduled the case for decision on November 7, 2012, at which time it voted _____ to _____ the motion to dismiss. The Board then considered the merits of the case and voted ____ to deny the appeal as without merit.

FINDINGS OF FACT

The Property

1. The subject properties are located at Square 1394, Lot 23, premises address 2338 King Place, N.W. ("2338 Property"), and at Square 1394, Lot 24, premises address 2334 King Place, N.W. ("2334 Property") in the R-1 B District.

2. Each lot is rectangular in shape with street frontage on King Place. The remainder of the lots abut other residential properties. The rear yard of each lot slopes downward, with a change in grade of approximately eight to ten feet from the backs of the houses to the rear lot lines.

Events Leading to the Filing of the Appeal

3. In early February 2012, DCRA issued permits authorizing Sandy Spring Builders to construct two detached single-family dwellings, one on the 2334 Property and a second on the 2338 Property, and retaining walls surrounding the properties. The work was authorized under Building Permit Nos. B1110274 (2334 Property) and B1200230 (2338 Property).

4. Shortly after issuance of these permits, the Appellant contacted SSB in February 2012 to complain about the scope of construction. On March 9, 2012, Appellant's counsel sent an email to SSB stating that he believed the permits were issued in error and in violation of the Board's ruling on "retaining walls" and "elevated platform structures" in BZA Appeal No. 17285 of Patrick J. Carome, March 24, 2006, ("Carome Appeal") and as upheld by the D.C. Court of Appeals in *Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427 (D.C. 2008) (collectively, the *"Economides"* case). Appellant's counsel stated that he had contacted the Zoning Administrator ("ZA") and that if the permits were allowed to stand, he would appeal the issuance of the permits to the BZA. (Exhibit 18J).

5. After receiving a complaint from Appellant in early March 2012, the ZA conducted a review of the plans, discussed them with the Property Owners, and determined that the building permits had, in fact, been issued in error. Specifically, the ZA determined that the retaining wall was comprised of fill dirt supported by geogrid sheets that were anchored to a masonry wall. The ZA determined that these three elements created an "elevated platform structure" under the *Economides* case and, as designed, violated 11 DCMR § 2503.2 as being in excess of 4 feet in height in the required rear yard. On April 2, 2012, DCRA revoked Building Permit Nos. B1110274 and B1200230.

6. In order to allow construction to continue on the houses authorized under the permits, the Property Owners amended the permits to exclude the retaining wall/platform structure from the scope of work. On April 6, 2012, DCRA issued revised Building Permit Nos. B1207074 and B1207072, allowing for the construction of a detached single-family house on the 2334 Property and 2338 Property, respectively. Stop work orders, however, were issued for the retaining walls/platform structure.

7. At the same time, the Property Owners worked with the ZA to resolve the zoning issues with the retaining wall/platform and bring it into compliance. The changes proposed by the Property Owners included lowering the height of the wall and the retained soil in the rear yard. On April 23, 2012, CAS Engineering, the Property Owner's civil engineer, submitted a report to the ZA (the "April 23rd Report"), which explained the changes that would be made to the platform. (See Exhibits 18F and 18G). The ZA reviewed this report and found it to be in compliance with the Zoning Regulations. On May 30, 2012, the ZA gave final zoning approval to the plans in the April 23rd Report and entered the approval into the DCRA database, which then made the approval publicly known and available that same day through the Permit Information Verification System ("PIVS").

8. After the revised permit applications and plans were reviewed by other disciplines within DCRA, Building Permit Nos. RW1200111 and RW1200113 were issued for the construction of the retaining wall/platform on June 29, 2012.

