

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17285-A of Patrick Carome, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs. Appellant alleges that the Zoning Administrator erred by issuing a building permit (No. B460927, dated April 23, 2004) allowing the construction of a masonry retaining wall serving a single-family dwelling. Appellant contends that the retaining wall violates the Zoning Regulations, including the side yard requirements (§ 405), rear yard requirements (§ 404), and structures in open space requirements (§ 2503). The subject premise is located within the Wesley Heights Overlay/R-1-A District and is located at 4825 Dexter Terrace, N.W. (Square 1381, Lot 806).

HEARING DATES: March 1, 2005, March 15, 2005, April 5, 2005,
May 10, 2005 and May 24, 2005

DECISION DATE: July 5, 2005

BOARD OF ZONING ADJUSTMENT
District of Columbia

**DATE OF DECISION ON
RECONSIDERATION:** May 2, 2006

CASE NO. 17285
EXHIBIT NO. 110

ORDER ON RECONSIDERATION

Background

On July 5, 2005, the Board of Zoning Adjustment ("Board" or "BZA") upheld the appeal of Patrick J. Carome ("Appellant"), and concluded that the Department of Consumer and Regulatory Affairs ("DCRA") and its Zoning Administrator ("ZA") had erred in issuing a building permit to construct a retaining wall to property owners and intervenors Frank and Dina Economides ("intervenors"). The Board's final order was issued on March 24, 2006, at which time the wall had already been completely constructed. On April 3, 2006, the intervenors filed a timely motion for reconsideration ("motion") of the Board's decision, and on April 10, 2006, the Appellant filed a timely response to the motion ("response"). Another intervenor in the appeal, the National Park Service ("NPS"), filed a timely responsive letter to the motion, as well as a clarification letter filed the next day.

Standard for Reconsideration

Section 3126.4 of the Zoning Regulations sets forth the standard for requesting reconsideration of a Board decision: It provides therein that "[a] motion for reconsideration

should state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought.” Pursuant to this provision the Board considers allegations of errors in its decision based on the record in the case.

The Arguments Presented

The motion for reconsideration presents two main arguments: (1) the Board’s conclusion that the retaining wall was really “an elevated platform structure” is arbitrary, capricious, and not supported by substantial evidence, and (2) the appeal was not timely. Within the first argument is a claim that the testimony of the NPS expert should be impeached, and a claim that the Board’s decision was influenced by inflammatory and irrelevant factors. Both the Appellant’s response and the NPS’s responsive letters refute these arguments.

Discussion

There is substantial evidence to support the Board’s decision

The motion claims that there is not substantial evidence to support the Board’s conclusion that, due to its construction methodology and resultant characteristics, the retaining wall at issue is actually an “elevated platform structure” which violates the Zoning Regulations. The motion lists specific documents in the record wherein the stonemason, the mesa system manual (which explains the wall’s construction), the ZA, and several engineers, whose testimony was variously submitted by the Appellant, the intervenors, and DCRA, all refer to the wall at issue as a “retaining wall.” The motion cites these documents and highlights other parts of the record to support its conclusion that “there is no evidence of record by any expert that the wall is anything but a retaining wall.” (Motion at p. 5, emphasis removed)

The response counters that there is an overwhelming amount of evidence in the record supporting the Board’s conclusion that the wall at issue is actually “an elevated platform structure” constructed in violation of the Zoning Regulations. The response distinguishes the statements of the engineers, the stonemason, the mesa system manual, and the ZA which are relied on by the motion and claims that the motion takes quotes out of context. The response further points out that, when all the evidence presented to the Board is taken as a whole, it fully and substantially supports the Board’s conclusion and decision.

