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June 20, 2005

Patrick J. Carome

By Hand

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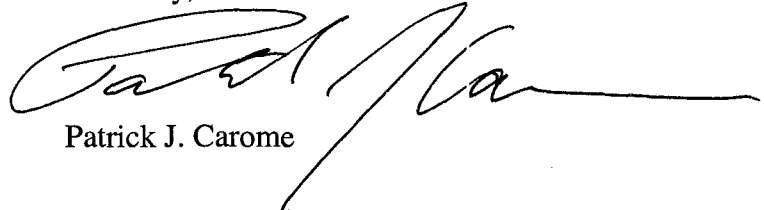
Re: *BZA Appeal No. 17285*

Dear Ms. Kress:

Enclosed for filing in the above-referenced appeal, please find the original and ²/~~20~~ copies of the Proposed Findings of Fact and Conclusions of Law of Appellant Patrick J. Carome, Intervenor National Park Service and Advisory Neighborhood Commission 3D. *

If you have any questions, please feel free to contact me.

Sincerely,



Patrick J. Carome

Enclosure

cc w/enclosure:

Richard L. Aguglia, Esq.
Lisa Bell, Esq.
Jeff Bernstein, Esq.
Alma Gates, ANC Chair

* P.S. Remaining copies
will be delivered
tomorrow.

BZA
Case No. 17285
Exhibit No. 98

BALTIMORE BEIJING BERLIN BOSTON BRUSSELS LONDON
MUNICH NEW YORK NORTHERN VIRGINIA OXFORD WALTHAM WASHINGTON

Board of Zoning Adjustment
District of Columbia
CASE NO. 17285
EXHIBIT NO. 98

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

Appeal of Patrick J. Carome

of Building Permit
No. B460927

4825 Dexter Terrace, NW

Frank & Dina Economides, Owners

BZA Appeal No. 17285

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**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
APPELLANT PATRICK CAROME, INTERVENOR NATIONAL PARK
SERVICE AND ADVISORY NEIGHBORHOOD COMMISSION 3D**

Appellant Patrick J. Carome, Intervenor the National Park Service ("NPS"), and Advisory Neighborhood Commission 3D ("ANC 3D") hereby submit to the Office of Zoning, pursuant to 11 DCMR § 3121, the following Proposed Findings of Fact and Conclusions of Law. Appellant, NPS and ANC 3D respectfully request that the Board of Zoning Adjustment adopt these proposed findings and conclusions as its decision of this Appeal.

PROPOSED FINDINGS OF FACT

General Background

1. This Appeal seeks review and reversal of a decision by the Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit No. B460927 (the "Permit"), dated April 23, 2004, which purported to authorize Frank and Dina Economides (the "Economides" or "Owners") to erect, "around" the "rear yard" of residential property located at 4825 Dexter Terrace, N.W. (the "Subject Property"), a structure that the Owners and DCRA characterize as a "retaining wall" (*see* BZA Ex. 1; App. Ex. 52) and that Appellant has characterized as a "huge earthen platform structure." (BZA Ex. 21B at 1).^{1/}

^{1/} This submission utilizes the following protocols for citations to the record in this case. Citations in the form of "BZA Ex. _" refer to items by the Exhibit Number which has been

2. Appellant Carome, who resides with his wife and children at 4747 Fulton Street, N.W., commenced this Appeal on December 12, 2004. Mr. Carome asserts that DCRA's decision to issue the Permit, as well as the structure that the Economides have been erecting under the supposed authority of the Permit, violate the Zoning Code in numerous respects.

3. The front yard of the Carome residence is approximately 300 feet away from the rear property line of the Subject Property. Immediately across the street from the Carome residence is Wesley Heights Park, which is part of the federally owned Rock Creek National Park System. During seasons when foliage is not on trees in the park, the rear of the Subject Property is plainly visible from the Carome's residence and front yard.

4. NPS, represented by counsel from the United States Department of Interior, Officer of the Solicitor, has intervened in this Appeal and is challenging the lawfulness of the Permit and supporting positions of Appellant. (BZA Ex. 36; 3/1/05 Tr. at 19-20.) NPS has a stake in this Appeal because the rear of the Subject Property abuts Wesley Heights Park and according to NPS negatively affects NPS resources. Additionally, NPS has determined that the footing of the walled platform structure encroaches onto parkland.

5. ANC 3D, whose area of jurisdiction encompasses the Subject Property, the residential property where the Appellant resides, and Wesley Heights Park, is a party to this Appeal. It voted unanimously to support this Appeal and has submitted a written report and testimony supporting the positions of the Appellant. (BZA Ex. 19.)

6. The Subject Property is owned by Dina Economides. (*See* App. Ex. 26.)

7. Frank Economides, the husband of Dina Economides, is a real estate developer in the District of Columbia. Frank Economides, along with one or more companies associated with him, has been providing construction services with respect to the Subject Property. (BZA Ex. 2 ¶ 10.)

8. The Economides (also referred to herein as "Owners") have intervened in this Appeal and are supporting the positions of DCRA. (*E.g.*, BZA Ex. 31.)

assigned to them by the Office of Zoning on the "Exhibit Log" for this Case. Citations in the form of "App. Ex. _" are to the consecutively numbered exhibits in the three bound volumes of exhibits that Appellant filed on February 16, 2005 or March 1, 2005; on the BZA Exhibit Log, those three volumes are referenced as BZA Exs. 21B, 21C and 34B. Citations in the form of "App. Reb. Ex." are to the set of exhibits that Appellant submitted during his rebuttal presentation on May 24, 2005; on the BZA Exhibit Log, they are referenced collectively as BZA Ex. 87. Citations in the form of "MM/DD/YY Tr. at ____" are to the transcript of the hearings held in this matter, by date and page number.

9. A number of interested non-parties have made written submissions to this Board regarding this Appeal.

- a. Submissions in favor of Appellant's position were received from the Palisades Citizens Association, the Sierra Club (Washington, D.C. Chapter), and the residents of 2715 49th St. (Danny and Ruth Tate), 2825 49th St. (Kathryn and Spence Spencer), 2831 49th St. (Ray and Alice Pushkar), 2845 49th St. (Joyce Woodward), 2901 49th St. (Philip and Karen Morrison), 4664 Garfield St. (Peter Chew), 4615 Fulton St. (Richard and Ilse Higgins), 4715 Fulton St. (Wendy Gray), 4707 Fulton St. (Louis and Marcia Lehrman), 4711 Fulton St. (Lisa Koenig and Mark Reford), and 4701 Fulton St. (Owen and Janet Roberts). (BZA Exs. 30, 33, 37, 38, 39, 44 and App. Ex. 85.^{2/})
- b. Submissions in support of the Owners' position were received from the residents of 4773 Dexter St. (A. & H. El-Mohandes), 4811 Dexter Terrace (R. & N. Schooling), 3920 49th St. (J. & E. Xanthos), and 7447 Dexter St. (Iraklis Karabassis), and from Kathie Dematitis and Stephen Schott. (BZA Exs. 16, 26, 27, 32, 35, 41, 54.)

The Subject Property

10. The Subject Property is located at 4825 Dexter Terrace, N.W. (Lot 806, Square 1381), in the Wesley Heights neighborhood of the District.

11. The Subject Property is zoned R-1-A and is entirely within the Wesley Heights Overlay District ("WHOD"). 11 DCMR § 1541.2(b) (providing that all of Square 1381 is included in WHOD).

12. The Subject Property is an irregularly shaped quadrangle that, according to District of Columbia Tax Department records, is 25,811 square-feet in size. (*See* App. Ex. 23, 26).^{3/} The front of the Subject Property faces onto Dexter Terrace, a public street that is immediately to the south of its front boundary. The rear of the Subject Property abuts Wesley Heights Park on the north, sharing a common boundary line with the Park that is approximately 200 feet long. Immediately to the east of the Subject Property is 4819 Dexter Terrace, which serves as the Japanese Consulate. Immediately to the west of the Subject property are 4833

^{2/} Appellant has adopted all such submissions in favor of this Appeal and has requested that they be treated as part of the evidence in this proceeding. (3/15/05 Tr. at 188-89.)

^{3/} Documents that the Owners previously submitted to DCRA asserted that the subject property is 26,811 square feet, or 1,000 square-feet larger than stated in the District's official tax records. (*See, e.g.,* App. Ex. 56.) The Owners have not sought to rebut Appellant's assertion that the authoritative statement of the size of the lot is that reflected in the official tax records.

Dexter Terrace and 2715 49th Street, N.W. (See App. Exs. 23; BZA Ex. 56 at Tab 5 (2nd Carome Aff. at ¶ 3 and Ex. A thereto).)

13. The Subject Property occupies the upper portion of one side of a ravine. The lower portion of the ravine is within the boundaries of Wesley Heights Park. The ravine contains, at its bottom, a stream that flows from east to west through the park. The park is heavily wooded and has walking and running trails that pass between the stream and the Subject Property. (BZA Ex. 2 (Appeal Attachment) ¶ 16.)

14. Accordingly, the natural slope of the Subject Property is relatively steep. It slopes downward from its front (where it borders Dexter Terrace) to its rear (where it borders Wesley Heights Park). Topographically, the Subject Property sits above Wesley Heights Park. (See App. Ex. 25 at 9.)

15. The Wesley Heights neighborhood is a wooded, park-like neighborhood marked by steeply sloping lots and unusual architectural charm. Its unique environmental and aesthetic qualities led to its protection under the Wesley Heights Overlay. See 11 DCMR §§ 1541-1543.

16. Until December 2002, the only significant building on the Subject Property was a half-century-old, single-family dwelling with a gross floor area of approximately 5,000 square feet. That dwelling stood on the front (and upper) portion of the lot. (See App. Exs. 28 & 58; BZA Ex. 43; 3/15/05 Tr. at 190.)

17. As of early 2002, most of the sloped rear yard of the Subject Property was thickly wooded, making it similar in appearance and terrain to the rear yards of the neighboring residential properties on Dexter Terrace and making it blend in with Wesley Heights Park to the north. (See, e.g., BZA Ex. 52 (NPS aerial photos of Subject Property and vicinity); App. Ex. 31 (photos of pre-construction views from Tate rear yard).)

18. For a period of years before Spring 2002, Dina and Frank Economides and their children lived in the pre-existing house on the Subject Property. (BZA Ex. 2 ¶10.)

19. From mid-2002 through the present, the Owners have been transforming the Subject Property through a series of inter-related construction projects, including the following:

- a. In Spring 2002, the Mr. Economides cleared the rear of the property of all trees and also engaged in certain “land disturbing” activities without having the necessary permit. (See App. Ex. 50.) As part of this activity, trees that were located in Wesley Heights Park were also felled.
- b. Starting on December 15, 2002, the Owners razed the pre-existing dwelling. DCRA and the District of Columbia have alleged they had no valid permit to do so. (See App. Ex. 65.)
- c. Starting in early 2003, they commenced construction of a new, much larger residence. DCRA and the District of Columbia have alleged that they had no permit to do so. (See App. Ex. 65.) Construction of this dwelling was still ongoing as of Spring 2005.

- d. Starting in approximately mid-2004, they erected in the rear yard a large structure — which DCRA and the Economides assert is a “retaining wall” but which Appellant, NPS and ANC 3D assert is a “walled platform structure” — pursuant to Building Permit No. 469027.
- e. Starting on or about April 16, 2005, they began to erect a six-foot high chain link fence around the perimeter of the elevated surface of this rear-yard structure. (*See* BZA Ex. 65; 5/10/05 Tr. At 230-39.)