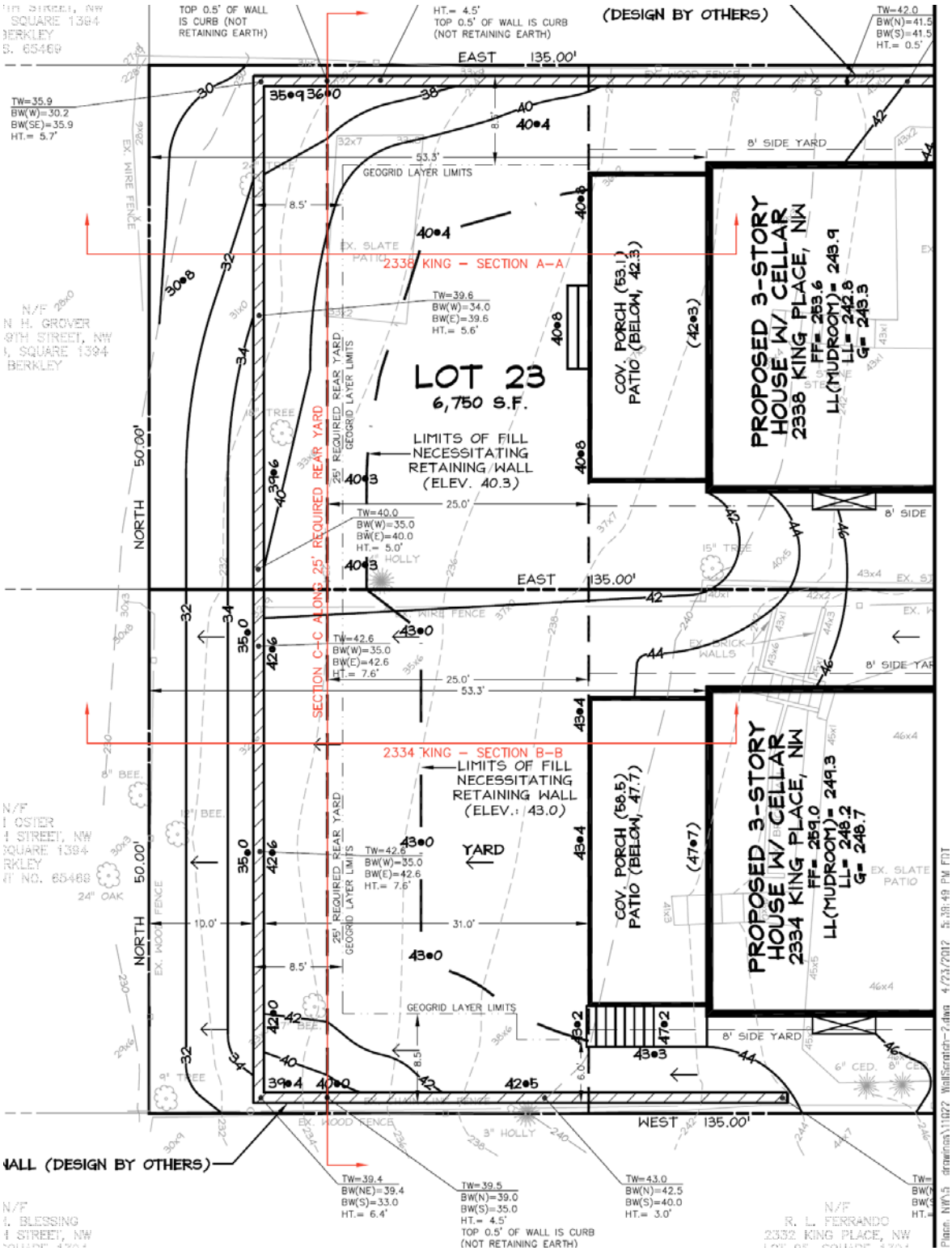
9. The approved plans show an amalgam of fill dirt, geogrid fabric and a retaining wall that together comprise an elevated platform structure, as defined under *Economides*. The wall portion of the structure is located just inside the north lot line of the 2338 Property in the side yard and extends west into the rear yard approximately ten feet short of the rear lot line. It then turns south through the rear yard and continues into the rear yard of the 2334 Property approximately the full width of that yard. It turns east and runs just inside the south property line of the 2334 Property to a point adjacent to the house. Geogrid fabric is anchored to the wall and extends inward to the property for a distance of 8.5 feet along the wall. The geogrid fabric helps to support and stabilize the fill dirt to create useable, level back yards at each property.

