



HUNTON & WILLIAMS LLP
1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

RICHARD L. AGUGLIA
DIRECT DIAL: 202-955-1634
EMAIL: ragu@hilton.com

FILE NO: 66266.000002

April 3, 2006

By Hand Delivery

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

**BOARD OF ZONING ADJUSTMENT
District of Columbia**

CASE NO. 17285
EXHIBIT NO. 103

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

Dear Chairman Griffis and Board Members:

Pursuant to Section 3126 of the Zoning Regulations, on behalf of the property owners, we hereby request reconsideration of the Board's Order in this case dated March 24, 2006.

Section 3126

Section 3126.2 states that any party may file a motion for reconsideration (or rehearing) of any decision of the Board, provided the motion is filed with the Board/Office of Zoning within 10 days of the date of issuance. This request for rehearing is within the 10 day rule, noting that while the order was dated March 24, 2006, it was not mailed until March 27, 2006 and received by counsel for the property owners, a party to this case, on March 28, 2006.

Section 3126.4 states that a motion for reconsideration shall state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought. As described more specifically below, the Board's decision to grant the Appellant's appeal in this case, that is, to hold that DCRA erred in issuing Building Permit No. B460927 to construct a rear yard retaining wall in violation of certain maximum lot occupancy zoning regulations, is arbitrary and capricious and without substantial evidence. In fact, the evidence adduced at the hearings in this case overwhelmingly indicated that the wall in question was a retaining wall not subject to lot occupancy restrictions. As such, the relief sought is to deny the appeal of the Appellant.

Standard of Review

The courts will uphold the validity of the BZA's findings if they are supported by and in accordance with reliable, probative, and substantial evidence. *Lovendusky et al. v. DC BZA*

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et al., 852 A.2d 927 (DC 2004), citing *inter alia Georgetown Residents Alliance v. DC BZA*, 816 A.2d 41, 45 (DC 2003).

The courts must determine:

- (1) whether the agency made a finding of fact on each material contested issue of fact;
- (2) whether substantial evidence in the record supports each finding; and
- (3) whether the conclusions of law follow rationally from the findings.

Foggy Bottom Ass'n v. DC Zoning Comm., 639 A.2d 578, 584-85 (DC 1994).

**The Evidence Presented Does
Not Support the Board's Decision**

The Board's conclusion that the wall is not a retaining wall but an "artificially elevated platform structure" (Decision at 7) is not supported by the evidence. In fact, the evidence is overwhelmingly to the contrary, as follows:

**Admissions from Appellant's Own Experts and
Materials That the Wall Was a True Retaining Wall**

- (1) A letter dated February 18, 2005 from a professional engineer Peter Neubauer (engaged by Appellant), that the structure was a "rear yard retaining wall." BZA Exhibit No. 29 (Exh. Date 2/23/05 Letter from Patrick J. Carome with enclosed additional items of documentary evidence)
- (2) A letter dated February 16, 2005 and revised February 17, 2005, from a professional engineer, Allyn Kilsheimer (also engaged by Appellant) describing the wall as a "large geostructure type wall relying on earth characteristics and gravity for support in an acceptable boot straps approach." BZA Exhibit No. 24 (Exh. Date 2/17/05; Letter from Patrick J. Carome with enclosed additional items of documentary evidence)
- (3) A manual on mesa retaining wall systems (Exhibit 90 to Carome Appeal) which describes walls like the subject as a mesa retaining wall system, providing unsurpassed structural integrity. BZA Exh. No. 29.