DCRA’s Permitting Decision

20. On February 23, 2004, the Owners, through an agent, submitted to DCRA an application for a building permit authorizing them to “construct new retaining wall around rear yard as per plans.” (*See* App. Ex. 51.)

21. The permit application did not reflect or indicate that the Subject Property is located within the Wesley Heights Overlay District. (*See id.*)

22. The permit application stated that the height of the “retaining wall” would vary from zero (0) feet to thirty (30) feet, that it would be built from “Mesa Block,” and that it would cost \$30,000. (*See id.*)

23. At the time that DCRA acted on the permit application, the file before DCRA included, at a minimum, the following materials that were submitted by or on behalf of the Owners:

- a. A 36-page document entitled “Mesa Site Retaining Wall: Final Designs for: Economides Residence,” bearing an engineer’s seal dated February 27, 2004, prepared by Doug Statler of Ryan & Associates. (App. Ex. 24.)
- b. A one-page site drawing or plat, entitled “WALL PLAN,” bearing an engineer’s seal dated March 31, 2004, that purports to show, among other things, the location of a “proposed retaining wall” and the relatively level elevations that would be achieved as a result of the construction project. (App. Ex. 23, page 1.)
- c. A one-page site drawing or plat, entitled “EXISTING CONDITIONS,” bearing an engineer’s seal dated October 15, 2002, that purports to show, among other things, the pre-construction ground elevations of the Subject Property as of September 2002, before the Owners commenced the series of construction activities described above in paragraph 19. (App. Ex. 25, page 9.)

24. DCRA’s records further indicate that, before DCRA issued Building Permit No. 460927, it instructed the Owners to provide to DCRA “all information relevant to this wall design, including soil conditions, soil boring or t[e]st pits, soil classification, direct shear test, and slope analysis.” (App. Ex. 50 at 5.) The word “Done” is hand-written immediately below DCRA’s note to this effect, purporting to indicate that DCRA in fact received all of this “information.” (*Id.*)

25. Although it was clear from the foregoing documents that the proposed structure would be constructed from large quantities of material besides Mesa Blocks, including more than 6000 cubic yards of imported compacted soil and large synthetic reinforcement sheets, DCRA's zoning analysis did not consider any of the components other than Mesa Blocks. (4/5/05 Tr. At 160-61.)

26. There is no evidence in the record that indicates that anyone within DCRA who reviewed or acted on the permit application was aware that the Subject Property is within the Wesley Heights Overlay District.

27. DCRA treated the special restrictions applicable under the WHOD as entirely irrelevant to the question of whether the Permit should be issued. (*See* 4/5/05 Tr. at 182.)

28. On April 23, 2004, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") issued Building Permit No. B460927 authorizing the Economides to "construct new retaining wall around rear yard as per plans [—] entirely on owner's land." (*See* BZA Ex. 21 (App. Ex. 52).) Permit No. B460927 is the subject of this Appeal.

Nature and Characteristics of the Structure at Issue

29. The structure at issue is a level, elevated platform or terrace, adjoined to and accessible from the rear of the newly erected dwelling (hereinafter the "Platform Structure"). Its principle purpose is for the support of persons engaged in recreational and leisure activities and therefore is akin to a large elevated deck or patio structure. (*See* 5/10/05 Tr. at 299, 314.)

30. The outer walls of Mesa blocks that form the exterior façade of the Platform Structure on its east, north, northwest, and west sides do not represent the end that the Owners sought to achieve; rather, those walls are merely a means for achieving the desired end of creating an all new, and relatively flat, recreational platform. (*See* BZA Ex. 31 (Owners Opp.) at 5.)

31. The Platform Structure rests on top of the sloped rear yard of the Subject Property. It occupies space that, before its construction, was occupied by only air and trees. (3/15/05 Tr. at 289; BZA Ex. 3 (model).)

32. The Platform Structure was constructed from a combination of several different materials, including the following:

- a. Thousands of Mesa blocks, which are stacked together — without any mortar between them — to form the exterior walls, or façade, of the Structure (*see* App. Exs. 36-39; 5/5/10 Tr. at 457);
- b. Thousands of square feet of geogrid sheets — consisting of high-density polyethylene plastic — which attach to the exterior walls (including to the top of such walls) and stretch laterally into the interior of the Structure (*see* App. Ex. 24 at 10-25; App. Reb. Ex. C-1; 5/10/05 Tr. at 324, 458, 523; 5/24/05 Tr. at 252-53.)

- c. Over 6,000 cubic yards of earthen fill material — enough to fill “a few hundred” dump trucks — that was trucked onto the Subject Property from a “donor site” in Spring Valley and then highly compacted into layers separated by the geogrid sheets (*see* App. Exs. 23 & 24; 5/10/05 Tr. at 255-56, 312, 523.);
- d. Course gravel that was used for creation of a drainage zone just inside the Structure’s exterior walls (*see* App. Ex. 24 at 5-6);
- e. Fine compacted gravel that was used to create the so-called “leveling pads,” or footings, that help support the Structure’s exterior walls (*see id.*);
- f. A carpet of sod that covers the level top surface of the Structure (App. Ex. 71 (P. Carome Aff.) ¶18.);
- g. Nearly four-hundred-feet (400’) of chain-link fencing now being erected near the perimeter of the Structure’s top surface. (*see* BZA Ex. 65; 5/10/05 Tr. at 230-39.)

33. According to the Owners’ own expert, the Structure at issue is “comprised of blocks, geogrid, gravel and compacted soils. It is a ‘unified mass’ exerting pressure downward onto” the Subject Property. (*See* BZA Ex. 55 (D. Statler Aff.) at 2.)

34. The mason who built the Structure, and who testified on behalf of the Owners, acknowledged that “the geogrid and the wall are one piece” and that “[i]t’s not just a wall.” (5/10/05 Tr. at 365.)

35. The Platform Structure is, in engineering terms, a “Mechanically Stabilized Earth Structure” (“MSE Structure”). (*See* BZA Ex. 69 (R. Pinciotti Test.) at 2; App. Reb. Ex. F-4 at 2-3.) DCRA’s own engineer agrees with this characterization. (*See* BZA Ex. 90 (A. Barrow Aff.) ¶¶ 4, 6). As geotechnical engineering texts show, MSE Structures are a complex “system” of interrelated elements that typically include (a) compacted soil (b) geosynthetic inclusions (also known as geogrids) that reinforce the soil and convert it into a “mechanically stabilized earth mass,” (c) an outer “[f]acing . . . used to prevent the soil from raveling out between the rows of reinforcement,” (d) a “leveling pad” on which the facing rests, and (e) “retained backfill” that occupies the area between the stabilized earth mass and a pre-existing original slope and that, along with that mass, can support a level platform or terrace. (*See* App. Reb. Ex. F-4 at 2-3.)

36. The Structure at issue is huge and massive:

- a. The area of its elevated terrace surface is nearly 15,000 square feet — more than a third of an acre. (*See* App. Reb. Exs. C-2, C-6.)
- b. It is flanked by four exterior Mesa block walls totaling nearly four hundred (400) feet in length. (*See* App. Exs. 23, 24.)
- c. The horizontal area, or footprint, occupied by just the Mesa block walls and the geogrid reinforcement sheets is nearly 7300 square feet — approximately one sixth of an acre. (*See* App. Reb. Exs. C-1, C-3; 5/24/05 Tr. at 255-56.)

- d. Its longest exterior face, which runs directly along the border of Wesley Heights Park, is nearly two-hundred (200) feet long and soars to thirty (30) feet above grade. (See App. Exs. 23, 24.)
- e. At their highest points, the surface of the elevated platform and top of the exterior walls are more than thirty (30) feet above ground level. (See App. Exs. 23 & 24; see also App. Ex. 25 at 9.)
- f. The chain-link fence that is being added around the perimeter of the elevated platform increases the overall height of the structure by an additional six feet, making it more than 36 feet above ground level at its highest points. (See BZA Ex. 65.)

37. The Platform Structure was erected *after* the erection of the new dwelling on the property was put under roof. (See App. Ex. 23.) There is no evidence that the Platform Structure plays any role at all in structurally supporting the new dwelling or any other structure on the property other than the partially erected chain-link fence.

38. Unlike traditional retaining walls, the exterior walls of MSE Structures, such as the Platform Structure, do not play a major role in ensuring their structural stability. (See App. Reb. Ex. F-4.) Indeed, there was un rebutted expert testimony to the effect that the Mesa block walls of the structure are merely a “veneer” or “façade,” that some MSE structures are built without exterior walls, and that removal of the walls of this Structure would cause only loose soil at the edge of the MSE to fall away and would leave the great bulk of the structure intact. (See BZA Ex. 69 (R. Pinciotti Test.) at 2; Tr. on 5/10/05 at 512, 520)

Location and Impacts of the Platform Structure

39. Taking into account all of its components — including compacted earthen fill material, synthetic geogrid sheets, Mesa block exterior walls, and gravel footings — the Platform Structure occupies nearly 15,000 square feet of the area of the Subject Property that is to the rear of the newly constructed dwelling. (See App. Reb. Ex. C-6; 5/25/05 Tr. at 327-29.)

40. The exterior Mesa block walls, the outer margins of the elevated platform, and the chain link fence atop the platform are all in extremely close proximity to neighboring properties. Indeed, the plans for the Structure show that, in general, its exterior Mesa Block walls would be built approximately only one (1) foot away from (and inside) the property lines that divide the rear yard of the subject property from neighboring properties.^{4/} (App. Exs. 23, 24.)

^{4/} The only exception is that the plans provided that a small triangular area of approximately 315 square feet in the northwest corner of the Subject Property would not be occupied by the Structure. (App. Ex. 23; App. Reb. Ex. 5.)

41. The longest exterior Mesa Block wall of the Structure — which is approximately 185 feet long and more than 30 feet high at its highest point — runs approximately parallel to, and between approximately one to two feet away from, the property line between the Subject Property and Wesley Heights Park. (App. Exs. 23, 24, 45, 71 (¶ 32), 86; App. Reb. Ex. C-3.)

42. The exterior walls of the Platform Structure now dominate the landscape of Wesley Heights Park as seen from within the Park (for example, from the jogging/walking trail that runs along the stream) at all times of the year. (*See, e.g.*, App. Exs. 29, App. Reb. Ex. B at 1-2; BZA Ex. 21B (App. Br.) at 2.) During seasons when foliage on the trees within Wesley Heights Park is absent or nearly absent, they also dominate the view *into* Wesley Heights Park as seen both from Fulton Street and from 49th Street. (*See, e.g.*, App. Ex. 42 at 1-2; BZA Ex. 2 at 5-7.)

43. Overall, the Structure is a jarring anomaly that towers and looms over the neighboring parkland and residential properties. It fundamentally alters the whole look and feel of the area and destroys much of its natural character. In size, mass and appearance, it is completely out of keeping with the wooded, park-like ambience of its surroundings. (*See, e.g.*, App. Exs. 29, 30, 35, 36, 42, 69.)

44. One of the signature characteristics of the Wesley Heights neighborhood is that it was developed in a manner that preserved its undulating and sloped topography. It is the norm in this environment for homes to have front, side, and rear yards that are steeply sloped. (*See, e.g.*, App. Reb. Ex. 2 at 3-4.) The Platform Structure, which seeks to convert the entirety of one such yard into a raised, flat and level terrace, is entirely out of step with this characteristic. (*See, e.g., id.* at 1-2.)

