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April 10, 2006

By Hand

Ms. Gerrily Kress
Director
District of Columbia Office of Zoning
441 4th Street, NW
Suite 200 South
Washington, DC 20001

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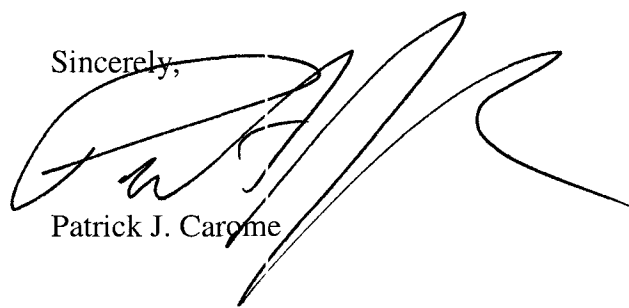
Re: BZA Appeal No., 17285

Dear Ms. Kress:

Enclosed for filing in the above-referenced appeal, please find the original and twenty copies of my Response to Property Owners Frank and Dina Economides' Request for Reconsideration filed on April 3, 2006.

Please contact me with any questions.

Sincerely,



Patrick J. Carome

Enclosure

cc: Richard L. Aguglia, Esq.
Lisa Bell, Esq.
Jeff Bernstein, Esq.

Alma Gates, ANC Chair
BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17285

EXHIBIT NO. 104

**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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**APPELLANT'S ANSWER IN OPPOSITION TO
OWNERS' REQUEST FOR RECONSIDERATION**

The Request for Reconsideration ("Request") filed by Property Owners Frank and Dina Economides (the "Owners") on April 3, 2006 is utterly meritless. The Board's March 24, 2006 ruling that the massive walled-platform structure at issue in this appeal violates multiple provisions of the Zoning Code is carefully reasoned and plainly is supported by substantial — indeed, overwhelming — evidence. The points that the Owners raise in their Request were all previously made during the five days of hearings and multiple rounds of written submissions that preceded the Board's decision, and after giving them due consideration the Board correctly rejected them. As further explained below, each of the Owners' points is without substance, and there is no basis at all for the Board to reconsider its decision.

The Board's Decision Is Well Reasoned and Supported by Overwhelming Evidence

The crux of the Board's decision in this case is actually quite simple and straightforward. It is the proposition that the structure that the DCRA purported to authorize as a mere "retaining wall around rear yard" (Building Permit No. B460927, App. Ex. 52), and that the Zoning Administrator analyzed as if it were nothing other than stacked cement blocks (4/5/05 Tr. at 160), is in fact an "amalgam" of different materials (Order at 7) that is "patently more than a retaining wall" (*id.* at 8) and that "creates an artificially elevated platform structure" (*id.* at 7)."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 that has been 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

While the record contains an abundance of expert testimony and technical authority that supports this proposition, its greatest support derives from the most basic and undeniable physical characteristics of the structure — characteristics that the Owners have conceded from the outset and do not question now. As the Board’s Order correctly recognizes, these undisputed physical characteristics include the following:

- In addition to its mesa block perimeter walls, the structure is comprised of more than 6000 cubic yards of compacted fill material trucked in from a “donor site” (Order at 3 (Finding No.18)), plus thousands of square feet of high-density synthetic geogrid sheets (*id.* (Finding Nos. 19, 20)).
- The structure has been built atop a rear yard that “in its natural state sloped steeply downward away from the dwelling” (Order at 2-3 (Finding Nos. 5, 17)) and has created “an artificially elevated surface, with no slope, extending back from the rear of the dwelling to the top of the mesa block wall” (*id.* at 3 (Finding No. 22)).
- The structure is massive, with an artificially elevated surface of nearly 15,000 square feet (a third of an acre) surrounded by mesa block walls that total 370 feet in length and that are more than 30 feet above grade at their highest point. (Order at 2-3 (Finding Nos. 8, 15, 16, 23).)
- The structure “looms over adjacent properties, negatively affecting the air and light available to them.” (Order at 4 (Finding No. 33).)

The extensive record generated during this Appeal literally overflows with evidence establishing these characteristics of the structure, including before and after photographs of the site, photographs of the site under construction, construction plans, eye witness testimony, written submissions from neighbors, industry texts, and the oral and written submissions of experts sponsored by Appellant, the Owners, DCRA and the National Park Service. (*See generally* BZA Ex. 99 (Appellant’s Proposed Findings of Fact and Conclusions of Law), at 9-13.)

