

Before the
DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Patrick J. Carome

From the Administrative Decision of DCRA

To Issue Building Permit No. B460927

)
)
)
)
)

BZA Appeal 17285

RECEIVED
D.C. OFFICE OF ZONING
2005 JUN -3 PM 5:01

**National Park Service Rebuttal
to the
Objections of the Department of Consumer and Regulatory Affairs
to the
National Park Service Witness Mr. Robert D. Pinciotti**

I. The DCRA Mischaracterized the Testimony of NPS Expert Witness Robert Pinciotti, Geotechnical Engineer, as follows:

- a. "The MESA wall constructed by the permit holder is not a structure akin to a dam rather than a retaining wall." DCRA May 27, 2005, filing at 1.

NPS Response: Mr. Pinciotti characterized the structure as a Mechanically Stabilized Earth Structure (MSE). DCRA admits that it is an MSE structure. Affidavit of Abdullah Barrow at 2. The Gaithersburg, Maryland, dam referred to by Mr. Pinciotti is an example of an MSE structure. Mr. Pinciotti provided this example to the BZA to illustrate two points. First, MSE structures such as the Gaithersburg dam and the Economides' structure are not dependent on the existence of retaining walls for structural stability. Second, while one component of the Economides' MSE structure is a mesa block facade, the facade could be removed and the majority of the MSE structure would remain intact.

- b. "The dam structure is not governed by the building codes in the District of Columbia or other jurisdictions upon which he has worked (such as Maryland)." DCRA May 27, 2005, filing at 2.

BZA

Case No. 17285
Exhibit No. 95

NPS Response: Contrary to this mischaracterization by DCRA counsel, Mr. Pinciotti did not state that the Economides' structure is a dam. Rather he said the dam and the Economides' structures are both MSE structures. Mr. Pinciotti stated that the Gaithersburg dam MSE structure was constructed under state dam safety regulations.

- c. "Mr. Pinciotti [sic] testimony should be stricken since he is a witness who is unfamiliar with the legal standards in the jurisdiction that governs the work he is licensed to perform. In this regard, Mr. Pinciotti's admission that he did not know if the 1996 BOCA code was prevailing law in the District of Columbia is alone a basis to strike his testimony." DCRA May 27, 2005, filing at 2. "Mr. Pinciotti's lack of knowledge about the minimum standards applied to construction projects in the District of Columbia, notwithstanding the project at issue here, is compounded by his assertion that no law applies to this project or other similar projects." Id.

NPS Response: Mr. Pinciotti is an engineer and not a lawyer. He was not asked to testify to, and did not testify to, whether the District could legally rely on 1996 BOCA code definition of retaining wall in its decision to permit the MSE structure. The DCRA, not Mr. Pinciotti, stated that the 1996 BOCA code applied to the Zoning Administrator's permitting decision its April 5, 2005, PowerPoint presentation to the BZA. The DCRA reconfirmed this view in its May 27, 2005, filing. Specifically, footnote 2 of that filing provides that "the 2003 D.C. Building Code, published in January 2004 entitled Construction Code, incorporates the 1993 and 1996 BOCA code and the IBC code." Id. at 2.

Mr. Pinciotti testified that the MSE structure is not consistent with the 1996 BOCA code definition of a retaining wall because it is not constructed of concrete, steel, wood, or mortared masonry block. Furthermore, to the extent Mr. Pinciotti suggested that the D.C. building code does not contemplate construction of MSE structures on residential properties in the District, Mr. Pinciotti is correct.

Contrary to DCRA counsel's gross misstatement at page 2 of its May 27 filing, Mr. Pinciotti never asserted that a building permit was not needed to construct the Economides' structure. If this were true this matter would not be before the BZA.

- d. "Mr. Pinciotti erroneously described the duty of the zoning reviewer extends [sic] to comparisons of the site plan dimensions and the design specifications for a mechanically stabilized earth structure before approving the application under Title 11."

NPS Response: Mr. Pinciotti made no such legal argument. Rather, the NPS made this argument in its filings and in oral argument. Mr. Pinciotti merely stated that he has determined that the leveling pad has encroached onto NPS property. Contrary to DCRA's misrepresentation at pages 3-4 of its May 27, filing, encroachment was documented at two locations on NPS property, not one. Furthermore, Mr. Pinciotti testified that the Ryan and Associates design for the structure predicted that the leveling pad could encroach onto NPS property.

- e. "The footer, as described by Mr. Pinciotti, or [sic] more accurately described as a leveling pad consists of loose gravel." DCRA's May 27, 2005 filing at 4. "Encroachments or actions for trespass or encroachments [sic] do not typically encompass gravel." Id.

NPS Response: Under District law a permit cannot be issued where a structure such as a wall, or any portion thereof including its footings, will encroach onto another's property. See NPS May, 19, 2005, Supplemental Brief at 6-9. DCRA asserts, in the absence of citation and common sense, that placing highly compacted gravel structures, some portions of which are covered by plastic sheeting, on park property is not a "substantial intrusions" on parkland. DCRA's May 27, 2005 filing at 5. DCRA implies, therefore, that the Zoning Administrator's actions regarding this encroachment should not be held arbitrary. Whether an encroachment is substantial or not is legally irrelevant. Basis tenets

of property law make clear that all encroachments onto another's property are prohibited. Moreover, DCRA did not cite to provision of District law, nor could it, that allows the Zoning Administrator to disregard encroachments during permitting processes. Notwithstanding this, NPS considers this a substantial intrusion onto federal parkland.

- f. "It is with note that the witness presumed, without evidence to support that presumption, that the site plan illustrated where the wall would be placed on the property, and not, where the wall could end. That is to say, the one foot boundary could have illustrated where the retaining wall and its leveling pads would stop, one foot within the property line" DCRA May 27, 2005, filing at FN 5.