45. A study conducted on behalf of the Owners regarding the presence and height of “retaining walls” within the WHOD failed to identify any instance of a structure that is comparable to the Platform Structure in terms of its mass, height above natural grade, and location in a required yard. (BZA Ex. 73, Tab 10 (R. Talastas Aff.).)

- a. The study examined 367 residential properties — apparently all properties within the WHOD — and identified 109 as having a retaining wall.^{5/} It did not identify even a single retaining wall as being in excess of ten (10) feet in height. (*Id.*)
- b. The study identified twenty-seven (27) of the properties as having retaining walls in excess of four (4) feet. (*Id.*) Photographs submitted as part of Appellant’s rebuttal presentation show that, unlike the Platform Structure, nearly all of those retaining walls are entirely at or below natural grade. (App. Reb. Ex. A; 5/24/05 Tr. at 244-47.) For example, the majority of these retaining walls hold back soil

^{5/} The study sought to identify every retaining wall in the WHOD that could be seen without trespassing on private property.

on either side of a channel that has been cut to allow a driveway to enter a below-grade garage. (*See id.* at 245; App. Reb. Ex. A.) Measured from grade level, the height of such walls is zero (0) feet above grade.

- c. The only structure that the Owners' study identified that bears any resemblance to the Platform Structure is located at 4635 Dexter Terrace, N.W. (*See* App. Ex. 83; App. Reb. Ex. A at 17.) Like the structure at issue here, that structure appears to create an above-grade, elevated platform that is accessed from doors on the lowest floor of the dwelling. (*Id.*) That structure is only one-third the height of the Platform Structure (BZA Ex. 73, Tab 10) and is set back substantially more than twenty-five (25) feet from the rear property line. (5/24/05 Tr. at 246-47; App. Ex. 83; App. Ex. 71 (P. Carome Aff.) ¶ 37.) There is no evidence in this record regarding whether that structure ever received any approval from zoning authorities. (*See id.*)^{6/}

46. Characterizations of the visual impact of the Structure include the following comments from neighborhood residents other than Appellant:

- a. "a massive eyesore . . . a symbol of excessive development that mocks the law . . . a blight on our neighborhood. . . ." (BZA Ex. 37);
- b. "a clear case where a piece of public parkland to be enjoyed by walkers and nature lovers and maintained for generations to come . . . has been mutilated" (BZA Ex. 38 at 1);
- c. "looks like a battleship has significantly impacted upon the public parkland in Wesley Heights" (BZA Ex. 38 at 2);
- d. "an eyesore that saps air and light from the park" (BZA Ex. 33);
- e. "Its proximity and looming presence continually and significantly diminish our enjoyment of our home. . . ." (BZA Ex. 39);

^{6/} The Owners' efforts to identify comparable structures outside the WHOD also did not suggest that there is any precedent for the erection of any comparable structure in the required yard of a home. Appellant demonstrated, for example, that structures the Owners asserted to be comparable were exterior portions of a parking garage and the side of a swimming pool attached to a 12-story apartment complex. (*See* App. Ex. 71 ¶ 36 & App. Ex. 82.) In no instance did the Owners demonstrate that zoning authorities had ever approved any structure that the Owners asserted to be comparable to the Platform Structure, or even that any of the other structures had been built after the promulgation of the D.C. Zoning Code. (*See* 5/10/05 Tr. at 277-79, 313.)

- f. “In 18 years of living here I have yet to see a more un-neighborly, offensive structure!” (BZA Ex. 38 at 3.)

47. The Platform Structure is having a particularly negative impact on the residential property located at 2715 49th Street, N.W., owned by Danny and Ruth Tate, who have made a written submission to the Board in support of this Appeal. (See BZA Ex. 39.)

- a. The Structure’s exterior Mesa block walls tower and loom over the Tates’ rear yard, and the Structure as a whole blocks sunlight and air that otherwise would flow into their yard. (App. Reb. Ex. B1, B2; 3/15/05 Tr. at 196.)
- b. The Platform Structure’s tallest point is less than ten feet from the Tate’s rear yard. (BZA Ex. 39; App. Reb. Ex. B1, B2.)
- c. The upper surface of the Platform Structure is at least several feet higher than the roof of the Tate’s house; someone standing on the Platform Structure would actually have to look down to see the top of the Tate’s house. (BZA Ex. 56 at Tab 5 (2nd Carome Aff.) ¶ 2C); see also 5/10/05 Tr. at 322.)
- d. As the Owners’ own witness acknowledged, “from their kitchen window, for example, the Tates look out at this great big wall.” *Id.*

48. Construction of the Platform Structure has caused, and its continued presence would continue to cause, a profound reduction in the number of trees in an area that previously was heavily wooded. A large number of trees were destroyed in order to make way for the Platform Structure to be built. (See BZA Ex. 52 (aerial photographs of Subject Property taken before and after tree clearing operations); 5/10/05 Tr. at 442-443 (D. Murphy).) There also is evidence both that large trees cannot grow atop the Platform Structure due to the compacted nature of the fill and the geogrid sheets, and that the additional shade from the Structure will negatively affect the long-term ecology and forest cover of the surrounding area. (5/10/05 Tr. at 443.)

The Structure’s Actual Encroachment on Federal Parkland

49. Below-grade portions of the Platform Structure actually extend across the Subject Property’s rear property line and encroach directly onto National Park Service property. Specifically, portions of the leveling pad supporting the exterior walled façade of the platform structure are located within the bounds of Wesley Heights Park. (BZA Ex. 69 (Pinciotti Test.) at 3-4; BZA Ex. 81 (NPS Supp. Br.); 5/10/05 Tr. at 472 L. Chmura Aff. (5/19/05).) The leveling pad is also properly referred to as a “footing” or “footer.” (See Pinciotti Aff. (6/3/05) ¶ 4; Ardon Aff. (4/5/05) ¶ 5; App. Ex. 23 (second step of planned “construction sequence” includes “begin footing excavation”).)

50. Former Zoning Administrator Bello testified that, pursuant to 11 DCMR § 3202.2, DCRA zoning personnel relied on the building plat, marked by the permit applicant, to show the location of the exterior wall of the proposed structure, to determine that structure would not encroach onto park property. (4/5/05 Tr. at 209-15.)

51. In fact, it was evident from the plat to which Mr. Bello was referring (App. Ex. 23 at 2), as well as other information that was presented to DCRA before the permit was issued, that the structure's leveling pad would extend onto the park property. The basis for this finding is as follows:

- a. The plat document indicates that the outer edge of the "proposed retaining wall" would be approximately a one-foot (plus or minus typically) away from the park boundary. (*See* App. Ex. 23 at 2; *see also* App. Ex. 51.)
- b. The plat further indicates that the "proposed retaining wall" itself would have a depth of approximately one-foot. This is so because the plat depicts the depth of the "proposed retaining wall" as being the same as the depth of the buffer between the wall and the park boundary. (*Id.*)
- c. The Ryan & Associates engineering design document for the so-called "retaining wall" (App. Ex. 24), which was also presented to DCRA, made clear that the depth of the Mesa blocks themselves would be one-foot. (*Id.* At 5.) This information, in combination with the plat, was more than sufficient to enable DCRA to deduce that the plan called for the *outer face of the Mesa blocks themselves* to be located approximately one-foot away from the park border. (5/10/05 Tr. at 475.)
- d. The Ryan & Associates engineering design document further indicated, however, that the proposed structure would have a "leveling pad" that would project outward, beyond the outer face of the Mesa blocks, by at least six inches and, depending on soil conditions, by as much as two (2) feet or more. One diagram in that document depicts a full-page cross-section of the structure with a four (4) foot wide leveling pad that projects approximately one (1) foot beyond the front of the "wall face"; that same diagram includes a note indicating that an even larger leveling pad, having a width of six (6) feet, might have to be used. (App. Ex. 24 at 6.)
- e. In addition to the foregoing information that was submitted to DCRA as part of the permit application, the permit file indicates that DCRA specifically requested and received for consideration in the permit decision "all information relevant to this wall design including soil conditions (soil boring, or test pits, soil classifications, direct shear tests and slope analysis." (App. Ex. 51 at 5; BZA Ex. (Owners Br.) at 7). According to NPS's expert witness, the soil boring information provided soil resistance values that, when read in combination with the engineering design, would have allowed the Zoning Administrator to determine the required width of the leveling pad. (BZA Ex. 69 at 3; 5/10/05 Tr. at 472-74.)
- f. Had DCRA determined the design-dictated width of the leveling pad and compared it to the one (1) foot plus or minus buffer depicted in the plat, it would have been evident that the leveling pad would encroach onto park property. (5/10/05 Tr. at 502-03.) Indeed, the NPS expert witness testified that "according

to [the engineering design and soil borings] the leveling pad, at the design depth, would have to . . . extend 18 to 30 inches beyond the face of the wall.” (*Id.*) Such extensions of the leveling pad would be well “onto the parkland.” (BZA Ex. 69 at 4.)

52. In light of the foregoing, the Board finds that, before Permit No. B460927 was issued, DCRA was or should have been in possession of all information necessary to determine that the leveling pad of the structure, if constructed in accordance with the plat and design plan, would physically encroach onto the federal parkland.

Advisory Neighborhood Commission 3D’s Support of this Appeal

53. Concerns about construction and zoning issues relating to the Subject Property in general, and to the Platform Structure in particular, were raised at an ANC 3D meeting for the first time in early November 2004. (3/1/05 Tr. at 83 (A. Gates).) Since then, many members of the community surrounding the Subject Property have been well aware of the Platform Structure, and many community residents have publicly voiced concerns about its enormity and incongruity with the Wesley Heights neighborhood. (*See, e.g.*, BZA Exs. 19, 30, 33, 37, & 39.) For example, following an open meeting on this subject at which both Appellant and the Owners’ counsel spoke, the Palisades Citizens Association “*unanimously voted to support Mr. Carome’s appeal.*” (BZA Ex. 33 (emphasis in original).)

54. On February 2, 2005, after Appellant had filed the present Appeal, the Advisory Neighborhood Commission 3D held a lengthy public hearing where the Appellant and counsel for the Owners presented their positions on the propriety of the permitting decision in considerable detail. (*See* BZA Ex. 19 (ANC 3D Report) at 1-2.) Before that hearing, both the Appellant and the Owners had submitted written materials for the ANC’s review. (App. Exs. 69 & 70.)

55. At the conclusion of the public hearing, the six ANC Commissioners present (one Commissioner was absent) voted unanimously to support the appeal. In a letter report to the Board (*see* BZA Ex. 19 at 2-3), ANC Chair Alma Gates stated the grounds for the ANC’s support as, in relevant part:

- a. “The retaining wall is not in harmony with Title 11, § 1541 [the] Wesley Heights Overlay District. It does not ‘preserve existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood;’”
- b. “The combined wall structure and the dwelling are in excess of the 30 percent lot occupancy allowed in the Wesley Heights Overlay District as specified in Title 11, § 1543.2;”
- c. “The height of the wall is in excess of seven feet as permitted under Title 12, § 3110A; and, the retaining wall examples presented by Mr. Aguglia failed to convince the commission that the structure is a retaining wall;”

- d. “The incomplete permit application . . . indicates a new retaining wall will be constructed around the rear yard, but fails to indicate that the area behind the wall will be backfilled or that the property is in the Wesley Heights Overlay District;”
- e. “The wall is built on the rear and side property lines and does not meet the setback requirements [in] Title 11, §§ 404 and 405;”

56. This Board must accord “great weight” to the unanimous support and written statement of the ANC in support of this Appeal. D.C. CODE § 10309.10(d)(3)(A); 11 DCMR § 3115.2; *see also Lovendusky v. Dist. of Columbia Bd. of Zoning Adjustment*, 852 A.2d 927, 933 (D.C. 2004); *Foggy Bottom Ass’n v. Dist. of Columbia Bd. of Zoning Adjustment*, 791 A.2d 64, 76 (D.C. 2002).