Based upon this wealth of evidence, the Board correctly determined that a host of violations of the Zoning Code flow directly from the obvious fact that that the structure at issue is an “artificially elevated platform” instead of a “mere ‘retaining wall.’” (Order at 7.) These include violations of the general prohibition on structures in excess of four feet of height in required yards (11 DCMR § 2503), the prohibition on structures that occupy more than 50

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.

percent of a required yard, and the prohibition on structures within the Wesley Heights Overlay District (“WHOD”) that occupy more than 30 percent of the entire lot.²

The Property Owners’ Attack on the Board’s Fact-Finding Is Meritless

In challenging the merits of the Board’s decision that the structure at issue violates the Zoning Code, the Property Owners do not contest any aspect of the Board’s legal analysis. Instead, they merely argue that evidence in the record does not support the Board’s central factual finding that the structure is not merely a “retaining wall,” but rather is an “artificially elevated platform structure.” (Request at 2.) Thus, the Owners apparently concede that if there is substantial evidence in the record that supports the Board’s factual finding that this massive structure is not just a “retaining wall,” it then follows, as a matter of law, that the structure violates the Zoning Code in at least several different respects.

Although the Property Owners conclusorily assert that “the evidence is overwhelmingly . . . contrary” to the Board’s finding that the structure is not merely a retaining wall (*id.*), they do not even deign to mention, much less grapple with, the vast majority of evidence discussed above regarding the most basic characteristics of the structure. Instead, they have merely latched upon a few snippets of testimony from amongst the vast factual record developed in this case, and they have baselessly asserted that a single witness’s testimony was somehow “impeached.” As we show below, however, when the snippets are viewed in context it is clear that they do not undermine the Board’s central factual finding, and when the supposed impeachment is parsed it is clear that there was no impeachment at all.

1. The Supposed “Admissions” Found in Appellant’s Written Submissions

From the literally hundreds of exhibits that Appellant submitted during the extensive proceedings in this Appeal, the Owners have seized on three exhibits in which they claim to have found a single phrase that supports their contention that structure at issue was nothing but a “true retaining wall.” (Request at 2.) In fact, far from weighing against the Board’s factual finding, each of these exhibits actually supports the Board’s view that, taken as a whole, the structure is an artificially elevated platform and not just a retaining wall.

- The letter from Peter Neubauer (second attachment to BZA Ex. 29) does not remotely assert that the totality of the structure that the Owners have erected is merely a “retaining wall.” To be sure, the letter mentions the words “retaining wall” in a few locations, but it does not do so in a manner that purports to characterize the totality of what the Owners had built. To the contrary, the letter repeatedly refers to the overall structure as “a large flat back terrace,” or simply

² The Board also determined, for reasons that appear to be independent from whether or not the structure at issue is merely a “retaining wall,” that the structure is “antithetical to the purposes and goals of the Wesley Heights Overlay” (Order at 8).

“terrace,” of which the “wall” (together with “synthetic fabric mats” and compacted fill) is merely one supporting component. This characterization strongly *supports* the Board’s finding that the structure is, in its totality, “an artificially elevated platform.” As Appellant has previously noted, *Webster’s Unabridged Dictionary* defines the word “platform”³ as “a natural or constructed terrace.” (App. Ex. 21.)⁴

- The letter from Allyn Kilsheimer (BZA Ex. 24) likewise does not characterize the totality of the structure as merely a “retaining wall.” Indeed, this letter never even uses the term “retaining wall”; instead, it refers to the structure as “a large wall structure” and “a large geostucture type wall.” This phraseology is fully consistent with the other evidence presented to the Board about the nature of the platform structure and with the way that the Board itself discussed that evidence. Moreover, as was also the case with the Neubauer letter, the Kilsheimer letter was directed at the narrow issue of whether the structure was at risk of structural failure, not at defining the basic nature of the structure.
- Nor does the Tensar Earth Technologies construction manual (App. Ex. 90) constitute an “admission” that the structure, in its totality, is nothing but a “retaining wall.” Quite obviously, this general manual does not purport to characterize the totality of the particular structure that the Owners have built to create a third-of-an-acre elevated terrace; rather, the manual describes a construction technology that can be used “for a wide array of applications” (App. Ex. 90 at 3). Moreover, as the Owners themselves concede (Request at 2), the manual generally describes what the Tensar company offers — which include the mesa blocks and geogrid components for certain forms of walled structures but not other potentially essential components such as “cast-in-place concrete” and “fill” — not as “retaining walls” but as “retaining wall *systems*” (App. Ex. 90 at 1, 3, 6, 25). The manual’s use of the word “systems” indicates that the resulting structures may have *components* that are “retaining walls,” yet at the same time indicates that the overall resulting structure may well be more than just a retaining

³ Like “retaining wall,” “platform” is one of the examples that the Zoning Code explicitly identifies as a distinct type of “structure.” 11 DCMR § 199.1 (definition of “structure”).