NPS Response: DCRA's critique of Mr. Pinciotti's testimony regarding the site plan is misleading. Mr. Pinciotti did not presume anything. The Zoning Administrator has testified that he relied on the site plan (or "plat" as he referred to it) to determine whether the project would encroach onto parkland. April 5, 2005 Tr. At 209. The plat is drawn to scale. It depicts three equidistant parallel lines. The outermost line represents the park boundary. The distance between the outermost line and the centerline is labeled 1 foot, plus or minus, typically. The space between the centerline and the inner most line is labeled "proposed retaining wall (typically)." This space is also graphically depicted as being 1 foot deep. This 1 foot deep dimension is consistent with the Ryan and Associates design, which provides that the mesa blocks forming the wall are 1 foot deep. Carome Exhibit 24 at 5. Further, according to the design, the leveling pad extends beyond the face of the wall a minimum of 6 inches. Indeed, given the design requirement and the soil characteristics of the construction site, Mr. Pinciotti testified that "the pad should extend 18 to 30 inches beyond the face of the wall." Thus if DCRA counsel's hypothesis were to have any merit, the plat space labeled "proposed retaining wall" would have to be depicted as being much larger than 1 foot deep. It was not. Therefore, DCRA's argument lacks merit.

II. Regarding the Affidavit of Mr. Abdullah Barrow:

- a. NPS Objects to Mr. Barrow's Testimony and his Qualifications as an Expert Witness: Mr. Pinciotti has researched Mr. Barrow's credentials at NPS's request and his findings are contained in his attached affidavit. To summarize, the best current information indicates that Mr. Barrow is not a Certified Professional Engineer. Rather, he is an Engineer in Training. Therefore, he lacks the qualifications necessary to evaluate Mr. Pinciotti's expert testimony. Moreover, unlike Mr. Pinciotti who is a Geotechnical Engineer, Mr. Barrow is a structural Engineer in Training and has no geotechnical engineering expertise. Therefore, he cannot offer any testimony of probative value regarding MSE structures. In light of the foregoing, NPS requests that Mr. Barrow's affidavit be stricken from the record.
- b. "In my opinion the wall at issue here is a retaining wall that can be classified as a mechanically stabilized earth structure." Barrow Affidavit at 2 -3. "The structure meets the definitions for retaining wall set out in the BOCA code, referred to in the IBC Code and adopted in the D.C. Building Code." Id.

NPS Response: Both Mr. Barrow and the DCRA (see footnote 2 of the DCRA's May 27 filing) believe that the 1996 BOCA code defines a retaining wall. However, Mr. Barrow's testimony is plainly inconsistent with the 1996 BOCA code. The 1996 BOCA code defines a retaining wall as a concrete, steel, wood or mortared masonry structure. Mr. Pinciotti has testified that the MSE structure at issue is not constructed of any of these materials. The DCRA has not refuted this testimony. Therefore, the structure is not a retaining wall for purposes of the 1996 BOCA code.

- c. "[The] MESA wall as designed does not include a footer. The portion of the wall which serves as a grounding for the wall is a leveling pad." Barrow Affidavit at 3.

NPS Response: In the attached affidavit Mr. Pinciotti concludes that the leveling pad acts as a footing and should be considered a footing for the wall because the leveling pad is designed to spread the weight of the wall. See also the April 5, 2005 affidavit of the Economides' stonemason Hugo Arden wherein Mr. Arden refers the gravel pad as a "footer".

- d. "There is nothing in the D.C. building Code which prohibits a property owner from backfilling a site." Barrow Affidavit at 3.

NPS Response: To create the Economides' platform structure hundreds of truckloads of fill material were compacted to a 95 percent compaction rate. Numerous synthetic geogrid sheets, up to 27 feet in length, were laced between the densely compacted layers of soil to add additional strength to the structure. The end result was the creation of a stable platform akin to a concrete mass covered with sod. This project was qualitatively different than a landscaping or grading project involving backfill that the Zoning Administrator should have recognized the difference immediately and denied the permit.

- e. "Given the content of the soil, removal of the retaining wall would result in the cave in or erosion of the site." Barrow Affidavit at 3.

NPS Response: Mr. Pinciotti's point regarding removal of the facade was that the majority of the structure would remain intact. He also said that wrapping the front in geotechnical fabric as was done at the Gaithersburg dam site could prevent erosion of the structure. Thus, his primary point was that the MESA block is not physically retaining the vast majority of compacted, geogrid laced soil in the structure. Rather, it altered the repose of the structure such that the rear yard platform could be larger.

Respectfully Submitted,



Jeffrey P. Bernstein

Attorney-Advisor

United States Department of the Interior

Office of the Solicitor

Division of Parks and Wildlife

1849 C Street N.W.

Mail Stop 3217

Washington, D.C. 20240

Certification of Service

I hereby certify the Rebuttal of the National Park Service to the Department of Consumer and Regulatory Affairs May 27, 2005, filing was mailed, First Class, postage prepaid, this day of June 3, 2005, to

Lisa Bell, Senior Counsel
D.C. Department of Consumer
and Regulatory Affairs
941 North Capitol Ave. N.W.
Suite 9400
Washington, D.C. 20012

Richard Aguglia, Esquire
Hunton & Williams
1900 K Street, N.W.
Washington, D.C. 20006

Patrick Carome, Esquire
Wilmer Cutler Pickering Hale & Dorr
2445 M Street, N.W.
Washington, D.C. 20037

Alma Gates, ANC 3-D
Post Office Box 40846
Palisades Station
Washington, D.C. 20016

David Murphy