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June 20, 2005

By Hand Delivery

Geoffrey Griffis, Chairman
Board of Zoning Adjustment
Room 210 South
441 4th Street, N.W.
Washington, D.C. 20001

**Re: BZA Appeal No. 17285
(4825 Dexter Terrace, N.W. - Retaining Wall)**

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Dear Chairman Griffis and Board Members:

As requested by the Board, on behalf of the property owners, enclosed please find an original plus 20 copies of proposed findings of fact and conclusions of law denying the appeal in this case.

Sincerely,

Richard L. Aguglia

By Mail

cc: Patrick Carome, Esq., appellant

ANC 3D
c/o Alma Gates

Lisa Bell, Esq.,
Senior Counsel, DCRA

Corey Buffo, Esq.
Office of the Zoning Administrator - DCRA

Jeff Bernstein, Esq.
NPS, Intervenor

BZA
Case No. 17285
Exhibit No. 97

Appeal No. 17285 of Patrick Carome, pursuant to 11 DCMR § 3100 and 3200, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit No. B460927, dated April 23, 2004 to construct a new retaining wall around rear yard as per plans for property located at 4825 Dexter Terrace, N.W., zoned WH/R-1-A (Square 1381, Lot 806)

HEARING DATES: **March 1 and 15, 2005; April 5, 2005; May 10 and 24, 2005**
DECISION DATE: **July 5, 2005**

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on December 13, 2004, challenging DCRA's decision to approve a building permit dated April 23, 2004 for the construction of a retaining wall in the rear yard of 4825 Dexter Terrace, N.W. The property owners and DCRA moved to dismiss the appeal as untimely. After hearing on March 1, 2005, the Board voted 3 to 2 to deny the motion to dismiss. After extensive hearings and arguments by the parties, including Appellant, the property owners, DCRA, ANC 3D and intervenor, National Park Service (NPS), the Board voted to deny and thereby dismiss the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for March 1, 2005. In accordance with 11 DCMR § 3113.12 and § 3113.13, the Office of Zoning mailed notice of the hearing to the Appellant, the property owners, ANC 3D (the ANC for the area concerning the subject property) and DCRA.

Parties

The Appellant in this case is Patrick Carome, whose personal residence is across the street from the rear yard of the subject property, where the retaining wall is located, separated by federal parkland. He was assisted by representatives of his law firm, Wilmer Cutler. Frank and Dina Economides, the owners on whose property the retaining wall was built, were represented by Richard Aguglia, Esq. of Hunton & Williams LLP. As the property owners, Mr. and Mrs. Economides are automatically a party under 11 DCMR § 3106.2. DCRA was represented by Lisa Bell, Esq., Senior Counsel. ANC 3D was represented by its chair, Alma Gates.

Requests for Party Status

The National Park Service (NPS) requested intervention in the case because of the proximity of the retaining wall to federal parkland and received party status over the objection of the property owners and DCRA for, inter alia, lack of timeliness and jurisdiction of the Board. NPS was represented by Jeffrey Bernstein, Esq., U.S. Department of the Interior.

FINDINGS OF FACT

Background

1. The property owners, Frank and Dina Economides, through an agent, applied for and obtained a building permit to construct a retaining wall in the rear of their yard at 4825 Dexter Terrace, N.W. in April of 2004. The wall was needed to retain fill dirt used to level their backyard, which all parties concede was steeply sloped and unusable. The rear yard property line also abuts federal parkland (Wesley Heights Park). A professional survey was conducted on at least two occasions at the request of the property owners to assure that the retaining wall, when constructed, would be entirely on the subject