⁴ Mr. Neubauer’s use of the term “retaining wall” to describe a component of the erected structure is actually no different than this Board’s own usage of that term. In the early parts of its Order in this Appeal, the Board repeatedly uses the term “retaining wall” (or, sometimes, “perimeter retaining wall”) to refer to the mesa block component of the structure. (Order at 2-4 (Finding Nos. 7, 11, 13, 14, 15, 16, 20, 22)) Obviously, such usage is not inconsistent with, and certainly does not negate, the Board’s central finding that “the amalgam of mesa block wall, the geogrid sheets, and the compacted fill dirt creates a structure which is *more than* a mere ‘retaining wall.’” (Order at 7.)

wall. Indeed, the manual itself depicts the use of Tensar's products as components of structures that plainly are not merely "retaining walls," such as elevated metro rail overpasses (*id.* at 21) and elevated roadways (*id.* at 16-17).

2. *The Supposed "Impeachment" of NPS's Engineering Expert*

The only witness in the proceeding whom the Board formally recognized as an expert witness was Robert Pinciotti, a geotechnical engineer presented by Intervener the National Parks Service ("NPS"). He testified at considerable length that the structure at issue in this Appeal is not a retaining wall, but rather is a complex, multi-element structure of a class known as a mechanically stabilized earth structure ("MSE"). (5/10/05 Tr. at 457-67; *see also* BZA Ex. 69 at 2 (R. Pinciotti written testimony).) His testimony to this effect was subsequently corroborated by excerpts from an engineering textbook that discussed and described MSEs as a distinct category of structure (BZA Ex. 87, App. Reb. Ex. F-4 at 2-3) and by the DCRA's own building engineer, whose affidavit explicitly agreed that the structure at issue here is an MSE. (BZA Ex. 90 (A. Barrow Aff.) ¶¶ 4, 6.) Mr. Pinciotti also testified that in certain key respects (i.e., the fact that the wall is merely a "veneer," the presence of lateral support at the top and absence of masonry), even the wall component of the structure at issue in this Appeal did not meet the 1996 BOCA Code's formal definition of "retaining wall." (5/10/05 Tr. at 455-57, 471; BZA Ex. 69 at 1-3 (R. Pinciotti written testimony).)

The Property Owners now claim that Mr. Pinciotti's testimony was "impeached," and that it therefore should be accorded "little or no weight," because his testimony referred to the 1996 BOCA Code's definition of "retaining wall," rather than to 2000 IBC Building Code (Request at 3-4). While it is true that the Owners' counsel made a big fuss during Mr. Pinciotti's testimony about his reference to the 1996 Code's definition (5/10/05 Tr. at 512-16), it was subsequently explained to the Board that it was perfectly logical and appropriate for Mr. Pinciotti's testimony to refer to the 1996 BOCA Code's definition of "retaining wall." (5/10/05 Tr. at 519; App. Reb. Ex. G; BZA Ex. 93 at 3-4; BZA Ex. 95 (NPS Rebuttal) at 2-3; BZA Ex. 99 (Appellant's Proposed Findings of Fact and Conclusions of Law), at 18 note 9, 19-20.) The Owners' attempt to recycle this previously aired and discredited claim about supposed impeachment of Mr. Pinciotti's testimony is grossly misleading and clearly not a legitimate basis for seeking reconsideration.⁵

⁵ The "tempest in a teapot" quality of the owners' fixation on which building code Mr. Pinciotti referred to is magnified further by the fact that his central conclusions that the structure is an MSE was not tied in any manner to any building code (MSEs are addressed in neither the 1996 BOCA code nor the 2000 IBC Code) and that his testimony that the mesa walls are a non-structure "veneer" (5/10/05 Tr. At 458, 512, 520-523) prevents even those walls from being true "retaining walls" under any applicable building code.