Procedural History of the Appeal

57. The named parties to this Appeal are Patrick J. Carome, who owns a home at 4747 Fulton Street NW, in close proximity to the structure at issue, and the DCRA. (*See* BZA Ex. 1 & 2.) Property owners Frank and Dina Economides, as well as ANC 3D, represented by Chair Alma Gates, were permitted to intervene as a matter of right. At its March 1, 2005 hearing, this Board permitted intervention of NPS. (*See* 3/1/05 Tr. at 19-20.)

58. As an initial procedural matter, the Owners moved to dismiss the Appeal for untimeliness and lack of standing. (BZA Ex. 31 at 4-11.) Following an extensive evidentiary hearing on these issues (3/1/05 Tr. at 20-122), the Board deliberated and denied these motions (*id.* at 123).

59. At a hearing on March 15, 2005, Appellant presented arguments concerning the errors in the permitting of the Platform Structure. While he set forth numerous arguments in his original Appeal filing (BZA Exs. 1 & 2) and in his opening Brief (BZA Ex. 21B), all of which he continues to press as valid reasons for this Board to reverse the Zoning Administrator’s decision, he focused on five in his oral presentation to the Board:

- a. The Platform Structure violates the core purposes of the Wesley Heights Overlay, yet the DCRA failed even to consider the Overlay in its zoning assessment of the structure. (*See* 3/15/05 Tr. at 193-97.)
- b. The Platform Structure is a violation of § 2503’s^{7/} prohibition of structures in a required yard and does not fall within any of its exceptions. (*See id.* at 197-203.) In this context, he argued that the Walled Platform Structure is not a “retaining wall,” or if it is, only its façade could be so characterized, thus exempting the

^{7/} Citations are to the Zoning Code, unless otherwise noted.

whole structure from § 2503 would constitute “the tail wagging the dog.” (*Id.* at 199.)

- c. The Platform Structure occupies more than 50 percent of a required yard in violation of a prohibition within the definition of “Yard” in § 199.1. (*Id.* at 203-04.)
- d. The Platform Structure occupies more than 30 percent of the entire lot in violation of § 1543.2. (*Id.* at 204-05.)
- e. The exterior wall of the Walled Platform Structure violates the Building Code’s 7-foot height limitation on fences and fence walls near property lines, incorporated into the Zoning Code through § 2503.3, which permits only such structures when “constructed in accordance with the D.C. Building Code.” (*Id.* at 205-10.)

60. At a hearing on April 5, 2005, DCRA presented its case in opposition to the Appeal. Represented by its counsel and by then (and now former) Zoning Administrator Toye Bello,^{8/} DCRA asserted that:

- a. The structure at issue is a “retaining wall” as defined by “Webster’s,” and within definitions provided by the 1993 and 1996 BOCA Codes, are incorporated into D.C. law. It is therefore exempt from the requirements of § 2503. (*See* 4/5/05 Tr. at 22-83, 85.)
- b. The structure was properly conceived of as nothing more than Mesa blocks stacked up to form a wall. All of the other materials that Appellant contends are also part of the “structure” — including the 6000 cubic yards of imported earthen fill that has been compacted into layers and the thousands of square feet of geogrid sheets — are not part of any “structure” and are “totally irrelevant” to the Zoning analysis. (*See* 4/5/05 Tr. at 156-62.)
- c. The Wesley Heights Overlay is “not critical to the zoning decision,” and “it has no substantive or material impact on the issuance of the building permit.” *Id.* at 83, 91. Specifically, the Wesley Heights Overlay applies only to buildings, and the structure at issue is not a building. (*Id.* at 97-98, 102.)
- d. The structure does not violate the Code’s rear yard occupancy requirements. The DCRA put forth an interpretation of “rear yard” at odds with that advanced by

^{8/} No one who was actually involved in DCRA’s decision to issue the Permit No. 17285 testified. Mr. Bello was not appointed Zoning Administrator until after the Permit was issued, and he ceased to be Zoning Administrator soon after he testified in this Appeal.

Appellant, specifically, that the rear yard is to be measured 25 feet out from the rear line of the house, not 25 feet in from the rear property line. (*Id.* at 86, 94-95.)

- e. When the Zoning Code's definition of "lot occupancy" and "building area" are read in tandem, the Zoning Administrator argued, occupancy percentages are limited to those parts of a building "projected above the main floor level" and thus the structure at issue in this appeal would have no lot occupancy. (*Id.* at 134.)
- f. The language of § 2503.3 exempting "retaining walls built in accordance with the D.C. Building Code" does not make the height limitations in the Building Code a concern of the Zoning Administrator; as a matter of zoning, there is no limitation on the heights of such walls. (*Id.* at 152-53.)

61. At a hearing on May 10, 2005, counsel for the Owners provided arguments in opposition to the Appeal. This presentation focused on three claims:

- a. The structure at issue is a "retaining wall built in accordance with the D.C. Building Code," thus exempt from § 2503.3. (*See* 5/10/05 Tr. at 245-51.) Neither the Zoning Code *nor* the Building Code limits the height of such structures. (*Id.* at 289.)
- b. The Wesley Heights Overlay applies only to "residences and livable structures," not structures such as that at issue in this appeal. (*Id.* at 251-52.)
- c. Retaining walls are permitted under R-1-A Zoning as a matter of right. (*Id.* at 252.)

62. Also at the May 10, 2005 hearing, counsel for the Owners presented the testimony of Hugo Ardon, the construction supervisor for the structure at issue. Mr. Ardon testified as to the construction process he oversaw (*id.* at 252-64) and discussed various photos of other structures purported to be retaining walls in the vicinity of Northwest Washington, D.C. (*Id.* at 264-285).

63. Following the testimony of Mr. Ardon, ANC Chair Alma Gates and her witness, George Watson, President of the Wesley Heights Historical Society, made statements in support of the Appeal. (*Id.* at 388-404.)

64. The May 10, 2005 hearing closed with arguments of the NPS, also in support of the Appeal. NPS presented the testimony of geotechnical engineering expert Robert Pinciotti. He testified as to his expert opinion that the structure at issue in this Appeal is a Mechanically Stabilized Earth Structure, not a "retaining wall." (*Id.* at 455-59.)

65. Finally, on May 24, 2005, the Appellant presented rebuttal and closing arguments. He contended that the DCRA made an overarching and fundamental error in treating the multi-component Platform Structure as if it consisted of nothing more than stacked Mesa blocks constituting a "retaining wall." He then reiterated and expanded upon the five key points he made in his opening presentation. (*See* 5/24/05 Tr. at 243-352; BZA Ex. 88.)

PROPOSED CONCLUSIONS OF LAW

A. DCRA Fundamentally Erred In Accepting the Owners' Characterization of the Structure at Issue As Being Merely a "Retaining Wall."

1. The structure that the Economides proposed to erect and that DCRA purported to authorize through Permit No. B460927 is not merely a "retaining wall," but rather is an elevated platform or terrace that has been fabricated from a variety of construction materials, including compacted earth, geogrid fabric, and Mesa blocks. It therefore was clearly erroneous for DCRA to analyze the zoning issues related to this structure as if it consisted of nothing more than stacked Mesa blocks that form a "retaining wall." The bases for this conclusion are set forth below.

2. The Zoning Code provides a broad and expansive definition for the term "structure," as follows: "Anything constructed, including a building, the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground, including, among other things, radio or television towers, reviewing stands, *platforms*, flag poles, tanks, bins, gas holders, chimneys, bridges, and *retaining walls*." 11 DCMR § 199.1 (emphasis added).

3. Where a term is not defined in the D.C. Zoning Code, this Board generally assumes that term has the meaning given in "*Webster's Unabridged Dictionary*." 11 DCMR § 199.2(f). The parties submitted several such definitions which are relevant to our interpretation and application of the Code's definition of "structure," including the following:

- a. *Webster's Third New International Dictionary of the English Language Unabridged* ("*Webster's Unabridged Dictionary*") defines "construct" as "to form, make, or create by combining parts or elements" and as "to fabricate out of heterogeneous or disparate elements." (App. Ex. 21).
- b. *Webster's Unabridged Dictionary* defines a "platform" as "a natural or constructed terrace." (*Id.*)
- c. *Webster's Unabridged Dictionary* defines a "terrace" as a "relatively level paved or planted area adjoining a building and in formal settings often surrounded by a balustrade." (*Id.*)
- d. *Webster's Unabridged Dictionary* defines "retaining wall" as "a wall built to resist lateral pressure other than wind pressure: *esp.* one to prevent an earth slide." (*Id.*)^{2/}

^{2/} As noted below, DCRA has placed greater weight on the 1996 BOCA Code definition of "retaining wall" than the *Webster's* definition, and has steadfastly asserted that the 1996 BOCA Code remains operative in the District as a matter of law. While we do not decide the legal

4. The thing that the Economides have “constructed” in the rear of their property is not merely “a wall built to resist lateral pressure.” The Mesa block walls are but one component of a much larger object that, in the words of the Economides’ engineer, is a “unified mass” “comprised of blocks, geogrid, gravel and compacted soils.” (See BZA Ex. 55 (Affidavit of Doug Statler at 2).)

5. This entire “unified mass” that has been built up on top of the ground in the rear yard of the subject property meets the Zoning Code’s definition of “structure.” The reasons for this include the following:

- a. It has been “constructed” in the sense of having been both “form[ed], ma[d]e, or create[d] by combining parts or elements” and “fabricate[d] out of disparate elements.”
- b. Its intended use is for supporting leisure activities in an area immediately adjacent to the newly constructed dwelling on the subject property. Quite obviously, this use requires “permanent location on the ground.”
- c. It falls within one of the explicit, non-exclusive examples of “structure” — namely, “platform” — because it is a “constructed terrace” and a “relatively level . . . planted area adjoining a building”

6. The fact that one of the components of the Platform Structure is “compacted soils” is not a license to ignore that component for purposes of a zoning analysis. It is well recognized in the construction and engineering industries that soil or earth can be a construction material. See S. Scott, *The Dictionary of Civil Engineering* (4th Ed. 1993) at 435 (defining “structure” as “anything built by people”, and listing, as its very first example “a hydraulic fill dam *built of earth*”) (emphasis added) (App. Reb. Ex. E-1); R.J. Mitchell, *Earth Structures Engineering* (1983) (“Earth structures engineering involves the analysis, design, and construction of structures, such as slopes and dams, that are composed mainly of earth materials. . . .”) (App. Reb. Ex. E-2). Indeed, the Board is persuaded that, from the perspective of the Zoning Code, there would not be a significant distinction between an elevated terrace constructed entirely from reinforced concrete and an elevated platform constructed from layers of compacted earth reinforced with sheets of geogrid layers and surrounded by a wall façade.