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**NPS' So Called Expert Testimony
on the Wall Was Impeached**

NPS presented an engineer, Robert Pinciotti, whom the Board qualified as an expert for purposes of this case over objection of the property owners and DCRA. Mr. Pinciotti testified that the wall was not a retaining wall but a mechanical stabilized earth structure (MSE), like a dam. In reaching his conclusion, Mr. Pinciotti relied on the 1996 BOCA Code definition of a retaining wall. However, upon cross examination by the property owners' attorney, Mr. Pinciotti admitted that the 1996 BOCA Code was not in effect when the wall application was filed and permit issued in 2004, but the 2000 IBC Code was then in effect. He agreed that the IBC Code's definition of a retaining wall was one "designed to resist lateral soil loads" (§ 1610.1) but testified that he was instructed by NPS to define the wall solely in relation to the 1996 BOCA Code definition. As such, his testimony was impeached and must be given little or no weight.¹

¹ Mr. Aguglia: Let's go to the BOCA Code. What BOCA Code is now in effect in the District of Columbia? What BOCA Code?

Mr. Pinciotti: I do not know which BOCA Code is currently in effect. I --

Mr. Aguglia: You do not know?

Mr. Pinciotti: I went to the one that the Zoning Administrator went to, 1996.

Mr. Aguglia: But do you realize that's not the BOCA Code that's now in effect when this retaining wall was built? Do you know that?

Mr. Pinciotti: I do, yes.

Mr. Aguglia: It is not, correct?

Mr. Pinciotti: That's --

Mr. Aguglia: So you were submitting evidence about a BOCA Code that was not in effect?

Mr. Pinciotti: I was following the lead of the Zoning Administrator.

(continued...)

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Nevertheless, despite the fact that Mr. Pinciotti's testimony was impeached – indeed he even testified that he had no duty to tell the Board that he was relying on an outdated code as support for this testimony – the Board's sole factual predicate for its conclusions is his testimony. (Board's decision at 7, referring to the May 10, 2005 Transcript at 365, 457-459, 461 and 510-511).

**The Property Owners Presented Affidavits, Exhibits
and Testimony That the Wall Was a True Retaining Wall**

- (1) William Ryan, a D.C. certified engineer who designed the wall and some 50 to 60 other mesa block retaining walls, submitted an affidavit dated March 29, 2005, that the wall was a true retaining wall and not a fence or fence wall or part of a warehouse, platform or terrace as alleged by Mr. Carome. He also indicated that all mesa block retaining walls relied on a geogrid system (grids, properly compacted soil and gravel) for support and that all properly constructed retaining walls rely on some in ground reinforcing system for support. BZA Exhibit No. 55 (Exh. date 3/30/05; Letter from Richard Aguglia on behalf of the property owners in opposition with attachments)
- (2) Hugo Ardon, the stone mason who built the wall, testified and submitted an affidavit in support of the property owners that the wall was a true retaining wall. BZA Exhibit No. 31 (Exh. date 2/25/05; Letter from Richard Aguglia with enclosed opposition of property owners, attached as Exhibit I)
- (3) Counsel for the property owners submitted additional exhibits which indicated that mesa retaining walls are built with geogrids and gravel and that the design of any retaining wall must include some form of reinforcement. (BZA Exh. No.

Mr. Bernstein: The Zoning Administrator identified that as what the Zoning Administrator relied on, and he was responding to the Zoning Administrator.

Mr. Aguglia: Don't you think you have a duty as an expert to tell this Board that perhaps that was wrong and that's not the -- that is not the building code that was relied on in issuing this permit? You didn't have that duty to tell this Board?

Mr. Pinciotti: No.

(May 10, 2005 Transcript at 512-513.)

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31 at page 12). In addition, counsel for the property owners noted that the wall met both: (1) the dictionary definition of retaining wall (since the term is not specifically defined in the zoning regulations which then incorporate under §199.2 a dictionary definition from Webster's Third New International (Unabridged) Dictionary) to "resist lateral pressure" and (2) case law definition "to withstand lateral pressures of earth or other filling or backing deposited behind it after construction."

**The Zoning Administrator and DCRA's Own
Engineer Agreed the Wall Was a Retaining Wall**

- (1) Abdullah Barrow, a structural engineer employed by DCRA, submitted an affidavit on June 1, 2005 that the structure meets the definition for retaining wall in the various D.C. Building Codes and that the use of "imported" soil to backfill the project does not change its function to retain soil. BZA Exhibit No. 91 (Exh. date 6/1/05; amendment to DCRA's objection submitted by Lisa Bell, Esq.)
- (2) Then Zoning Administrator Toye Bello also testified against the appeal and that the retaining wall in question was a permitted exception to the lot occupancy limitations in the zoning regulations.