- property. The retaining wall would be constructed of mesa blocks, anchored by geo-grids, with gravel leveling pads, which become part of the surrounding soil.
2. The application for the permit to build the wall was filed on February 23, 2004. The application indicated that that height of the retaining wall varied from 0' to 30' and would be entirely on the owner's land. The application was approved by DCRA for zoning, erosion control, storm water management and structural engineering between April 5 and April 23, 2004. The plat of the subject property which accompanied the application clearly indicated the dimensions of the retaining wall along the property's rear and side yards and that it would be built within 1 foot $\pm$ of the rear yard boundary line. DCRA's structural engineer also reviewed and stamped approved the final design plans for the retaining wall prepared by Ryan & Associates, a professional engineer certified to practice in the District of Columbia. Those plans indicated that the structure was a mesa site retaining wall, anchored by geo-grids, with gravel leveling pads.
 3. Work commenced on the retaining wall in the summer (June) of 2004. Construction was monitored daily by Specialized Engineering to assure compliance with the approved design plans. Specialized Engineering representatives required the owners to replace existing soil with better, integrated and free draining soil for safety factors related to the wall construction, such as proper compaction to meet the design plans specifications. The wall was completed in late October of 2004. Specialized Engineering, on December 15, 2004, verified to the property owners that fill placement, compaction, foundation design, bearing capacity and geogrid lengths were in substantial compliance with the Ryan design plans and specifications which had been previously approved by DCRA. On December 16, 2004, DCRA requested that the structural certification form be sealed and

signed by Ryan & Associates and this was done on December 17, 2004, and filed with DCRA.

Prior to filing the application for the building permit for the wall, the owners, in 2002, also obtained a storm water management (SWM) infiltration rate study from Specialized Engineering. That study indicated that infiltration for the proposed SWM facilities in the rear yard would be feasible. The Department of Health, Watershed Protection Division, approved the SWM system. The SWM system would include three catch basins, dry wells and drains/gutters from the house leading to the basins. Specially trucked in free draining soil was required. The end result would be less soil erosion from water run off. The owners signed a declaration of covenants with DOH, recorded against the property, for the maintenance of the SWM facility. In sum, the owners had in place a unified and professionally designed system for construction of the retaining wall including SWM retention for added safety enhancement to protect against pressure build up on the wall, and soil and water run off into the park.

The Present Appeal

Appellant Patrick Carome, on December 13, 2004, filed an appeal of DCRA's issuance of the building permit for a retaining wall to the owners of the subject property, arguing that he could not see the wall until late October or early November of 2004, when the leaves fell off the trees in the park and thus his appeal was timely. Appellant described the wall as an illegal warehouse-platform structure and argued, inter alia, that the wall is not a true retaining wall and therefore violated the rear yard and side yard set back requirements of the zoning regulations in the R-1-A zone district and the provisions of the Wesley Heights Overlay District (WHOD) (11 DCMR § 1541) with respect to lot occupancy and gross floor area, as well as the height limit for fences

and “fence” walls under the zoning regulations (11 DCMR § 2503.1) and the building code (12 DCMR § 3110.1.3).

The property owners oppose the appeal. ANC 3D supports the appeal. DCRA opposes the appeal. NPS joined in the appeal and was recognized as a party because the subject property abuts federal parkland. NPS adopted Appellant’s theory of the case and in addition argued that the underground “footers” of the wall encroached onto (under) federal parkland.

THE ISSUES ON APPEAL

On March 1, 2005, the Board narrowed the issues for which it had jurisdiction to hear and decide this appeal as follows:

1. Whether there was an error by the zoning administrator in issuing the permit, including proper review of the WHOD where the property was located; and
2. Whether the structure is not a retaining wall but actually something totally different.

The Board set forth those issues raised in the appeal for which it had no jurisdiction:

- quality of construction
- issues that go off the property line without a proper foundation
- adverse impacts be it in soil run off or structural integrity
- building code issues

EVIDENCE

(Whether the wall is a true retaining wall)

1. Appellant Carome produced no testimony from any expert witness that the retaining wall was not a true retaining wall. In fact, Mr. Carome was his only witness. Mr. Carome did submit into the record written evidence which negated his own appeal and supported

DCRA's and the property owners' position that the wall was a true retaining wall, as follows:

- A. A letter dated February 18, 2005 from a professional engineer, Peter Neubauer, that the structure was a "rear yard retaining wall."
 - B. A letter dated February 16, 2005 and revised February 17, 2005, from a professional engineer, Allyn Kilsheimer, describing the wall as a "large geostructure type wall relying on earth characteristics and gravity for support in an acceptable boot straps approach."
 - C. A manual on mesa retaining wall systems (Exhibit 90 to Carome Appeal) which describes walls like the subject as a mesa retaining wall system, providing unsurpassed structural integrity.
2. NPS presented an engineer, Robert Pinciotti, whom the Board qualified as an expert for purposes of this case over objection of the property owners and DCRA. Mr. Pinciotti testified that the wall was not a retaining wall but a mechanical stabilized earth structure (MSE), like a dam. In reaching his conclusion, Mr. Pinciotti relied on the 1996 BOCA Code definition of a retaining wall. However, upon cross examination by the owners' attorney, Mr. Pinciotti admitted that the 1996 BOCA Code was not in effect when the wall application was filed and permit issued in 2004, but the 2000 IBC Code was then in effect. He agreed that the IBC Code's definition of a retaining wall was one "designed to resist lateral soil loads" (§ 1610.1) but testified that he was instructed by NPS to define the wall solely in relation to the 1996 BOCA Code definition. Accordingly, the Board accords his testimony little weight.

3. The property owners and DCRA presented affidavits, exhibits and testimony that the wall was a true retaining wall as follows:

- A. William Ryan, a D.C. certified engineer who designed the wall and some 50 to 60 other mesa block retaining walls, submitted an affidavit dated March 29, 2005, that the wall was a true retaining wall and not a fence or fence wall or part of a warehouse, platform or terrace as alleged by Mr. Carome. He also indicated that all mesa block retaining walls relied on a geogrid system (grids, properly compacted soil and gravel) for support and that all properly constructed retaining walls rely on some in ground reinforcing system for support.
- B. Hugo Ardon, the stone mason who built the wall, testified and submitted an affidavit in support of the property owners that the wall was a true retaining wall.
- C. Abdullahi Barrow, a structural engineer employed by DCRA, submitted an affidavit on June 1, 2005 that the structure meets the definition for retaining wall in the various D.C. Building Codes and that the use of “imported” soil to backfill the project does not change its function to retain soil.
- D. Counsel for the property owners submitted additional exhibits which indicated that mesa retaining walls are built with geogrids and gravel and that the design of any retaining wall must include some form of reinforcement. In addition, counsel for the property owners noted that the wall met both: (1) the dictionary definition of retaining wall (since the term is not specifically defined in the zoning regulations which then incorporate under § 199.2 a dictionary definition from Webster’s Third New International (Unabridged) Dictionary) to “resist lateral

pressure” and (2) case law definition “to withstand lateral pressures of earth or other filling or backing deposited behind it after construction.”

4. Mr. Carome admitted upon questioning by the Board that there was no zoning regulation which prohibited the owners from “importing” soil offsite to meet the building code and engineering safety requirements that the dirt for this type of mesa block retaining wall be of a certain quality that it could be properly compactable to 95% and free draining to prevent pressure build up on the wall.

CONCLUSION OF LAW NO. 1

Based upon the facts and evidence adduced by the parties at the hearings, the Board concludes as a matter of law that the structure is a true retaining wall for zoning regulation purposes and appellant has failed to meet his burden of proof that it is not a true retaining wall.

LEGAL ARGUMENTS

(whether the Zoning Administrator properly issued the building permits for the retaining wall in accordance with the zoning regulations including the WHOD)

- A. Appellant maintains that the retaining wall violates the rear and side yard set back requirements of the zoning regulations. However, as pointed out by counsel for DCRA and the property owners, under 11 DCMR § 2503.3, “a fence or retaining wall constructed in accordance with the D.C. Building Code may occupy any yard required under the provisions of this title.” (Emphasis supplied). A review of the legislative history of this provision supports the proposition that retaining walls are permitted as a matter of right in any part of a yard. See ZC Case No. 76-15, where it is stated in numerous letters, proposals and exhibits that a retaining wall constructed in accordance with the Building Code may occupy any yard required under the Zoning Regulations. In addition, counsel for the property owners

submitted a case on point, Wilger v. Dodge County Planning and Development Dep't., 599 N.W. 2d 666, wherein the Supreme Court of Wisconsin concluded that the property owners' retaining wall was landscaping exempt from the setback provisions of the local zoning code. Appellant produced no evidence that the retaining wall was not built in accordance with the D.C. Building Code. In fact, there was substantial evidence that structural design approval and completion certification in accordance with the D.C. Building Code was provided by Ryan & Associates, Specialized Engineering and Robert Chen, DCRA engineer.