7. Taking into account the purpose for which this structure was created, the fact that it comprises an entire system of elements, the fact that those elements collectively occupy space

question of whether the 1996 BOCA Code is in fact operative in the District, we do believe that the 1996 BOCA Code definition should take precedence in this Appeal both because DCRA clearly gives it weight as a matter of working policy and because it represents the most recent official definition of “retaining wall” recognized under District law.

where previously there was nothing but air, and the fact that as a whole it fits neatly within the definition of “platform,” we conclude that the “structure” at issue on this appeal is not a “retaining wall” (or, at a minimum, is not merely a “retaining wall”) but rather is a “platform” or “terrace” whose size and dimensions encompass all of its component elements.

8. Our conclusion that the Platform Structure is not a “retaining wall” is buttressed by the fact that structures such as this fall within a generic category, well recognized in the field of engineering, known as “Mechanically Stabilized Earth Structures.” As discussed above, engineering texts demonstrate that MSE Structures are a complex system of multiple interdependent components. To the extent that such structures have an exterior wall, engineering texts refer to it as a “component” that “prevent[s] the soil from raveling out between the rows of reinforcement” and only “plays a minor structural role in the stability of the structure.” (App. Reb. Ex. F-4 at 2-3.)

9. Even if the Mesa block exterior walls of the Platform Structure could be deemed, in isolation, to be a “retaining wall,” that obviously would not alter the fact that the entire object of which those walls are merely one component is a much larger structure that is aptly characterized as a “platform” or “terrace.”

10. In any event, the exterior walls, if looked at in isolation, do not qualify as a “retaining wall” within the meaning of the Zoning Code and Building Code, and therefore even they cannot qualify for exceptional treatment under 11 DCMR § 2503.3.

- a. Neither the Zoning Code 11 DCMR § 199.1, nor the IBC Code (*see* App. Reb. Ex. at G-3), which the District adopted as the basis for its current Building Code, contains any definition for the term “retaining wall.”
- b. The definition of “retaining wall” contained in the 1996 BOCA Code should be given substantial weight in determining whether the walls of the Platform Structure are a “retaining wall.” DCRA itself said that it used the 1996 BOCA definition as its principle “working definition” for purposes of deciding whether to issue the Permit in this case. (BZA Ex. 64 (DCRA PowerPoint) at 3; 4/5/05 Tr. at 154.) DCRA also repeatedly asserted, including in its last written submission, that the 1996 BOCA Code has continuing operative force within the District. (4/5/05 Tr. at 82-83, 154-55; BZA Ex. 90 at 2 note 2 (stating that “[t]he 2003 D.C. Building Code . . . incorporates the 1993 and 1996 BOCA Code and the IBC Code”).)
- c. Appellant asserted that the 1996 BOCA Code’s definition of “retaining wall” should be determinative here, because, even if the BOCA Code is not currently governing law in the District, this definition is, in any event, the most recent definition of “retaining wall” that has been operative in this jurisdiction and the one on which the permitting agency relied as a matter of policy. (5/24/05 Tr. at 268-70; BZA Ex. 88 at 22-23.)
- d. The 1996 BOCA Code defines a “retaining wall” as “[a] wall that is not laterally supported at the top, designed to resist lateral soil load.” The 1996 BOCA Code

further provides, under the heading “Retaining Walls,” that “[w]alls built to retain or support the lateral pressure of earth or water or other superimposed loads shall be designed and constructed of masonry, concrete, steel sheet piling or other approved materials (see Section 2311.7).” (Section 2311.7 discusses the use of wood for retaining walls.)

e. NPS’s expert witness provided un rebutted testimony that the exterior walls of the Platform Structure do not fall within the foregoing description of “retaining wall.” In particular, he testified that the walls are not constructed of “masonry” because (i) the BOCA Code defines “masonry” as certain materials “bonded together with mortar” and (ii) the Mesa blocks here are not bonded together with mortar. (5/10/05 Tr. at 457.) He further testified that the walls are not constructed of concrete, steel, or wood. (*Id.*)

f. The exterior walls of the Platform Structure also fall outside of the 1996 BOCA Code’s definition for the separate and additional reason that they *are* laterally supported at the top. Specifically, there are layers of geogrid reinforcement sheeting attached to the walls at intervals of every few feet. According to the engineering plans, the uppermost geogrid layer is continuously attached to the full length of wall at a level that is between zero (0) and three (3) feet from the uppermost Mesa block. (App. Ex. 24 at 8-25.)

g. A further reason why the exterior walls of the Platform Structure should not be considered a “retaining wall” because it was not built to “resist lateral pressure” of soil, which is the most basic requirement of a retaining wall under either the BOCA 1996 definition or the *Webster’s Unabridged* definition. There is un rebutted evidence that the exterior walls of an MSE Structure do not play a major structural role in supporting the overall structure, that some MSE Structures do not even have exterior walls, and that when an MSE Structure does have exterior walls their principle function is to control erosion at the edges of the structure and to prevent the geogrid layers from unraveling. (BZA Ex. 69 (Pinciotti Test. at 2-3; 5/10/5 Tr. at 511-12.) In these respects, it cannot be reasonably stated that the true purpose of the exterior walls is to “resist lateral pressure.” This conclusion is supported by the testimony of the Owners’ expert witness, who stated that the structure at issue is a “unified mass” that “exerts downward pressure.” (BZA Ex. 55 (D. Statler Aff.) at 2.) Although there appear

to be no decided cases in the District addressing the scope of the term “retaining wall,” the Board is persuaded by decisions from courts in other that have held that erecting a wall, then filling behind it with earth where previously there was none, does not create a “retaining wall.” *Ranson v. City of Charleston*, 496 S.E.2d 191 (W. Va. 1997) (where owners built wall then added imported fill to create a level rear yard, the resulting structure did not qualify as “retaining

wall”); *Adler v. Craft*, A-1-03T5 (N.J. Super. Ct. App. Div. Sept. 22, 2004) (same).^{10/} As more fully developed below, DCRA’s erroneous conclusion that the structure that it was permitting was nothing more than a “retaining wall” comprised of Mesa blocks caused it to fail to recognize that the structure inevitably would violate several key provisions of the Zoning Code.

B. The Platform Structure Violates the Zoning Code, 11 DCMR § 2503.1, Because It Is Located in a Rear Yard But Does Not Fit Within Any of the Prescribed Exceptions.

1. Since the structure at issue is an enormous elevated Platform Structure, and not merely a retaining wall, it is readily apparent that DCRA’s decision to issue Permit No. B460927 violated 11 DCMR § 2503. That section, entitled “Structures in Required Open Spaces,” prohibits the erection of any “structure” in any part of a required yard unless the structure fits within one of the exceptions specified in subsections 2503.2 through 2503.5.

2. Subsection 2503.1 states: “Except for the structures and exceptions specified in this section, every part of a yard required under this title shall be open and unobstructed to the sky from the ground up.”

3. The exceptions to Section 2503’s general prohibition, as spelled out in subsection 2503.2 through 2503.5, are limited, in relevant part, to the following:

- a. “A structure, not including a building[,], no part of which is more than four feet (4 ft.) above the grade at any point. . . .”^{11/}

^{10/} The case from Wisconsin on which the Owners heavily rely is not relevant here. In that case, *Wigler v. Dodge County Planning and Development Dept.*, 599 N.W. 2d 666 (Wisc. App. 1999) (BZA Ex. 31 at Tab N) all the parties were in agreement that the structure in question (a wall that ranged in height “from four feet above grade at its tallest, to grade level at its shortest”) was a “retaining wall.” The only issue in that case was whether the wall also fit within an ordinance exempting “landscaping and vegetation” from certain rear yard requirements. That issue is irrelevant here because (1) the D.C. Zoning Code does not have any comparable provision, (2) all “retaining walls” are “structures” under the D.C. Zoning code, and (3) in any event, there is no similarity at all between the small retaining wall in that case and the huge Platform Structure here.

^{11/} As Appellant explained and documented in his submission concerning the legislative history of Section 2503 and the corresponding revision to the definition of “yard” (BZA Ex. 48), the provision of the Zoning Code that is now codified as § 2503.2 had a comma after the word “building” both when it was originally enacted in 1977 and when it was published in the 1982 edition of the Code. (*See id.* at 3 note 9.) There have been no substantive amendments to this provision since 1982, and therefore the provision should be read as if the comma were still present. (*See id.*) The comma sets off the phrase “not including a building,” thus emphasizing

- b. “A fence or retaining wall constructed in accordance with the D.C. Building Code. . . .”

4. The general prohibition against structures in a required yard is underscored and reiterated in the Zoning Code’s definition of the term “Yard,” which states (in part) that “A yard required by the provisions of this title shall be open to the sky from the ground up, and shall not be occupied by any building or structure, except as specifically provided in this title.” 11 DCMR § 199.1.

5. The Zoning Code explicitly requires that “a rear yard be provided for each structure located in a Residence District” and that the “minimum depth” of such rear yard be twenty-five (25) feet for lots, like the Subject Property, that are classified R-1-A. 11 DCMR § 404.1.

6. The Zoning Code defines the term “rear yard” as “a yard between the rear line of a building or other structure and the rear lot line, except as provided elsewhere in this title.” 11 DCMR § 199.1. The definition further states that “The rear yard shall be for the full width of the lot and shall be unoccupied, except as specifically authorized in this title.” *Id.*

7. Because a building (i.e., the single family dwelling) is located on the Subject Property, a rear yard with a minimum depth of twenty-five (25) feet must be provided on the Subject Property.

8. There is no doubt that at least a very substantial portion of the Platform Structure is located in the required rear yard of the Subject Property, and that this causes a very substantial portion of the required rear yard of the Subject Property not to “be open to the sky from the ground up.”^{12/}

9. The Platform Structure does not fit within any of the categories of specially excepted structures that may be constructed in a required yard.

that § 2503.2’s narrow exception for structures in required yards does not include either any structure that is a building or any structure that projects more than four feet above the grade at any point.

^{12/} This is true regardless of which of three competing methodologies offered by the parties for measuring and mapping the location of a required rear yard is utilized. Those competing methodologies are discussed in greater detail below in Section C.6 of these Proposed Conclusions of Law.

10. In particular, the Platform Structure does not fall within subsection 2503.2, which states 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.”

- a. The DCRA has not sought to rely on this exception as a basis for its permitting decision.
- b. This exception is, in any event, inapplicable here because many — indeed, most — parts of the Platform Structure are more than four feet (4 ft.) “above the grade.” Under subsection 2503.2, height “above the grade at any point” is measured from the top of the structure at the point in question to a second point that is directly below the first point and at the level where the surface of the ground was prior to construction. (*See* BZA Ex. 48, at Tab A (drawings depicting method for measuring height of structures in a required yard))
- c. The parts of the Platform Structure that exceed the four-feet-above-grade limitation include, among others, most parts of the structure’s upper surface, most parts of the Mesa block exterior walls, most of the geogrid sheeting, and many parts of its multiple layers of compacted earth.

11. Likewise, the Platform Structure does not fit within subsection 2503.3, which states that “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.”