In fact, there is *no evidence of record by any expert* that the wall is anything but a retaining wall as defined under the D.C. Building Code and 2000 IBC. Thus, there is no basis for the Board to conclude that the retaining wall is a platform structure that is not permitted in the rear yard of the property.

**The Board's Decision Was Influenced
by Irrelevant and Now Moot Factors**

The Appellant's appeal was filled with highly inflammatory and irrelevant material that appears to have influenced the Board's decision in this case. However, now that the "dust has settled", it is clear that:

- (1) Another appeal against the size of the property owners' house as violative of certain zoning regulations was withdrawn;
- (2) Of the 1480 "so called" misdemeanor counts filed by the District of Columbia against one of the property owners for alleged violations of the building code not related to the retaining wall, the Government withdrew several hundred and

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the court dismissed over a thousand counts on February 28, 2006, leaving only 3 counts. The District of Columbia Government voluntarily dismissed the remaining three counts on March 16, 2006. It is our understanding that the government intends to refile only 103 of those counts and that counsel for the property owner will again move to dismiss those counts.

- (3) Appellant's essential theme throughout the course of the hearing was the size and appearance of the retaining wall. In this regard, we note that the wall is hidden from public view including the view from Appellant's home across the park for more than half the year by thick leaf growth on surrounding trees. (See attached pictures taken in the Fall of 2005.) In any event, the Board has stated on many occasions that questions of "adverse impact" cannot be considered in a zoning appeal, even if it is considered "monstrous looming". See, for example, BZA Appeal No. 17414. (Appeal of Jeffrey Schonberger)

The Appeal Was Not Timely

The Board's decision to deny the Motion to Dismiss is likewise not supported by the evidence. No exceptional circumstances existed that would allow the Caromes to file an appeal eight months, or 240 days, after issuance of the permit and well after the 60-day deadline. The Board's only reasoning is internally inconsistent and contradictory: on one hand the Board determined the Caromes *could* view the wall from their property such that they were aggrieved parties but on the other hand could *not* view the wall until the leaves fell from the trees in November so they could not file a timely appeal. See BZA Transcript, March 1, 2005 (Tr.), at 84 (leaves were not off trees until sometime in November). Logic would dictate that you can't be aggrieved for just three months of the year. Even so, Mrs. Carome was able to check DCRA's records in October 2004, *prior* to the leaves falling off the trees. Consequently, the obscuring vegetation had nothing to do with the Appellants' dilatory appeal and there was nothing to prevent them from checking DCRA's records earlier. Rather, as testified to by Mr. Ardon, the stone mason, the bulldozers generated significant noise to put anyone in the vicinity on notice that construction was taking place on the Economides property. Tr. at 101.

Indeed, the Carome household was on notice that construction had started in June because *they did, in fact, file noise complaints* between June and October of 2004 regarding the bulldozers operating at the Economides property. In a November 5, 2005 e-mail from Elsie Carome to Theresa Lewis, Juan Scott and David Clark at DCRA, Mrs. Carome states she called Inspector Lowery at DC Noise Control "to measure the sound of the two bulldozers working 7-7 six days a week from June – October." She also states that she had been in touch with Detective Critchfield of the National Park Service regarding the Economides retaining wall construction

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“over the past six months.” A copy of the email correspondence is attached. Thus, the Caromes were fully aware of the retaining wall construction activity at the Economides property from the beginning and should have reasonably known of the permit issuance at that time. Thus, the appropriate time to start the 60-day clock is with the issuance of the permit or, alternatively, when the bulldozers began making noise in June. There were no exceptional circumstances outside of the appellant’s control that impaired his ability to check DCRA’s records at that time and file an appeal to the Board. It was likewise disingenuous of the appellant to claim that he could not have reasonably known about the construction earlier.