10. The wall/structure on the north side of the 2338 Property is approximately 0.5 feet in height, adjacent to the house. The grade drops such that the wall is 5.7 feet in height at the northwest corner of the wall/structure. The western portion of the wall/structure (which runs in a north-south direction) is 7.6 feet at its highest point at the back of the 2334 Property. The wall/structure is approximately 6.4 feet at the southwest corner, and drops to 4.5 feet and 3.0 feet as it moves along the south lot line of the 2334 Property adjacent to the house.

11. The wall/structure is set back approximately 31.0 feet from the rear of the covered porches at the back of each house. The rear lot line of both properties is another ten feet beyond the wall/structure. The grade slopes downward from the rear of the wall/structure by approximately four to six feet, depending on the location along the wall/structure.

12. A portion of the approved plans showing the location of the wall/structure and its heights is excerpted below. (See Exhibit 17B and 18F).

[Continued on Next Page]



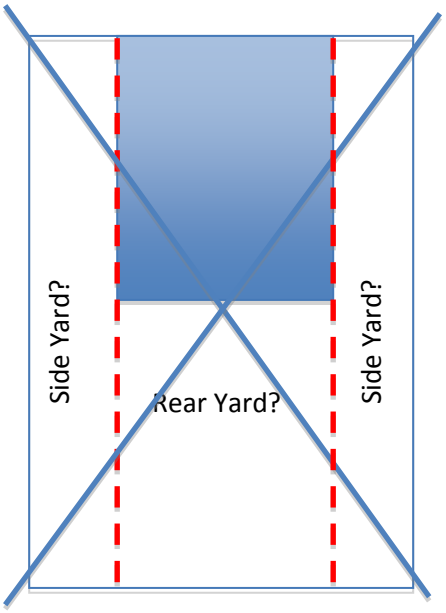
"Exhibit F: Revised Proposed Grading/Site Plan"
Excerpt from Exhibits 17B and 18F to the Record

CONCLUSIONS OF LAW

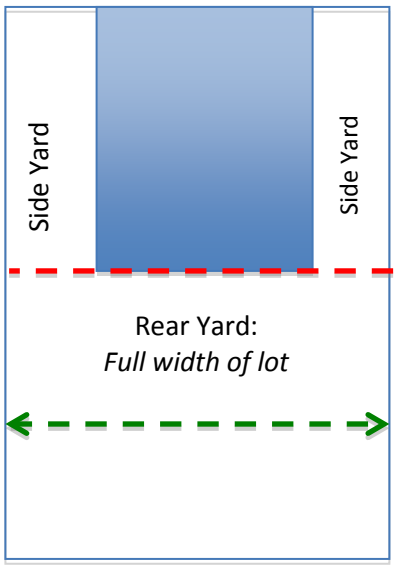
A retaining wall/elevated platform structure is customarily incidental to a single family dwelling, particularly those with significant grade changes in the yards, to allow a useable, level back yard. Accordingly, such a structure is permitted in the R-1 District pursuant to 204.1(c). However, this appeal raises several fundamental questions of interpretation regarding the side yard and rear yard provisions of the zoning regulations, and how they apply to this structure. We address each in turn below.

1. Do side yards extend the full depth of the lot?

Based on the definitions of both definition of both "yard, side" and "yard, rear" under the Zoning Regulations, the Board concludes that side yards do not extend the full depth of the lot. A side yard is "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 rear yard is "a yard between the rear line of a building or other structure and the rear lot line, except as provided elsewhere in this title. ***The rear yard shall be for the full width of the lot*** and shall be unoccupied, except as specifically authorized in this title." 11 DCMR 199.1 (emphasis added). The diagrams below indicate the correct and incorrect interpretations of the location of rear and side yards.