- a. The DCRA and the Owners assert that the structure that has been authorized and constructed fits within this exception on the theory that it is nothing more than a “retaining wall,” but that is plainly wrong.^{13/}
- b. As discussed above, the structure at issue here is not a “retaining wall,” or at least the great bulk of it is not a retaining wall. Any other conclusion would erroneously and unreasonably ignore the facts that (1) the purpose of the structure is to create a level platform/terrace; (2) the structure has been fabricated from a combination of materials, only one of which is the Mesa blocks on which DCRA myopically focused; (3) by any measure, the great bulk of the structure is the material that makes up the platform/terrace and that supports the platform/terrace from below; and (4) the Mesa block walls are essentially a façade or veneer and

^{13/} Subsequent sections of these Proposed Conclusions of Law address the separate question of whether, even if the structure at issue were assumed to be just retaining walls, it nonetheless falls outside the scope of subsection 2503.3, and therefore violates the Zoning Code, because it has not been constructed in accordance with the D.C. Building Code. *See infra* Section F (addressing the excessive height of the wall) and Section H (addressing failure to comply with special restrictions for “party walls”).

play only a relatively minor role in the structure's make-up and stability.

C. The Platform Structure Violates the Zoning Code's Prohibition Against Any Structure Occupying in Excess of Fifty Percent of a Required Yard.

1. Even if (contrary to the foregoing conclusions) the Platform Structure did fit within one of the exceptions to the general ban on structures in a required yard, it still violates the Zoning Code because it occupies more than fifty percent of the Subject Property's required rear yard, in contravention of the last sentence of the Zoning Code's definition of "Yard," 11 DCMR § 199.1.

2. The Code's definition of "Yard" states, without providing for any exceptions, that "No building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title." *Id.*

3. DCRA determined that the 50% prohibition had no bearing on its permitting decision here because of its conclusion that the structure would consist of nothing more than just the Mesa blocks stacked up to form the structure's exterior walls. But that conclusion was wrong, for reasons discussed above, because the structure consists of much more than just its Mesa block façade.

4. When the Structure is viewed for what it really is — an enormous, quarter-acre, elevated platform or terrace supported by thousands of cubic yards of imported, compacted fill dirt and thousands of square feet of geogrid sheeting, it is obvious that the Structure occupies a very substantial portion of the rear yard of the property.

5. In order to ascertain what portion of the required rear yard is occupied by the Platform Structure, it of course is necessary to determine both the area and the location of the required rear yard. During the proceedings in this case, the parties presented and discussed three alternative methodologies for doing this in circumstances, such as the present case. (*See* 5/24/05 Tr. at 256-59; App. Reb. Ex. C-4.) For purposes of deciding this Appeal, we will decide which of these methodologies is most consistent with the Zoning Code. *It is important to note, however, that no matter which of the three competing methodologies is used to define the location of the required rear yard, the Platform Structure occupies more than 50% of that yard and therefore violates 11 DCMR 199.1.*

6. The three competing methodologies for defining the area and location of a property's required rear yard that were identified during the proceedings in this case are as follows:

- a. DCRA's former Zoning Administrator, Toye Bello, asserted that the required rear yard is a strip of land that (a) is parallel to the rear lot line, (b) has a depth that is equal to the minimum depth for a rear yard as specified in 11 DCMR 404.1 (25

feet for lots zoned R-1-A), (c) is bordered on the end nearest to the front of the property by an imaginary line that intersects with the point of the dwelling building that is closest to the rear lot line, and (d) extends for the full width of the property, from one side lot line to the other. (4/5/05 Tr. at 86, 94-95; BZA Ex. 62.)^{14/} Appellant refers to this method as the “Bello Method.” DCRA did not offer any authority or precedent to support this methodology. Under this method, the location of a required rear yard is not fixed on a property, but will migrate over time, such as when property owners either add or subtract elements on the rear of a building or other structure.

- b. Another possible methodology is to define the location of the required rear yard as a strip of land that includes all of the area covered by the Bello method plus all additional portions of the lot (if any) that are between the Bello area and rear lot line. Appellant refers to this method as the “Whole Yard Method.”^{15/} Although no authorities or precedent have been offered by any of the parties to support this methodology, it appears to be more consistent with the language and intent of the Zoning Code than the so-called “Bello Method.” In particular, the “Whole Yard Method” has the clear advantage of ensuring that the rear lot line is always one of the boundaries of the required rear yard. This is more consistent with the Zoning Code’s definitions of “Yard, rear” and “Yard, rear, depth of,” both of which treat the “rear lot line” as an immutable boundary of any “rear yard.” This is also more consistent with one of the most important objectives of zoning setbacks, which is to limit the extent to which one property owner may erect buildings and structures that abut, and tower over, immediately adjacent properties.
- c. A third possible methodology is to define the location of the “required rear yard” as a strip of land that is (a) bounded at one end by the rear property line, (b) has a depth that is equal to the minimum depth for a rear yard as specified in 11 DCMR 404.1 (25 feet for lots zoned R-1-A), and (c) extends for the full width of the property, from one side lot line to the other. Appellant refers to this method as the “Code Method.”^{16/} This method incorporates the advantages of the “Whole Yard Method,” and has the further advantage of ensuring that a property’s “required rear yard” has a consistent and unchanging location, rather than migrating from

^{14/} Graphic representations of the “Bello Method,” as applied to the Subject Property, are reflected in BZA Ex. 62 (Bello drawing) and App. Reb. Ex. C-4 (strip designated by purple bracket and label).

^{15/} A graphic representation of the “Whole Yard Method,” as applied to the Subject Property, is reflected in App. Reb. Ex. C-4 (strip designated by orange bracket and label).

^{16/} A graphic representation of the “Code Method,” as applied to the Subject Property, is reflected in App. Reb. Ex. C-4 (strip designated by black bracket and label).

time to time as a property owner either adds or subtracts rooms or other elements at the rear of a dwelling (as can occur under both the “Bello” and “Whole Yard” methods).

7. After reviewing the competing methods for defining the “required rear yard,” it is the opinion of the Board that the most appropriate method is the one dubbed the “Code Method.” This interpretation of a “required rear yard” comports with common sense and our precedents. Appellant has provided the Board with several decisions in which this method has been used in the past both by this Board and the D.C. Court of Appeals. (App. Reb. Exs. D-1 through D-6.)^{17/} We further note that the central purpose of the 1977 amendments to the Zoning Code, which introduced the fifty-percent yard occupancy limitation, was to protect neighboring properties from encroachments. Those amendments were spurred by previous interpretations of the Code permitting, especially in steeply sloped areas like the Wesley Heights neighborhood, relatively tall structures extending all the way to the property line because of an anomalous interpretation of “grade.” (See BZA Ex. 47 (Legislative History) at 2.) The Code’s drafters intended to prevent future property owners from suffering the placement of ponderous structures, like the Platform Structure, directly across from their property lines. Taking those precedents into account, as well as the reasons set forth in the preceding discussion, the Board concludes that this third method, which is the one advocated by Appellant, is most consistent with the letter and spirit of the Zoning Code.

^{17/} See *Application No. 17188 of Deborah Miles*, Sept. 9, 2004 at p.2 (calculating occupancy of “required rear yard” with reference to 20-foot wide area of rear yard *closest to the rear lot line*, rather than the corresponding—and mostly open—area of the rear yard closest to the back of the dwelling); *Davidson v. Bd. of Zoning Adjustment*, 617 A.2d 977 (D.C. App. 1992) (stating that in R-1-A Zone District, dwellings “must be set back twenty-five feet *from the rear property line*,” confirming that a “required” rear yard is measured from the rear property line) (emphasis added); *Application No. 15718 of Donald and Carol Borut*, Jul. 15, 1992 at p.2 (describing a 14.5-foot-deep rear deck that would result in a rear yard that would be 22.05 deep as “*extend[ing] beyond the new addition and into the required rear yard*” by 2.95 feet, thus recognizing that the 25-foot required rear yard is measured from the rear lot line) (emphasis added); *Application No. 14549 of Charles M. and Judith L. Kupperman*, Jan. 28, 1987, at p.2 (finding that a proposed addition that “will extend 15 feet into the rear yard” will not “encroach upon a *required* rear yard,” thus conceiving of the required rear yard as being measured from the rear lot line) (emphasis added); *Application No. 13224 of Buchanan Street Limited Partnership*, Jul. 2, 1980, at p.2 (finding that rear walls of certain dwellings “*encroached into the required rear yards*” by certain measured distances, necessarily indicating that the required rear yard is measured starting from the rear lot line, not starting from the rear of the building); *Application No. 12565 of Paul S. and Susan Au Allen*, Apr. 5, 1978, at p.2 (finding that pole supports at rear end and farthest from the house of partially constructed deck “are located 1.35 feet *into the required rear yard*,” necessarily indicating that the required rear yard is measured starting from the rear lot line) (emphasis added).

8. Taking into account all of its components, as we must, it is readily apparent that the Platform Structure covers and occupies far greater than half of the required rear yard. Employing the methodology that we deem to be correct, the required rear yard of the Subject Property comprises all portions of the lot that are within 25 feet of the rear lot line — an area totaling approximately 5813 square feet. (App. Reb. Ex. C-4.) The Platform Structure appears to cover and occupy approximately 5498 square feet of that area; the only significant portion of the required yard that is not so occupied is the small triangle in the lot's northwest corner that is not covered by the structure. (App. Reb. Ex. C-7.) This amounts to an occupancy of more than ninety-four percent (94%). This occupancy involves the most massive and most elevated portions of the Platform Structure, including surface areas of the elevated terrace that are more than thirty-feet above existing grade. Nearly all of this occupancy is accounted for by portions of the Platform Structure that include multiple layers of geogrid reinforcement sheeting.^{18/} (See BZA Ex. 88; App. Reb. Ex. C-1.)

9. As noted above, even if we were to utilize one of the other alternative methods for defining the location and area of the required rear yard, we would still conclude that the Platform Structure violates the fifty percent yard occupancy limitation.

- a. Specifically, Appellant has demonstrated that 94.4% of the required rear yard, as it would be defined under the Bello Method, is occupied by portions of the Platform Structure whose elevated surface is at least two (2) feet above pre-construction grade, and 63.5% is occupied by portions that are at least six (6) feet above pre-construction grade. (See BZA Ex. 88 (App. Reb. Ex. C-6 & C-7).)
- b. Similarly, Appellant has demonstrated that 94.9% of the required rear yard, as it would be defined under the "Whole Yard Method" is occupied by portions of the Platform Structure whose elevated surface is at least two (2) feet above pre-construction grade, and 82.1% is occupied by portions that are at least six (6) feet above pre-construction grade. (See BZA Ex. 88 (App. Reb. Ex. C-6 & C-7).)

10. It therefore is clear that DCRA's decision to issue Building Permit No. B460927 violated the Zoning Code's prohibition against structures that occupy more than fifty percent (50%) of a required yard.

^{18/} The footprint occupied by the mass consisting of the stacked Mesa blocks, the geogrid layers, and the highly compacted fill material between those layers occupies 86.7% of this required yard. (See App. Reb. Ex. C-5.)

D. DCRA Further Erred in Failing to Consider the Wesley Heights Overlay in Its Zoning Analysis and in Failing to Recognize that the Platform Structure Would Violate the Core Purposes of the Wesley Heights Overlay.

1. Although it is undisputed that the Subject Property lies within the Wesley Heights Overlay District (“WHOD”), DCRA inexplicably failed, both as a matter of form and as a matter of substance, even to consider whether issuance of Building Permit No. B460927 would be in conformity with the provisions of the overlay, 11 DCMR §§ 1541-1543, which are among the most restrictive in all of the District.