While we will not re-plow here all of the reasons why Mr. Pinciotti's reference to the 1996 BOCA Code was entirely appropriate, we will offer the following highlights:

- As Mr. Pinciotti clearly testified (Tr. at 512-13), his testimony on this point was offered in direct response to that of former Zoning Administrator Toye Bello, who testified that the 1996 BOCA Code's definition of "retaining wall" served in this case as DCRA's principal "working definition" of "retaining wall" (*See* BZA Ex. 64 (DCRA PowerPoint) at 3; 4/5/05 Tr. at 154).
- DCRA itself consistently took the position throughout the entire Appeal that, as a matter of D.C. law, the 1996 BOCA Code in fact continues to have operative force. (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 Code and the IBC Code").) The Owners have never cited any authority to the contrary.
- Regardless of whether or not it is technically still legally effective, it is sensible to refer in this context to the 1996 BOCA Code (in addition to *Webster's Unabridged Dictionary*) because neither the Zoning Code nor the IBC Code (*see* App. Reb. Ex. at G-3) contains a definition for the term "retaining wall."⁶

3. *Statements by the Property Owners' Own Contractors*

The Owners also point to isolated statements made by two of their own contractors to the effect that the structure at issue is "a true retaining wall" (Request at 4-5). An examination of these statements in context, however, demonstrates that they are, at most, characterizations of just one component of the overall structure — i.e., its cement-block perimeter walls. Moreover, other statements made by these very same contractors, as well as the sworn statement of one of the Owners' other engineers that the Owners now conveniently ignore, strongly support the Board's finding that the totality of what the Owners have built is "a structure much greater than merely a 'retaining wall.'"

- Although the affidavit from William Ryan (part of BZA Ex. 55) makes the conclusory (and circular) statement that "[t]he retaining wall is indeed a true retaining wall" (Ryan Aff. ¶ 5), it contains other statements that confirm that the overall structure is more than just the walls. In particular, it concedes that all

⁶ The Owners further mislead by falsely asserting (Request at 3) that Mr. Pinciotti "agreed that the IBC Code's definition of retaining wall was one 'designed to resist lateral soil loads' (§ 1610.1)." In fact, Mr. Pinciotti directly (and accurately) testified that the 2000 IBC Code contains no definition of "retaining wall" (5/10/05 Tr. at 516). The provision that the Owners now purport to cite as the 2000 IBC Code's definition, § 1610.1 (submitted as Exhibit A to BZA Ex. 55) in fact is *not* a definition at all.

structures such as this one “rely on a geogrid system (grids, properly compacted soil and gravel).” (*Id.* ¶ 6.)

- The affidavit from stonemason Hugo Ardon (attachment I to BZA Ex. 31) simply uses the term “retaining wall” (without explanation) to refer to the structure’s Mesa block perimeter wall. On cross-examination, however, Mr. Ardon admitted that the overall structure is “not just a wall” (5/10/05 Tr. at 365), that another of its components was fill dirt brought to the site by “a few hundred trucks” (*id.* at 312), that another component is “geogrids [that] extend out into the yard” (*id.* at 324), and that the overall “purpose of this structure [was] to create a level area outside of the house that [the Owners] could use” (*id.* at 314).
- Although the Owners neglect to mention it now, Douglas Statler, the engineer who actually compiled the final design for the elevated platform structure, submitted a affidavit (part of BZA Ex. 55) stating that “[t]he Mesa wall is a structure comprised of blocks, geogrid, gravel, and compacted soils. It is a ‘unified mass’ exerting pressure downward onto the Ecomonides’ property.” (Statler Aff. at 2.) This sworn statement from the Owners’ own engineer strongly supports the Board’s factual finding that the overall structure is “much greater than merely a ‘retaining wall’” (Order at 4 (Finding No. 28)). Moreover, by describing the overall structure as “exerting pressure downward,” it also directly refutes the Owners’ contention that the overall structure “resists lateral pressure,” which the Owners themselves stress is an essential quality of any “retaining wall” (See Request at 5).