INCORRECT



CORRECT

2. How is the rear yard measured?

The Board previously addressed this question in *BZA Appeal No. 17414 of Geraldine Rebach and Jeffrey Schonberger,* November 16, 2006. The Board concluded that "a 'rear yard' begins at the rear wall of a building and runs to the rear lot line." *Schonberger Appeal,* fn 2 at 6.

The D.C. Court of Appeals upheld the Board's decision in 2008, and discussed this particular issue at length:

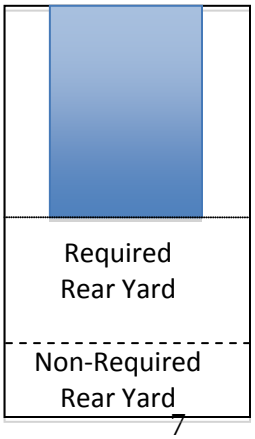
> [T]he regulations define a "yard, rear" as "a yard between the rear line of a building ... and the rear lot line, except as provided elsewhere in [Title 11]," and define the "depth of" a rear yard as "the mean horizontal distance between the rear line of a building and the rear lot line, except as provided elsewhere...." 11 DCMR § 199.1. The natural sense of these words is to establish both the starting point for measuring "distance" as the "rear line of a building," in this case the Epsteins' dwelling, and a direction of measurement, *i.e.*, toward the rear lot line. At least, the Board could rationally interpret them that way. And the definitional exceptions ("except as provided elsewhere") further support this reading. For example, 11 DCMR § 534, governing required rear yards in Special Purpose (SP) Districts, provides that "[i]n an SP District, the depth of the rear yard required ... may be measured as follows: (a) Where a lot abuts an alley, from the center line of the alley to the rear wall of the building or other structure ...; [but] (b) Where a lot does not abut an alley, the depth of the rear yard shall be measured as specified in the definition of rear yard in Section 199.1." Subsection (a), in other words, specifies an instance in which something other than the rear of the main building on a lot is (or "may be") the starting point for measurement of the required rear yard, while subsection (b) requires application of the general rule of measurement embodied in the definition of rear yard. *See also* § 774.9(a) & (b) (Commercial District) (reflecting the same distinction).

Schonberger v. District of Columbia Bd. of Zoning Adjustment, 940 A.2d 159, 161-62 (D.C. 2008).

Based on this precedent and the consistently followed application of the zoning regulations by the Zoning Administrators office, the required rear yard in the present appeal for the 2334 Property and 2338 Property is measured from the back of the rear porch on each house outward for a distance of 25 feet. The Board concludes that the approved drawings correctly delineate the required rear yards as extending 25 feet from the back of the two-story porches, as shown on the "Revised Proposed Grading/Site Plan" excerpted above.

3. What is the difference between a rear yard and a* required *rear yard?

As noted in *Schonberger*, a required rear yard is only that portion of the yard that is required by the regulations. In the R-1-B District, it is the first 25 feet of the yard as measured from the back of the house toward the rear lot line, and from side lot line to side lot line, as shown in the diagram below.



Structures normally prohibited in a required rear yard may be located in other parts of the rear yard. As the Board held in the *Schonberger* appeal,

> [s]ection 2500.2 states, with some exceptions not relevant here, that an accessory building may be located "*only* in a rear yard." (Emphasis added.) In the case of a two- story accessory garage, § 2500.6 states that a two-story accessory building may not be located in the *required* rear yard. Therefore, although a one-story garage may be located in a required rear yard, *i.e.*, within 25 feet of the rear of a dwelling in an R-1-B district, a two-story garage may not be located within this 25-foot area. The practical effect of this regulation is to create a 25-foot open buffer area between a dwelling and its two-story accessory building. The Board reads the buffer area to constitute the required rear yard of the dwelling, not a required rear yard for the accessory garage.
>
> The property owners' garage is not located within this required 25-foot rear yard area, but is located approximately 38 feet away from the rear wall of the dwelling. Therefore, the garage in question here is properly located in the rear yard, but is also properly not located within the *required* rear yard.

BZA Appeal No. 17414 (November 16, 2006), at 6 (footnotes omitted).