2. The Zoning Code explicitly provides that the purposes of the WHOD are to “preserve the current density of the neighborhood,” 11 DCMR § 1541.3(a), and “to preserve existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood,” *id.*, 1541.3(c).

3. The Board recognizes that there may be instances in which a proposed structure is so obviously and totally inconsistent with an explicit policy goal that a decision to approve the structure amounts to a violation of the Zoning Code. This is such a case.

4. There is more than enough evidence in the record to persuade the Board that allowing owners of sloped properties in Wesley Heights to create massive terraces atop the slopes would be totally antithetical to the policy objective of “preserv[ing] the current density of the neighborhood.” Just the single Platform Structure at issue in this case, by itself, has effectuated a drastic change in the density of structures in the vicinity of Wesley Heights Park. Whereas this area previously had an extremely open feel, it now is starkly closed in — like a canyon — as a result of the looming Structure. If every property owner in Wesley Heights were permitted to build a similar structure — which would be the message if DCRA’s decision in this case were left standing — then the same drastic increase in structural density could be imposed in every part of the WHOD.

5. The Board likewise is persuaded that allowing structures such as this one to be erected in Wesley Heights would be antithetical to the purpose of “preserv[ing] existing trees.” The record contains abundant evidence that the construction of this massive Platform Structure involved the destruction of a large number of mature trees, and that its continued existence would both prevent the growth of any substantial trees to replace those that were destroyed and harm the surrounding environment in ways that are likely to kill and stunt trees on neighboring land. (App. Ex. 29, 43, 44, 49, 50; BZA Ex. 52; 3/15/05 Tr. at 214-15.)

6. The Board also concludes that allowing structures like this to be erected in Wesley Heights would be antithetical to the objective of “preserv[ing] . . . access to air and light” in the surrounding neighborhood. Because of its extraordinary height, size and mass, as well as its location directly next to — and looming over Wesley Heights Park and the neighboring Tate property, the detrimental impact of the Platform Structure in destroying “access to air and light” is extremely great. (3/10/15 Tr. at 216-17.)

7. Finally, the Board is also convinced that the Platform Structure is so completely out of keeping with its natural, wooded, park-like surroundings as to be totally at odds with the

WHOD's purpose of "preserv[ing] . . . the harmonious design and attractive appearance of the neighborhood. (*See, e.g.,* BZA Ex. 33 (Palisades Citizens Association letter) at 1 ("This is the very sort of abusive construction the Wesley Heights Overlay was designed to prevent."); BZA Ex. 37 (Gray letter, at 1) (the structure is "an eyesore"); BZA Ex. 39 (Tate letter, at 1) ("This mammoth . . . masonry block structure [has a] looming presence [that] continually and significantly diminish[es] our enjoyment of our home").)

8. ANC 3D has strongly supported Appellant's challenge to DCRA's decision based on this ground, and it is incumbent upon this Board to accord "great weight" to that view. (*See* above at 14 ¶ 56.)

9. For all of these reasons, the Board concludes that DCRA's issuance of Building Permit No. B460927 was erroneous on the additional ground that the Platform Structure, as proposed, was totally contrary to the core objectives of the WHOD.

E. The Platform Structure Is So Large That It Violates the Wesley Heights Overlay District's Thirty Percent Lot Occupancy Limitation.

10. In its focus on the low density, park-like character of the Wesley Heights neighborhood, the WHOD generally mandates (subject to limited exceptions not applicable here) that "[n]o structure, including accessory buildings, shall occupy an area in excess of thirty percent (30%) of the lot." 11 DCMR § 1543.2.

11. Because the total area of the Subject Property is 25,811 square feet, subsection 1543.2 prohibits any "structure" on the Subject Property from occupying an area in excess of 7744 square feet.

12. The area that is in fact occupied by the Platform Structure — 14,975 square feet — occupies nearly fifty-eight percent (58%) of the Subject Property, nearly double the maximum allowable occupancy. (*See* BZA Ex. 89 (at Carome Reb. Ex. C-7).)

13. DCRA contends that the Wesley Heights Overlay is irrelevant to this Appeal because the Wesley Heights Overlay applies only to buildings and not to structures. (*See* Transcript of 4/5/05 Hearing at 87, 97-102, 216.) The Board rejects this interpretation because it conflicts with the plain language of § 1543.2, which explicitly uses the term "no structure," not "no building," in setting forth the lot occupancy prohibition. If the drafters wished to limit the Overlay's restrictions to "buildings," they could have done so, but they opted for broader application.

14. ANC 3D has strongly supported Appellant's challenge to DCRA's decision based on this ground, and it is incumbent upon this Board to accord "great weight" to that view. *See* above at 14 ¶ 56.

15. For the foregoing reasons, the Board concludes as a matter of law that DCRA's issuance of Building Permit No. B460927 was erroneous on the ground that the Platform Structure, as proposed, violates the WHOD's prohibition on "structures" that occupy an area in excess of the thirty percent of the lot.

F. Even If the Structure at Issue Were Nothing More Than a Mesa Block “Retaining Wall,” It Still Would Not Be Permitted Under Section 2503.3 Because It Violates the Building Code’s Seven Foot Height Limitation on Fences and Fence Walls.

1. Even if this Board were to accept DCRA’s premise that the Structure here is just a Mesa block “retaining wall,” that would not end the inquiry into whether the “retaining wall” is a structure that may be built in a required rear yard. This is so because the exception on which DCRA has relied, 11 DCRM § 2503.3, does not encompass all “fence[s]” and “retaining wall[s].” To the contrary, the exception has an explicit limitation: it applies only to “[a] fence or retaining wall *constructed in accordance with the D.C. Building Code.*” *Id.* (emphasis added).

2. Although a structure’s compliance with the Building Code ordinarily is outside the purview of the Zoning Code, subsection 2503.3’s cross-reference to the Building Code requires the Zoning Administrator to determine whether a proposed fence or retaining wall will be “constructed in accordance with the D.C. Building Code” before deciding that the structure fits within the subsection 2503.3 exception. To conclude otherwise, as former Zoning Administrator Bello urged the board during his testimony, would drain all meaning from those eight words of the Zoning Code, in violation of one of the most basic canons of statutory construction. *Thomas v. Dist. of Columbia Dep’t of Employment Servs.*, 547 A.2d 1034, 1037 (D.C. 1988) (“A basic principle is that each provision of the statute should be construed so as to give effect to all of the statute’s provisions, not rendering any provision superfluous.”); *Veney v. United States*, 681 A.2d 428, 433 (D.C. 1996) (en banc) (same).

3. The drafting history of Section 2503 indicates that the authors of this new rule intended for the phrase “constructed in accordance with the D.C. Building Code” to incorporate restrictions from the Building Code, and that the restriction that was foremost in the authors’ minds was the Building Code’s height limitations on fences and walls. (*See* Memorandum from B. W. Gilbert, Director, Municipal Planning Office, to D.C. Zoning Commission (Sept. 1, 1976) at 4; *see also* BZA Ex. 48 (App. Submission re: Legislative History of 1977 Zoning Amendments) at 3.)

4. This Board’s reasoning in one of its previous cases recognized that subsection 2503.3’s cross-reference to the Building Code means that a violation of the Building Code with respect to retaining walls or fences in required yards are also violations of the Zoning Code within the purview of this Board. *See Decision of the BZA in Appeal of David J. Grinstead* at 16-17.

5. The Building Code bars fences and fence walls in excess of 7 feet in height within 10 feet of lot lines or in a required yard. 12 DCMR §§ 3110.3.3, 3110.3.4.

6. The Building Code does not provide any definitions for the terms “fence” or “fence wall.” *Webster’s Unabridged Dictionary*, however, provides useful guidance. It defines “fence” as “a barrier intended . . . to mark a boundary” and it defines “wall” as “a masonry fence around a garden, park, or estate.” *Id.*

7. If DCRA is correct that the Structure at Issue should be deemed to be nothing more than just Mesa blocks stacked up around the perimeter of the rear yard, then the resulting structure must also be deemed to be, in addition to a “retaining wall,” a “fence” or “fence wall” within the meaning of the D.C. Building Code. This is so because the Mesa block wall, viewed in isolation, has the essential qualities of a “fence” and a “fence wall.” These include the facts that

- a. It traces the perimeter of the rear yard of a property, as fences typically do;
- b. It encloses a private area on a property, as fences typically do;
- c. It establishes a barrier to entry of a property, as fences typically do;
- d. It is a masonry structure that encircles an estate.

8. Nearly all of the nearly 400 feet of Mesa block wall that has been erected around the Subject Property’s rear yard was designed to be located within approximately one foot (1 ft.) of the property’s rear and side property lines. (App. Exs. 23, 24.) Accordingly, nearly all of the wall is subject to the Building Code’s seven foot height limitation.

9. Most of the Mesa block wall extends to a height of substantially more than seven feet, as measured from the preconstruction grade on either side of the wall. Significant portions of the wall extend to a height of more than 30 feet. And the Owners intend to add another six feet of fencing atop the structure, bringing its overall peak height to more than 36 feet — more than five times the allowable limit.

10. The Owners contend that the height of the wall is of zero height because, they assert, the height of a fence or fence wall is to be measured from the level of the grade at the front of the dwelling, which in this instance is higher than the top of the wall due to the overall slope of the property. (*See, e.g.*, 5/10/05 Tr. at 288-89.) But this argument is refuted by the express language of the Building Code, which unambiguously states that the height of a fence or fence wall must be measured from “the top of the fence to grade, on the side of the fence where grade level is higher,” 12 DCMR § 3110.1.3. The Owners argument also flies in the face of the core purpose of the 1977 amendments to the Zoning Code — including Section 2503.3 and the new definition of yard — a chief purpose of which was to introduce a requirement of measuring the height of structures in yards from the level of grade as it existed in the yard before construction, rather than from some higher level closer to the front of the property.

11. Other zoning authorities have found no trouble applying height limitations on fences to ostensible retaining walls. For example, in *Adler v. Craft*, A-1-03T5 (N.J. Super. Ct. App. Div. Sept. 22, 2004), a New Jersey appellate court addressed the scope of a municipal code provision mandating that “fences or walls shall not exceed seven feet in height,” but which did not expressly limit the height of retaining walls. *Id.* at 4. Like the Owners here, the property owners in *Adler* wanted to “create a more level, usable landscape” in their steeply sloped rear yard, so they built a wall and then backfilled behind the wall. *Id.* The resulting wall was 16 feet above pre-construction grade, and the property owners sought to exempt the wall from zoning height limitations because it was a “retaining wall.” *Id.* at 8. Conceding that the municipal code governing wall heights did not explicitly apply to retaining walls, the court in *Adler* nevertheless

applied the height limitation to the wall at issue in that case. As explained by the court, “the overall purpose of [the] fence ordinance is to protect adjoining property owners from the impact of massive, ponderous structures” and it would defeat that overall purpose to permit property owners to evade these regulations by building walls of any height, filling in behind them, and calling them “retaining walls.” *Id.* at 12.