4. *Statements from DCRA’s Own Experts*

The Owners also try to support their Request for Reconsideration by relying on the erroneous opinion that necessitated this Appeal in the first place: the contention of the former Zoning Administrator (Toye Bello) and a DCRA Engineer (Adbullah Barrow) that the structure that DCRA permitted here was nothing more than a “retaining wall.” (Request at 5.) The Board has already carefully considered and rejected the DCRA’s self-serving position on this point, and for that reason alone it cannot be a proper basis for reconsideration. But even if that were not the case, it is abundantly clear that neither Mr. Bello nor Mr. Barrow provided any evidence to back up their conclusory opinions.

- Although the Barrow Affidavit (part of BZA Ex. 91) conclusively asserts that “the wall at issue here is a retaining wall,” the statements it offers as purported support for that assertion actually support and corroborate the Board’s finding that the *overall structure* is much more than a mere retaining wall. For example, the Affidavit explicitly characterizes the structure as a “mechanically stabilized earth structure” (Barrow Aff. ¶ 4), acknowledges that a component of the overall structure was “the soil used to backfill the project” (*id.* ¶ 5), and states that “the wall . . . is included in a geogrid system” (*id.* ¶ 4).

- Mr. Bello’s conclusory assertion that the structure is a “retaining wall” is, in fact, entirely irrelevant to the Board’s *factual finding* that the overall structure is, in fact, much more than a retaining wall. This is so because Mr. Bello — consciously, deliberately, and without any stated explanation — completely ignored all elements of the structure other than “just the exterior [Mesa] blocks” (4/5/05 Tr. at 159-61). Wearing those blinders, Mr. Bello obviously was in no position to provide reliable “evidence” as to the nature of the overall structure that the Owners have erected.

* * *

In sum, contrary to the Owners’ preposterous suggestion that there is “no evidence of record by any expert” to support the Board’s decision (Request at 5), there are literally mountains of evidence in the record — from experts and non-experts alike expert — supporting the Board’s factual finding that the structure at issue is more than just a retaining wall. Moreover, none of the snippets of “evidence” on which the Owners now fixate even contradicts that mountain of supporting evidence, much less outweighs it.

Finally, even if the points that the Owners now raise in their Request had any merit (and, as demonstrated above, they do not), there still would be no basis for this Board, sixteen months after this marathon Appeal began, to reconsider its decision. All of the Owners’ points were already fully considered by the Board during the lengthy proceedings in this Appeal and were appropriately rejected by the Board in its carefully reasoned Order. Indeed, while the Property Owners pretend mightily that they are not doing so, the most that they are doing with their attack on the Board’s key factual finding is merely second-guessing how the Board exercised its collective judgment in weighing arguably conflicting evidence. This Board routinely rejects Requests for Reconsideration that do nothing more than rehash arguments over the weight to be given to competing evidence, especially where, as here, the evidence in question was thoroughly argued to, and fully considered by, the Board during extensive proceedings leading up to the challenged decision. (*See, e.g.*, BZA Appeal No. 15507 (Appeal of Marion Cieplak, 1991) (denying a motion for reconsideration that raised no material issues that the Board had not previously considered and addressed); BZA Appeal No. 14519 (Appeal of Doo Young Kim, 1987) (denying a motion for reconsideration that “merely [sought] to reargue the case presented. . . and considered by the Board in reaching its decision”).)

The Property Owners’ Accusation that the Board’s Decision Was Influenced By “Inflammatory and Irrelevant Material” Is Meritless.

Apparently recognizing the futility of attacking the merits of the Board’s zoning ruling, the Owners fall back to arguing that “highly inflammatory and irrelevant material appears to have influenced the Board’s decision in this case” (Request at 5). But the Owners do not — nor could they — point to even a single aspect of the Board’s deliberations, vote or decision that even remotely suggests that the Board’s decision was influenced by anything other than the evidence that was properly before it.

In particular, and contrary to the Owners' suggestion (*id.*), there is no reference whatsoever in the Board's decision, and there was no discussion at all during the Board's July 5, 2005 public meeting to deliberate about this Appeal, about either the now-withdrawn separate Appeal by other community leaders regarding the size of the Owners' house or the then (and still) ongoing criminal proceedings against Frank Economides.