Additionally, in extending the 60-day deadline, the Board failed to consider the second prong of the two-part test regarding prejudice to the parties under section 3112.2(d)(2). In its order, the Board recognizes the two part test, noting that in order to extend the 60-day deadline, the appellant must demonstrate that: (i) there are exceptional circumstances that are outside of the appellant’s control and could not have been reasonably anticipated that substantially impaired the appellant’s ability to file an appeal to the Board; and (ii) the extension of time will not prejudice the parties to the appeal. See BZA Order No. 17285, at 4 (emphasis added). Yet, neither the appellant nor the Board ever explained how the property owner was not prejudiced by the six- to eight-month extension.

In fact, the property owner was severely prejudiced by the delay – the retaining wall and re-grading activities were fully completed at least six weeks prior to the filing of the appeal. The building permit was issued on April 23, 2004, and construction did not begin for almost 60 days, the period in which an applicant knows that there is risk of an appeal. Because no appeal was filed, the Economides were entitled to repose confidence in building permit issued by the District. The purpose of time limits in filing appeals is a “salutary one. It provides a period after which the permittee knows that he may proceed safely in accordance with the permit.” *Waste Management of Maryland v. District of Columbia Bd. of Zoning Adjustment*, 774 A.2d 1117, 1122 (DC 2001). Had the appellant filed a timely appeal within 60 days of the permit issuance, or alternatively, within 60 days after the start of construction, the owners would have had the option to halt construction and mitigate their potential losses while the issues were resolved by the Board. However, as a result of the appellant’s inordinate delay in filing his appeal, the owners incurred substantial construction costs and thus were severely prejudiced by the Board’s extension of the filing deadline.

In adopting section 3112.2(d) of the Zoning Regulations, the Zoning Commission in effect incorporated the doctrine of laches into the regulations. Laches is an “[u]nreasonable delay in pursuing a right or claim -- almost always an equitable one -- in a way that prejudices the party against whom relief is sought.” *Black’s Law Dictionary*, (8th ed. 2004). Thus, while a delay may be found to be reasonable for jurisdictional purposes, it may nevertheless be barred by

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laches. *See Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 925, n.16 (DC 1980) (appeal which Board found timely for jurisdictional purposes was barred by laches). Just like section 3112.2(d)(2), “ ‘the principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself.’” *Id.* At 925 (internal citations omitted).

Here, even if the Board were correct in finding that the appellant did not have constructive knowledge in June of the retaining wall work by virtue of the bulldozer noise, it would nevertheless have to rule the appeal untimely on the basis of laches and prejudice to the permittee. To rule otherwise would contradict holdings of the D.C. Court of Appeals and previous Board decisions.

For example, in *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, the court held that a year’s delay in filing an appeal was not reasonable, where construction work on a hotel was commenced and substantially completed. Likewise, in BZA Order No. 15264, the Board dismissed an appeal on the basis of laches because had the city conducted its inspection earlier, the permittee could have curtailed his investments and activities before they became substantial and were completed. *See also* BZA Order No. 14110, July 24, 1984 (appeal dismissed based on laches where appellants waited five months to file appeal during which time the owner made expensive and permanent improvements on the property).

Thus, in light of the precedent cited above, extension of the appeal deadline in this case severely prejudices the Economides. The Economides made substantial and expensive improvements on the property in reliance on the affirmative actions of the District, and completed construction well before Mr. Carome bothered to file his appeal. Had Mr. Carome filed his appeal when bulldozer noise was clearly evident between June and October and so significant that his wife filed numerous complaints with the District and the Park Service, the prejudice to the Economides might have been lessened. However, by failing to act in a timely fashion, the appellant does not meet the second prong of the timeliness test under section 3112.2(d)(2) because of the severe and substantial prejudice to the Economides. Consequently, the Board should reconsider its decision and dismiss the appeal as untimely.



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CONCLUSION

For the reasons set forth herein, the Appeal should be denied or dismissed as untimely.