CONCLUSION OF LAW NO. 2

The subject retaining wall does not violate the rear or side yard setback requirements of the zoning regulations because retaining walls built in accordance with the Building Code are exempt from such requirements under 11 DCMR § 2503.3.

- B. Appellant next argues that the retaining wall violates the height restrictions under the zoning regulations found at 11 DCMR § 2503.2, because it projects more than 4 feet above grade and/or the 7 foot height limit for fences and fence walls within 10 feet of party lines under 12 DCMR § 3110. However, as pointed out by counsel for DCRA and the property owners, and as conceded by appellant in response to questions by the Board, there is no height restrictions in the zoning regulations for retaining walls. NPS concedes this fact but argues that the Board should read the provisions of § 2503.2 into § 2503.3, something the Board cannot legally do. Section 2503.2 indicates that a structure, not including a building, may not occupy any part of a yard, which structure is more than 4 feet above the grade at any point. Again, as discussed above, Section 2503.3 is an exception to

Section 2502.2 with no height restriction for a retaining wall which can occupy any part of a yard. In addition, 12 DCMR § 3110 refers to fences and fence walls and the Board has determined that the structure is a retaining wall.

The Board takes notice, as demonstrated by the owners, that there are many retaining walls in Wesley Heights in excess of 4 feet (when improperly measured from the lowest point of the property, even if that point is below grade as suggested by Appellant) including Appellant's own retaining wall, and that acceptance of his argument would lead to the absurd result that all these walls were also violative of the zoning regulations.

CONCLUSION OF LAW NO. 3

The Board concludes that the retaining wall has no height restriction under the zoning regulations or building code; therefore, the height restrictions for fences and fence walls cited by the Appellant and NPS are inapplicable.

- C. Appellant argues that the retaining wall violates the core purpose of the WHOD including maximum GFA and lot occupancy. However, a review of the WHOD regulations, including the legislative history found in ZC Case No. 90-5, demonstrates that the WHOD relates to residences and "livable" structures, not retaining walls. Retaining walls are allowed in the underlying R-1-A zoning as a matter of right, and is not in conflict with the overlay. The Board rejects Appellant's assertion that the fill dirt and in-ground geogrids which are simply anchors can be counted against maximum GFA or lot occupancy requirements of the WHOD as if they were livable structures as unreasonable and not supported by the evidence. The Board notes and agrees with DCRA and the owners that

there is no restriction in the WHOD or zoning regulations on “imported” or off-site soil being used as fill dirt for a retaining wall.

CONCLUSION OF LAW NO. 4

The retaining wall does not violate the core purposes or the maximum GFA and lot occupancy requirements of the WHOD.

ANC

The Board is required to give “great weight” to the resolution of ANC 3D supporting the appeal. ANC 3D has adopted the position of Appellant. However, for the definitive reasons already stated herein, the Board rejects that resolution. Further, the sole witness presented by the ANC, George Watson, testified to environmental matters allegedly related to the wall which are beyond the jurisdiction of the Board.

NPS

Similarly, the Board rejects for the same reasons the opposition of NPS to the issuance of the building permit here in issue, as NPS also adopted the basic arguments of the Appellant. The Board further concludes that any alleged finding by NPS of a few inches of “gravel” encroachment several feet under federal parkland as a result of two sample borings out of seven is insufficient evidence of impact for this Board to declare jurisdiction over the matter. The Board is aware from the evidence that the park boundary stakes were moved closer to the wall by NPS after two professional surveys were performed for the owners showing that the wall did not encroach onto federal parkland; that the NPS’ own boundary specialist found no encroachment of the wall onto federal property and that specialist monitored the construction of the wall on a regular basis to insure no encroachment, and that NPS uses similar non cohesive gravel on its paths in other park areas in the District. The Board is also aware from the evidence presented by

the owners that there are several very high retaining walls bordering federal parkland near the subject property.

Therefore, for the reasons stated above, it is hereby **ORDERED**:

The appeal is dismissed on the grounds that it fails to state a claim of administrative error with respect to the Building Permit No. B460927 of April 23, 2004.

VOTE:_____

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order

ATTESTED BY:_____

JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER:_____

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

BZA APPEAL NO. 17285

As Director of the Office of Zoning, I hereby certify and attest that on _____, 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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ATTESTED BY: _____
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