Upon consideration of the arguments set forth in the motion and the responses thereto, the Board finds that, contrary to movant’s assertions, its decision was based on substantial evidence in the record. The evidence relied on by the Board for its conclusion that the wall at issue is more than a retaining wall is fully set forth in the Board’s Order in its Findings of Fact and Conclusions of Law. *See*, Board Order No. 17285, *Appeal of Patrick J. Carome*. While the parties may disagree over the quality of the evidence and the amount of weight to be given to it, the order on its face sets forth the substantial evidence the Board relied on,

in support of its decision. Accordingly, the Board is not persuaded that it erred in this respect.

The testimony of the NPS engineer was not impeached

The motion claims that the NPS engineer's testimony provided "the sole factual predicate for" the Board's central conclusion, (Motion at p. 4) but that this testimony should be given little or no weight because the engineer allegedly improperly relied on the 1996 Building Code rather than the 2000 International Building Code. The response acknowledges that the NPS engineer referred to the 1996 Code, but explains that this was appropriate, particularly because the 1996 Code's definition of "retaining wall" was the "working definition" relied on by DCRA in issuing the permit in question. More importantly, the response points out that the NPS engineer's conclusion that the "retaining wall" in question is a mechanically stabilized earth structure ("MSE") "was not tied in any manner to any building code." (Response at p. 5, fn #5)

Under the circumstances presented in the record, the Board accepts NPS's explanation regarding the NPS engineer's referral to the 1996 Building Code and is not persuaded that his testimony should be disregarded or given little weight. Second, even if his reference to the 1996 Code were inappropriate, the Board concurs with NPS' assessment that the engineer's "testimony relative to the 1996 BOCA code represented only one small part of his testimony to the Board, and was made in direct response to the DCRA's stated reliance on the 1996 BOCA code." (NPS responsive letter) Third, the engineer's central conclusion that the "retaining wall" at issue was actually an MSE was a result of his independent judgment and was not dependent on an analysis of the 1996 Code. Finally, and most importantly for a reconsideration analysis, the NPS engineer's testimony was not the "sole factual predicate" for the Board's decision. The Board's decision is based on a careful weighing of the record as a whole and even if the testimony of the NPS engineer were of questionable reliability, it would not merit a reconsideration of the Board's decision.

The Board's decision was not influenced by irrelevant factors

The motion claims that the Board was influenced by its knowledge of other litigation concerning the intervenors and that the Board improperly considered factors such as the size, appearance, and alleged adverse impacts of the retaining wall in question. However, the motion fails to point to anything in the Board's deliberations, vote, or decision to support these claims. The Board's grounds for its decision rest solely on the record and is set forth accordingly in its decision.

The appeal was timely

The motion claims that the appeal was untimely because no exceptional circumstances existed that would have permitted the Board to extend the 60-day time limit for filing an appeal and because such an extension severely prejudiced the intervenors.¹ The motion, however, mischaracterizes the Board's decision on timeliness. The Board did not extend the time for filing an appeal pursuant to the authority stated in § 3112.2(d). Instead, it found that the appeal was timely because the Appellant filed the appeal within 60 days of when he had notice or knowledge of the issuance of the permit for the retaining wall in question. *See*, § 3112.2(a). Therefore, there was no extension of time granted for filing the appeal and the Board was not required to consider prejudice to the intervenors. Accordingly, the Board declines to reconsider this decision..

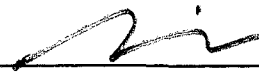
For all of the above reasons, it is hereby **ORDERED** that the intervenors' motion for reconsideration is **DENIED**.

VOTE: 3-1-1 (Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr., by absentee ballot, to deny. Geoffrey H. Griffis opposed to denial. No Zoning Commissioner present or voting.)

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

Each concurring member approved the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER. **OCT 27 2006**

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

¹11 DCMR § 3112.2 (a) states: "[a]n appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision 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(d) states: "[t]he Board may extend the sixty-(60) day deadline for the filing of an appeal only if the appellant demonstrates that: (1) 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 (2) The extension of time will not prejudice the parties to the appeal, as identified in § 3199.1."