Respectfully submitted

Hunton & Williams LLP

By: Richard L. Agostino

Holland & Knight LLP

By: Carolyn Brown
by RLA

Copies by hand delivery to:

Patrick Carome, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
2445 M Street, NW
Washington, DC 20037

Jeffrey Bernstein, Esq.
U.S. Department of Interior
National Capital Region
1100 Ohio Drive, S.W.
Washington, DC 20242

David Rubenstein, Esq.
Deputy General Counsel
941 North Capitol Street, N.E.
Suite 9400
Washington, DC 20002



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Copies by Mail to:

Chairperson
Advisory Neighborhood Commission 3D
Post Office Box 40846
Palisades Station
Washington, DC 20016

Single Member District Commissioner 3D01
Advisory Neighborhood Commission 3D
Post Office Box 40846
Palisades Station
Washington, DC 20016

Bill Crews
Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, DC 20002

Councilmember Kathleen Patterson
Ward Three
1350 Pennsylvania Avenue, N.W.
Suite 107
Washington, DC 20004

Ellen McCarthy, Interim Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, DC 20002

Alan Bergstein, Esq.
Office of the Attorney General
441 4th Street, N.W., 7th Floor
Washington, DC 20001



Fall 2005 view of wall from park side AND street



FALL 2005 taken from REAR of subject property towards PARK



view from street towards wall (Fulton and 49th)



side view of wall

Scott, Juan (DCRA)

DCRA/H66C FOIA 4576
PUBLIC RECORDS

From: EEORR@aol.com
Sent: Friday, November 05, 2004 10:29 AM
To: theresa.lewis@dc.gov; juan.scott@dc.gov; davida.clark@dc.gov
Subject: 4825 DEXTER TERRACE

Dear Ms. Lewis, Mr. Scott & Mr. Clark:

The homeowners of Wesley Heights and the Palisades are thankful and 100% supportive of your efforts to hold Mr. Economides responsible for his actions both past and present. We of Fulton Foxhall 49th & Dexter St/Terrace, and the homeowners of Macomb Street in the Palisades have suffered two years of Mr. Economides blatant disregard for his neighbors, National Park land, the permitting processees, the DCRA and the DC Government in general.

It would benefit your case and it's prosecution immensely if you were to visit the Dexter Terrace Site, 4825 Dexter Terrace, and to walk into the park and view the Wall and it's construction. I would be happy to walk with you if you call ahead. Elsie Carome 202-966-5892.

In addition to contacting you I also made contact with:

– National Park Service, Detective Critchfield - over the past six months and two years ago when the trees were felled.

–DC Noise Control - Inspector Lowery was called to measure the sound of the two bulldozers working 7-7 six days a week from June - October. Unfortunately they weren't working at the time of his visit.

– DC Watershed - Please get the watershed people involved in this. They need to investigate the silt damage to the creek and to the collapsed drainpipe that runs under 49th Street.

In addition, these people are very anxious to talk to you, while you are preparing your case.

2002 - 2004 - MacArthur Blvd. Economides Construction Site - silt damage onto private property from worksite, etc.

MacArthur Blvd./Macomb Street Contacts:

Caroline Quandt
5320 Macomb Street NW
202-363-6388

Mike Leavech
5304 Macomb Street NW

As I have viewed the permit file in mid October and am aware of the timeline of construction and destruction as well. My neighbors and I would like to offer our full cooperation in providing any information necessary to help you build a strong case.

Please, please, do not let Mr. and Mrs. Economides get away with this anymore.

Sincerely, Elsie Carome eeorr@aol.com 202-966-5892 202-251-6993

DCRA-FOIA-00440

11/9/2004

**FRANK ECONOMIDES
4825 Dexter Terrace NW
Washington, DC 20016**

April 3, 2006

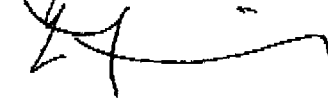
Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: BZA Appeal No. 17285

Dear Board Members:

I hereby authorize the law firm of Holland & Knight LLP to act as co-counsel with
Hunton and Williams in the above-referenced matter.

Very truly yours,



Frank Economides

cc: Richard Aguglia