The Owners' suggestion that the Board's decision was improperly influenced by evidence concerning "the size and appearance of the retaining wall" (Request at 6) is puzzling. Certainly the size of the elevated platform structure is highly relevant to the specific zoning issues that the Board decided, such as whether it violates the general prohibition on structures in required yards that exceed four feet in height, the prohibition on structures that occupy more than 50 percent of a required yard, and the WHOD prohibition on structures that occupy more than 30 percent of the lot. Likewise, both the size and appearance of the structure are highly relevant to the additional zoning issue, also decided by the Board, as to whether the structure is "antithetical to the purposes and goals of the Wesley Heights Overlay" (Order at 8). As the Board is well aware, those purposes expressly include "preserv[ing] the current density of the neighborhood," 11 DCMR § 1541.3(a), and "preserv[ing] existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood," *id.* § 1541.3(c).⁷

**There Is No Basis For Reconsidering the
Board's Determination that the Appeal Was Timely.**

Over a year ago, at the outset of the proceedings in this Appeal, the Board carefully examined the question of whether the Appeal was brought within the time period specified in the Zoning Code. The Board received and considered extensive briefs and evidentiary submissions from both the Owners and the Appellant on this issue, and devoted the bulk of the first hearing session to its consideration and resolution of this threshold issue. The Board's March 24, 2006 Order carefully analyzes this issue and, based on what the Order describes as the Board's review of "much evidence, both written and oral," it determined that the Appeal was timely brought within the 60-day period specified in 11 DCMR § 3112.2(a). (Order at 5.) The evidence that the Board considered on this point included Appellant's testimony that he was not aware of any permit decision concerning a retaining wall until sometime after his wife obtained a copy of the permit on October 13, 2004 and that the thick seasonal foliage in Wesley Heights Park had prevented him from seeing construction associated with that permit until mid-October 2004. (Order at 5.)

⁷ Appellant has been unable to find any BZA precedent having the name (Jeffrey Schonberger) or number (No. 17414) that the Owners purport to cite (*see* Request at 6) in support of their argument on this point. Appellant strongly suspects, however, that any such precedent (if it exists at all) is inapposite because it presumably did not involve the WHOD or any other provision of the Zoning Code in which criteria such as "harmonious design and attractive appearance" must be considered.

Although they made no request in their Proposed Findings of Fact and Conclusions of Law for any determination that the Appeal was not timely (*see* BZA Ex. 97), the Owners now assert, as the last point in their Request for Reconsideration, that the Board's determination regarding timeliness "is . . . not supported by the evidence." (Request at 6-8.) As with their other *post hoc* challenges to the Board's decision, however, the Owners' argument for reconsidering the Board's timeliness determination is completely meritless.

The Request for Reconsideration mischaracterizes both the Zoning Code's provision regarding the timing of appeals and the Board's application of that provision to the facts of this case. As the Board's decision correctly recognizes (Order at 4), but the Request for Reconsideration does not (Request at 7), the basic deadline for commencing an appeal is *not* 60 days from the issuance of the permit or the commencement of construction. Rather, it is 60 days from the date that the appellant "had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR § 3112.2(a). The Board correctly determined, based on the evidence, that the present Appeal was filed within this 60-day window. (Order at 4-5.)

The Owners now erroneously fault the Board for "extending the 60-day deadline" without adhering to the two-prong test provided in 11 DCMR § 3112.2(d)(2), which permits filings outside the basic 60-day window only upon a demonstration of "exceptional circumstances" and an absence of "prejudice" to the parties. (*See* Request at 7.) In fact, in this case there was no extension of the deadline, nor any need or occasion for the Board to apply that two-prong test, because the Board correctly determined that Appellant commenced this appeal within 60 days of the time that he first knew or should have known about the permit decision. (Order at 5.) The Owners' extensive discussion of alleged prejudice to the Owners (Request at 7-8), therefore, is entirely beside the point.

Similarly to their attack on the merits of the Board's Zoning ruling, the Owners' now also seize on a single isolated item of evidence contained in the extensive evidentiary record underlying the Board's timeliness determination and assert, falsely and illogically, that that one item by itself demonstrates that that determination is not supported by substantial evidence. (Request at 6-7.) The isolated item on which the Owners now fixate is a one-page email message that Appellant's wife sent to DCRA officials on November 5, 2004, several weeks after she had first learned of the "retaining wall permit" and approximately one month before Appellant commenced this Appeal. The Owners have had this email in their possession since at least February of last year, when Appellant filed and served it as part of his opposition to the Owners' motion to dismiss. (App. Ex. 80, page 6.) Nevertheless, the Owners' representatives and witnesses never once even mentioned this email to the Board during either the lengthy hearing on the timeliness issue or the remaining four months before the record was closed.