5. Can an "elevated platform structure" be located in a required yard?

Appellant has argued 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. For example, 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 p. 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 that connected to the rear of the house, 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 platform/wall located in the required yards are more than four feet in height. The approved plans show the platform structure located in the *required side* yard is even with the grade and have a wall curb height of 0.5 feet. A portion of the fill is not retained by the wall, because its slope does not exceed a gradient where the wall would be required. The required platform structure, including the geogrid fabric, located in the *required rear* yard has 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.

Consequently, the Board concludes that the portion of the elevated platform structure located in the required side yard and required rear yard of the 2334 Property and the 2338 Property are less than four feet in height, and thus are fully compliant with section 2503.2 of the regulations.

6. ***Does a structure located in a required yard need to provide its own side yard or its own rear yard?***

The Board addressed this question in the *Schonberger* appeal with respect to rear yards. There, the appellants argued that the two-story garage located in the rear yard was also required to provide its own rear yard. The Board disagreed, concluding that "[a]lthough the garage is a 'structure,' … it does not require its own rear yard under § 404.1." The Board based its decision on a harmonious reading of the other zoning provisions of Title 11 and the maxim of statutory construction that the specific governs over the general. *Schonberger* appeal, at 5; *U.S. v Rotheimer*, 570 A.2d 811 (D.C. 1990). The Board reasoned that section 404 is "a generally-applicable section setting forth the required rear yards for all residence districts" while section 204 applies specifically to accessory buildings, which are then subject to the even more specific provisions of Chapter 23. Section 2300.2(a) allows an accessory garage building to be located within a rear yard. The Board concluded, however, that "[n]owhere in section 2300 does it say that an accessory garage building must have its own rear yard, and in fact, it would be difficult to determine where this rear yard would be located." *Schonberger* appeal, at 5.

Similar reasoning applies to side yards. The definition of "yard, side" and the provisions of section 405.9 inform us that an R-1-B District requires a building or structure to provide a minimum side yard of eight feet. Section 2503.2, however, provides more specific allowances where certain low structures are expressly permitted in a required side yard. Nowhere in that

section, however, does it state that low structures are permitted in a required side yard *only if* that low structure provides its own side yard.

If such low structures were required to provide side yards it would obviate the need for section 2503.2. The low structure would be required to provide an eight-foot side yard *on each side*, one of which would be interior to the lot and adjacent to the principle building or structure. It would either overlap with or be in addition to the required side yard of the principle building or structure. That is, it would preclude the ability to place a low structure in the required side yard of a principle building or structure, rendering section 2503.2 meaningless. Such an interpretation would undermine the purpose and intent of the zoning regulations, where each provision is to be given meaning. *District f Columbia v. Jerry M.*, 717 A.2d 866 (D.C. 1998))(effect must be given to every word of statute, and interpretations that operate to render a word inoperative should be avoided); *Board of Directors, Washington City Orphan Asylum v. Board of Trustees, Washington City Orphan Asylum*, 798 A.2d 1068 (D.C. 2002) (courts must give effect to all the provisions of a statute, so that no part of it will be either redundant or superfluous); *Tenley and Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331 (D.C. 1988) (statute should not be construed in such a way as to render its provisions superfluous or insignificant). The only way to read the provisions of 2503.2 and 405.9 in harmony, then, is not require a structure expressly permitted within a required side yard to provide its own side yard. Accordingly, the Board concludes that the portion of the elevated platform structure located in the required side yard is not required to provide its own side yard.

Similarly, there is nothing in section 2503 that requires an elevated platform structure, which is accessory to a principle residential building, to provide its own rear yard. In fact, with the exception of garage structures, the regulations do not place any restrictions on accessory structures within the non-required rear yards. The rationale for this is clear. The required rear yard is to ensure light and air for the uses on that lot. Once beyond the required yards, there is no further need for protection. If accessory structures were required to provide their own required yards, it would lead to unintended and illogical results. For example, a property owner could never fence in his yard. Such a fence or garden wall, deemed a structure under the regulations, would need to be set back from the side lot line at least eight feet and 25 feet from the rear lot line to meet the minimum yard requirements. Thus, the Board concludes that the regulations do not require accessory structures to provide rear and side yards as set forth in sections 404 and 405, respectively.