12. Similarly, in *Ranson v. City of Charleston*, 496 S.E.2d 191 (W. Va. 1997), West Virginia’s highest court upheld application of a fence ordinance to a purported “retaining wall,” despite the fact the regulation in that case *explicitly exempted retaining walls*. *Id.* at 194. The court noted that the wall was not a “typical” retaining wall in that the property owners first built the wall, then filled in behind it to create a level yard. *Id.* In upholding the zoning board’s application of the fence ordinance to the purported retaining wall, the court credited the board’s argument that any other ruling would permit property owners to build “walls of any height” and simply place “fill dirt against them.” *Id.*

13. The position of DCRA and the Owners, which is that there is nothing in either the Zoning Code or the Building Code that prevents a property owner from building a wall of *unlimited height* immediately next to his or her neighbor’s property, at least so long as the owner fills in behind the wall with imported fill dirt, would produce absurd results and would put property owners in many areas of this City at great risk of harmful development.^{19/}

14. ANC 3D has strongly supported Appellant’s challenge to DCRA’s decision based on this ground, and it is incumbent upon this Board to accord “great weight” to that view. *See above* at 14 ¶ 56.

15. For the foregoing reasons, the Board concludes as a matter of law that DCRA erred in relying on 11 DCMR § 2503.3 as a basis for Building Permit No. B460927 because, even if the Structure were just a “retaining wall,” it exceeds the applicable height limitation specified in the Building Code and therefore cannot be characterized as “constructed in accordance with the D.C. Building Code.”

^{19/} The property owners presented scores of photos of retaining walls of various heights, apparently located near the subject property. The vast majority of these walls, however, were placed against preexisting earth, *e.g.*, after a driveway had been cut or a garden terraced. These walls are all *below grade* and are fully in compliance with the Building Code’s height limitations. The height limitations only come into play in the context of retaining walls in cases like *Adler* and *Ransom* and the present Appeal: where property owners build walls 7-feet above current grade and place foreign fill behind them. These situations are rare, of course, but they are also violative of the Zoning Code’s requirement that “retaining walls” in a required yard be “built in accordance with the D.C. Building Code.”

G. DCRA Erroneously Failed to Require that a Rear Yard and Side Yards Be Provided for the Platform Structure.

1. Because the Platform Structure is not subject to any provision of the Zoning Code that permits it to be located in a required yard, it automatically follows that the Platform Structure would have to have its own rear yard and side yards of minimum depth and width, respectively.

2. In Zone District R-1-A, a rear yard having a minimum depth of 25 feet “shall be provided *for each structure*.” 11 DCMR § 404.1. Absent dispensation under one of the exceptions to 11 DCMR § 2503, this requirement must be satisfied for “each structure” in a Residence District.^{20/}

3. As shown above, the Platform Structure is not subject to any of the exceptions to Section 2503. Therefore, it must have its own rear yard, completely open to the sky from the ground up, that is at least 25 feet deep and is for the full width of the lot. *See* 11 DCMR § 199.1 (definition of “Yard, rear”).

4. In Zone District R-1-A, a side yard having a minimum width of 8 feet is required. 11 DCMR § 405.9. Because the definition of “Yard, side” refers to open areas next to both “buildings” and “structures,” it is evident that, in general, a side yard of this width must be provided for each “structure.” *Id.* § 199.1 (definition of “Yard, side”). Again, the only dispensation from this requirement is for structures that fit within one of the exceptions to 11 DCMR § 2503.

5. Because no such exception is applicable, the Platform Structure must have its own side yards, completely open to the sky from the ground up (*see* 11 DCMR § 2503), that are each at least 8 feet wide and that lie between the Platform Structure and each of the side lot lines (*see* 11 DCMR § 199.1 (definition of “Yard, side”).)

6. In fact, any open area between the outer façade of the Platform Structure and the rear and side property lines is generally less than one (1) foot deep. As a result, DCRA’s issuance of the Permit, and the Owners’ erection of the Platform Structure, each constituted a violations of 11 DCMR §§ 404.1 & 405.9.

7. ANC 3D has strongly supported Appellant’s challenge to DCRA’s decision based on this ground, and it is incumbent upon this Board to accord “great weight” to that view. (*See* above at 14 ¶ 56.)

^{20/} Under the “Code Method” for measuring required rear yards, which we endorse, it would appear that the same required rear yard could serve as the required yard for all structures on a lot. In contrast, use of the “Bello Method” would appear to require a separate rear yard for each separate structure.

8. For all these reason, the Board concludes that DCRA's issuance of Building Permit No. 460927 was erroneous on the additional ground that its actions violated 11 DCMR §§ 404 and 405.

H. DCRA Violated the Zoning Code by Issuing the Permit in the Face of Clear Evidence that the Structure, If Built as Designed, Would Encroach onto Neighboring Property.

1. As discussed above, the National Park Service has demonstrated that portions of the foundation of the Platform Structure actually project onto park property. (BZA Ex. 69 at 3.) As has also been discussed, this encroachment is consistent with, and could have been predicted from, careful consideration of the application and associated documents that were in the possession of DCRA before the Permit was issued. (*Id.*; 5/10/05 Tr. at 503.)

2. DCRA has conceded that it lacks "any legal authority to issue a permit to anyone to build or construct on federal parkland." (4/5/05 Tr. at 197-98). Furthermore, the Zoning Administrator and this Board are compelled by 11 DCMR 101.1 to interpret and apply the Zoning Code in a manner that protects property, civic activity, and recreational, educational, and cultural opportunities. Parkland contains all of the above attributes.

3. In this case, DCRA had or should have had information in front of it that indicated that the footings of the Platform Structure, as designed, would project across property lines, yet nevertheless it issued the Permit. (*See above* at 11-13.)

4. In light of the foregoing, the Board concludes that DCRA was, as a matter of zoning compliance, obligated to review the permit application with an eye toward determining whether the Platform Structure was designed so as to encroach onto parkland. Because DCRA failed to make this determination, it issued the permit arbitrarily and in violation of District of Columbia law.

5. The Board further concludes that in these circumstances it violated the Zoning Code for DCRA to rely on 11 DCMR § 2503.3 as a basis for allowing the Platform Structure to be erected in a required yard.

- a. As noted above, if DCRA were correct that the structure can be looked at as nothing more than its Mesa block walls and that it may therefore be conceived of as merely a "retaining wall," then it also must be viewed as a "fence" or "fence wall." (*See above* at Part F.)
- b. Under the Building Code, a fence or fence wall is a "party fence," and therefore subject to additional special restrictions, if any portion of it, "*including footings, . . . are partly on each side of a party line.*" 12 DCMR § 3110.2 (emphasis added).
- c. As facts described above make clear, portions of the leveling pad — which the Owners' own witness and plan document refer to as "footing" or "footer" — are partly on the Wesley Heights Park side of the Subject Property's rear lot line. (*See above* at 11-13) The structure that has been permitted, therefore, is a "party fence." 12 DCMR § 3110.2, DCRA had or should have had sufficient

information before it to know this when it issued the Permit, yet it inexplicably and erroneously failed to recognize this. (*See above.*)

- d. The special restrictions applicable to a “party fence” include the necessity of accompanying the permit application with a written agreement signed by the other property owner (*see* 12 DCMR 3110.2.2) and the limiting of fence materials to “wood, woven wire, or iron fence of open pattern unless otherwise agreed by the adjoining owners” (*see id.* § 3110.2.1). These restrictions were not complied with here.
- e. Because these restrictions imposed by the D.C. Building Code were not complied with here, the structure cannot qualify as a “retaining wall constructed in accordance with the D.C. Building Code” within the meaning of 11 DCMR § 2503.3.
- f. Accordingly, for this reason as well, DCRA had no lawful basis under the Zoning Code for permitting the structure to be erected in a required rear yard.

I. THIS BOARD HAS AUTHORITY IN THESE CIRCUMSTANCES NOT ONLY TO VACATE DCRA’S DECISION TO ISSUE THE PERMIT, BUT ALSO TO ORDER THAT THE PLATFORM STRUCTURE BE REMOVED.

1. This Board’s authority in resolving this Appeal is not limited to simply deciding whether or not the Building Permit was issued in accordance with the Zoning Code; the Board also has statutory and regulatory authority to “make any order that may be necessary to carry out its decision or authorization; *and to that end shall have all the powers of the officer or body from whom the appeal is taken.*” 11 DCMR 3100.4 (quoting Zoning Act, D.C. Official Code § 6-641.07(g)(4)) (emphasis added).

2. Because this Appeal was taken from a decision made in the name of the Director of the Department of Consumer and Regulatory Affairs (“DCRA”), this Board in deciding this appeal may, to the extent necessary to carry out its decision herein, exercise any and all of the powers of DCRA.

3. The powers of the DCRA with respect to a structure that has been erected in violation of the Zoning Code include the power to order the removal of the structure. The Building Code specifically provides: “If a . . . structure or part thereof is deemed to have been erected [or] constructed . . . in violation of the . . . Zoning Regulations, the Code Official [i.e., the Director of the DCRA^{21/}] is authorized to order the condition corrected within a specified

^{21/} The Director of DCRA is the “Code Official” referred to in this provision. *See* 12 DCMR § 103.1.

time frame deemed reasonable by the code official." CDCR 12A-113.7. The Board notes that former DCRA Zoning Administrator Bello recently exercised this authority in another case relating to the partially built antenna structure near Tenley Circle and Wisconsin Avenue, N.W.

4. Accordingly, in resolving this Appeal, this Board has the authority to Order the Owners, who are before this Board as parties, to correct the unlawful condition.

5. In this instance, for the reasons outlined above, "correct[ion]" of the violations of the Zoning Code requires, at a minimum, removal of the Platform Structure. Such removal would not prevent the Owners from seeking, subject to the normal permitting procedures, permission to replace the Platform Structure with a structure that conforms in all respects to applicable Zoning Provisions, including at a minimum the following: (a) ensuring that no portion of any platform structure that is more than four feet above original pre-construction grade is located in the required rear yard (i.e., within twenty-five feet of the rear property line) ; (b) ensuring that the structure does not cover more than fifty percent (50%) of the required rear yard or more than thirty percent (30%) of the lot; (c) ensuring that no portion of the structure that constitutes a fence or fence wall and that is within ten (10) feet of the side lot lines is more than seven (7) feet in height above pre-construction grade; and (d) ensuring that all portions of the structure (including leveling pad and footer) are located entirely on the Subject Property.

6. Due to the extreme and cumulative nature of the violations of the Zoning Code we have found in this Appeal, the Board concludes that this is an appropriate case in which to exercise its authority to order correction of the unlawful conditions through removal of the offending structure.

CONCLUSION

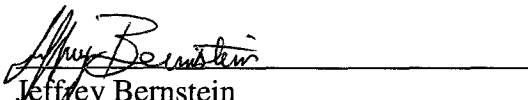
Any one of the above violations described above would be sufficient, by itself, to uphold this Appeal and reverse the Zoning Administrator's issuance of permit No. B460927. Taken together, they represent an enormous error on the part of DCRA and compel the conclusion that the Permit was in error, that the Platform Structure violates the Zoning Code, and that the Structure must be removed. Appellant, NPS and ANC-3D therefore respectfully requests that this Board adopt the foregoing Proposed Findings of Fact and Conclusions of Law and issue a decision and order that (1) declares Building Permit No. B460927 to be vacated and a nullity, (2) declares that the Platform Structure violates the Zoning Code, and (3) requires the Owners, within 120 days, to remove the Platform Structure and restore and remediate the rear yard of the Subject Property to its pre-construction slope and conditions.

Respectfully submitted,



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Dated: June 20, 2005



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