It is not at all surprising that the Owners did not see fit to mention this email to the Board before this thirteenth hour, for in fact the email adds nothing significant to the evidentiary mix that the parties vigorously presented to the Board in support and opposition to the Owners' motion to dismiss and that the Board carefully considered before ruling that the Appeal was timely. In particular:

- By recounting that Appellant’s wife “viewed the permit file in mid October” (*id.*), the email simply reinforces Appellant’s testimony that he did not become aware of the existence of the purported “retaining wall” permit until some time after his wife retrieved it from the DCRA’s permit office on October 13, 2004.
- Similarly, the email’s statement that Appellant’s wife had, on some unspecified date,⁸ made a “Noise Control” complaint regarding bulldozer sounds that occurred from June to October 2004 (*id.*) is merely cumulative and duplicative of written and oral testimony from one of the Owners’ witness, stone mason Hugo Ardon, who explained in considerable detail that construction on the retaining wall structure generated loud bulldozer noise from late June through late October 2004 (3/1/05 Tr. at 101-02, 106-07 (questioning by Chairperson Griffis); Attachment I to BZA Ex. 31 (Ardon Aff.) at 2.) During the public deliberations that preceded the Board’s timeliness ruling, Board members directly explored and appeared to fully credit Mr. Ardon’s testimony about such noise (*see* 3/1/05 Tr. at 122), yet the Board nevertheless reached the reasonable conclusion that bulldozer noises emanating from this unusual site — on which various construction activities had been ongoing continuously for two years and which was hidden until mid-October behind a thick screen of foliage (*see* Order at 5) — was not sufficient to put Appellant on notice that a large new wall structure was being erected in the Owners’ concealed rear yard. (3/1/05 Tr. at 123; Order at 5.)
- Most significantly, nothing in the email contradicts the statements of Appellant and ANC-3D Chair Alma Gates, the only resident of the local community who testified on the timeliness issue, that the ANC-3D had no awareness of the construction of the wall structure, or of DCRA’s issuance of the permit at issue, before mid-October 2004. (3/1/05 Tr. at 82-84.) Indeed, Ms. Gates, who “live[s] right down the street from [the Owners’] house as well” and who as ANC chair is one of the neighborhood’s most active observers, testified unequivocally that she “was not aware of this wall until the leaves came off the trees.” (*Id.* at 83-84.)⁹

⁸ Contrary to another blatant mischaracterization by the Owners (*see* Request at 8 (asserting that Appellants’ wife made “numerous complaints about noise” to the District and the Park Service as early as June 2004)), the email does not indicate that Appellant’s wife’s call to “D.C. Noise Control” occurred any earlier than mid-October, that she made more than a single complaint to a D.C. official, or that she made any noise-related complaint at all to the Park Service.

⁹ The Request for Reconsideration mischaracterizes Appellant’s wife’s email as stating that she “had been in touch with [an NPS detective] regarding the Economides retaining wall construction ‘over the past six months.’” (Request at 6-7.) In fact, the email provides no basis to conclude that Appellant’s wife had any communications with the NPS detective (or anyone else) concerning retaining wall construction, as opposed to other construction activities undertaken at

Lastly, the Owners now advance the patently meritless argument that, even if (as the Board has correctly ruled) the Appeal was timely filed in accordance with 11 DCMR § 3112.2(a), the Board should nevertheless grant reconsideration and rule that the Appeal should have been barred at the outset by the doctrine of laches. (Request at 7.) This argument fails for a host of reasons:

- Most importantly, the Owners' laches argument fails to take account of the well-settled proposition that laches and estoppel are highly disfavored by D.C. Courts in zoning cases because of the strong public interest in proper enforcement of the zoning laws. *See Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990); *Interdonato v. Dist. of Columbia Bd. of Zoning Adjustment*, 429 A.2d 1000, 1003 (D.C. 1981); *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 925 (D.C. 1980); *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 10 (D.C. 1978). Laches "is rarely applied [in this context [zoning cases]] except in the clearest and most compelling circumstances." *Wieck*, 383 A.2d at 11 (citation omitted.)
- The precedents cited by the Owners are entirely inapposite. Several were decided before the adoption of 11 DCMR § 3112.2(d), when prejudice to the parties was treated as an issue distinct from the jurisdictional question of timeliness. Moreover, each of them is readily distinguishable on its facts from the present case. In *Waste Management of Maryland v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 117, 1122 (D.C. 2001) and BZA Appeal No. 15264 (March 28, 1990), the appellants waited far longer, three years and six years respectively, before pressing their rights in an appeal before the Board. In contrast, Appellant here acted to secure his rights within 60 days of when he knew or should have known about the permit. Similarly, in BZA Appeal No. 14110 (March 28, 1984) the appellants had notice of the challenged action well in advance because the D.C. City Council had conducted public hearings in anticipation of the project more than a year-and-a-half before the appeal was filed and the entire project was a subject of community debate. Finally, in *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985), the appellants had full, actual notice of the challenged aspects of the building project on the date the permit was issued and had participated in an open negotiation and debate with the permittee prior to