This conclusion is supported by provisions elsewhere in the regulations that distinguish between required yards, and set backs along lot lines. For example, under section 2300.2(a), a private garage that is an accessory building in a residential district

> [m]ay be located either within a rear yard or beside the main building; provided, if the garage is located beside the main building, it shall be removed from the side lot line a distance equal to the required side yard and from all building lines a distance of not less than ten feet (10 ft.).

11 DCMR 2300.2(a).

The regulation does not state that accessory garages shall provide a side yard. Rather, it provides that accessory garages shall have setbacks that meet the side yard requirement. There would be no need to explicitly call out this setback if the structure were already required to have its own side yard under the section 404. The only way to reconcile and harmonize these provisions is if the required yard provisions only apply to principle buildings and structures. Otherwise, section 2300.2 would be rendered superfluous.

7. *Other Issues Raised by Appellant*

The Appellant raised several other issues in its initial appeal papers, although they were not argued during the hearing. We dispose of them now.

First, the Appellant alleged 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 this Board. 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. The Board thus concludes that the ZA did not err in reviewing the plans under the form of a retaining wall permit.

Second, the Appellant argued that the platform/structure should have been counted toward the lot occupancy of the property. While the Appellant conceded that lot occupancy is keyed to the term "building area," she asserted that the more specific provisions of section 403.2 should control. That section provides that "[n]o *structure*, including its accessory building, shall occupy its lot in excess of the percentage of lot occupancy set forth in the following table...." (Emphasis added). According to the Appellant, the term "structure" would include the elevated platform structure that would need to count toward the lot occupancy of the 2334 Property and the 2338 Property. She contends that each property would exceed the maximum 40% lot occupancy for the R-1-B District if the wall/structure were properly included in the calculation.

At first blush, there appears to be an inconsistency between the definition of building area and the provisions of section 403.2. "Building area" 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 would 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.

Yet, section 403.2 clearly states that "structures" are to be counted toward lot occupancy. To resolve this apparent discrepancy, the Board must look to the regulations as a whole and harmonize any apparently contradictory provisions. *Matter of T.L.J.*, 413 A.2d 154 (D.C. 1980); *Gondelman v. District of Columbia Dept. of Consumer & Regulatory Affairs*, 789 A.2d 1238(D.C. 2002). The Board need not look further to the *Economides* decision for clarity on this matter. There, the Board recognized that only structures, including elevated platform structures, located in the Wesley Heights Overlay counted toward building area calculations:

> 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 clear that the elevated platform structure at the 2334 Property and the 2338 Property <u>*does not*</u> count toward lot occupancy because they are not located in the Wesley Heights Overlay. Based on the calculations prepared by CAS Engineering and submitted as Exhibits 17B and 18F to the record, the lot occupancy of the 2334 Property is 34.8 percent and the 2338 Property has a lot occupancy of 34.8 percent. Thus, the Board concludes that both properties fully comply with the 40 percent lot occupancy limitation for the R-1-B District under section 403 of the Zoning Regulations.

Finally, the Appellant asserts that the platform/wall occupies more than 50 percent of the required rear yards, in contravention of the definition of "yard" under section 199.1 of the Zoning Regulations. That definition provides that "[n]o building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title." In fact, the platform/wall occupies only 46.8 percent of the required rear yard at 2334 King Place and just 42 percent of the required rear yard at 2338 King Place, in full compliance with this provision. See Exhibit 18G.

Based on the foregoing, the Board finds the appeal without merit. It is therefore **ORDERED** that the appeal is **DENIED.**

Vote taken on November 7, 2012.

VOTE: _____ (Lloyd J. Jordan, Peter May and Jeffrey L. Hinkle to grant the motion to dismiss; Nicole C. Sorg, not present, not voting; third mayoral appointment vacant).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

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.