the subject property, at any time before mid-October. This is especially so in light of the facts that the email broadly addressed the Owners' abusive activities over a period of "two years" dating back to when "trees were felled" into the park (resulting in the institution of federal criminal proceedings against Mr. Economides), and that much of the six-month period referred to in the email pre-dated the time (late June 2004) when the Owners claim construction of the wall commenced.

the issuance. All these situations are completely different from the present Appeal.

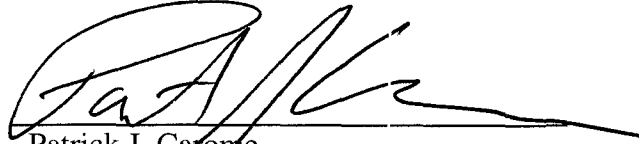
- The Owners argument principally addresses only one of the two essential elements of any laches defense, namely prejudice to the Owners, and it completely fails to satisfy the second element, which is unreasonable delay by the moving party. Both elements are essential under D.C. law. *Bannum v. Dist. of Columbia Bd. of Zoning Adjustment*, No. 04-AA-345, 2006 WL 647605, at *5 (D.C. Mar. 16, 2006) (citing *Beins* 572 A.2d at 126 (D.C. 1990)). Here, the second element cannot be met because, as the Board has already properly determined, Appellant could not be reasonably be charged with notice of the permitting decision more than 60 days prior to the filing of his appeal. (Order at 5.)
- Even as to the second prong of a laches defense (i.e., prejudice), the Owners have failed to present any evidence regarding any serious harm that they will suffer on account of the supposed delay in Appellant's commencement of the Appeal. Moreover, in light of the fact that they have officially valued the entire construction costs of the structure at just \$30,000 (App. Ex.51 (permit application) at 2), it appears that any costs that they could show in this regard would be just a drop in the bucket compared to the overall costs of the multi-million dollar compound they have erected on the site.
- It is well settled that a party with unclean hands may not assert the equitable defense of laches to bar a legal claim against him. *Connecticut General Life Insurance Co. v. Eldredge*, 102 U.S. 545 (1881); *Pfeiffer v. C.I.A.*, 60 F.3d 861 (C.A.D.C. 1995). See also, *City of Reading v. Austin*, 816 F.Supp. 351, 367 (E.D.Pa.1993) ("A delay may be excused upon a showing that the party asserting the defense substantially contributed to the delay through concealment, misrepresentation, unfilled promises, or any other inequitable conduct"). As discussed above and more fully in the background section of the Appellant's opening brief (App. Br. at 12-26), the Owners' behavior in connection with the subject property has been deceptive, misleading and often illegal. They have illegally cleared a wooded part of their back yard, including a portion of land that was within a federal park; illegally razed their existing residence and constructed an enormous, four-story mansion without obtaining the necessary permits, and they have erected a gigantic, elevated earthen platform that plainly violates the Zoning Code and that has caused (and is continuing to cause) great damage to parkland and the community. The Owners hands are unclean as relates to the ongoing construction on the subject property and therefore they cannot now rely on laches as a defense

In sum, the Owners' Request for Reconsideration has failed to identify any meritorious basis for the board to revisit or reverse its well-supported and carefully reasoned ruling that this Appeal was timely filed.

Conclusion

The Board's decision to grant this Appeal is eminently reasonable and is supported in all respects by substantial evidence in the record. The Owners' Request for Reconsideration does nothing more than rehash arguments already addressed and ultimately rejected by the Board. Therefore, for all of the reasons set forth herein, as well as for all of the reasons previously advanced by Appellant in support of this Appeal, the Request for Reconsideration should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Patrick J. Carone', written over a horizontal line.

Dated: April 10, 2006

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