

Before the
**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

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Appeal of Patrick J. Carome,

From the Administrative Decision of DCRA
to issue Building Permit No. B460927

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BZA Appeal No. 17285

Pre-hearing Statement of the Department of Consumer and Regulatory Affairs

The Department of Consumer and Regulatory Affairs ("DCRA" or "Appellee") hereby requests that the Board of Zoning Adjustment (BZA) dismiss this appeal as untimely. Additionally, the appellant, Patrick J. Carome, has failed to establish that he is a party of interest in this contested case, pursuant to 11 DCMR § 3106.2 (2004), in which he may participate in this proceeding. Finally, the substantive arguments raised by the appellant related to the Zoning Administrator's decision to issue Building Permit No. B460927, are ill-founded. For these reasons, the decision of the DCRA should be affirmed.

A. Factual Background

Frank and Dina Economides own the property at 4825 Dexter Terrace, N.W., Washington, D.C. It is an irregularly shaped parcel of land in the shape of a quadrangle. It is located in an R-1-A zoned district on Lot 806, Square 1381. The property is approximately 25,000 square feet and it lies within the Wesley Heights Overlay District (WHOD).

On or about July 2003, the Economides obtained a building permit from the DCRA to renovate the house; a revision and repair permit. A permit was issued in July 2003 approving that work (No. B452810). Construction of the site began shortly thereafter. During the following months, the Building and Land Administration (BLRA) got involved in the project resulting in investigations and enforcement action. In April 2004, the Economides applied for a building permit to construct a retaining wall. Upon a review of the application and site plans, a building permit was issued to them on April 23, 2004, (No. B460927). The permit provided,

"[C]onstruct new retaining wall around rear yard as per plans. Entirely on owner's land."

The retaining wall was constructed in a manner consistent with the Ryan and Associates Mesa Site Retaining Wall Report, dated January 2004. Upon completion, the retaining wall was certified by Specialized Engineering on December 15, 2004. DCRA's Building and Land Regulation Administration (BLRA) did not conduct interim

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Exhibit No. 45

inspections of the retaining wall. BLRA's Acting Chief Building Inspector, Abdullah Barrows reviewed the Ryan & Associates report as well as the certification documents.

B. The Appellant does not have Standing.

The zoning regulations provide that "any person or party may appear on that person's or party's own behalf, "in a proceeding before the Board. 11 DCMR § 3106.1 (2004). A party may file an appeal to the Board "aggrieved by any order, requirement, decision, determination, or refusal made by the administrative officer or body . . ." *Id.*, § 3112.2. Mr. Carome, the appellant asserts, he is aggrieved by the Economides project because the quiet enjoyment of his property is disrupted by loss of views, landscape and trees. As an appellant; he is therefore afforded the opportunity to challenge the appeal.

Although the zoning regulations do not specific the nature or type of 'aggrievement' that a person must show to satisfy the regulations, there is sufficient authority to shed light on this questions of standing. For instance, the federal courts have established a standard to evaluate what a person must show to have standing to bring a claim for relief. The standard is instructive here. Typically, the federal court requires a party to show an injury in fact that is protected by law. The injury must be concrete and particularized.¹ The *de minimis* injury identified by the appellant is the loss of a 'line of sight' view of landscape and trees. The appellant does not suggest his property value has decreased or even that his injury is unique from his neighborhood. Indeed, the appellant has not even raised an injury that is unique to this construction project. The varying heights of construction projects would change the landscape in any neighborhood and is not concrete or particularized.

The Board, itself, has recognized the need for a party to describe with some specificity and concreteness an injury that is the basis for participation in its proceedings. Indeed, for any other person to be granted the right to participate in a Board proceedings (not the applicant or appellant), he or she must be granted 'party status'. The standard to determine party status is quite specific. The person must show the Board:

[T]he person's interests would more likely be more significantly, distinctively, or uniquely affected in character or kind by the proposed relief than those of other persons in the general public.

Id., at § 3106.3.

The appellant cannot meet this test. Here, he argues that the construction of the retaining wall by the Economides has restricted the view of the neighborhood surroundings from his home and his quiet enjoyment of the neighborhood trees. The appellant has failed to identify any specific harm or injury he has suffered from the Economides project. The harm which he describes in this appeal, the loss of a view or his trees, is too generalized to be unique to one property owner. Moreover, the change in

¹ / See, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Friends of Tilden Park v. District of Columbia*, 806 A.2d 1202 (2002).

scenery is not significant or distinctive to alter Mr. Carone's enjoyment of his home. The changing scenery of a neighborhood is experienced by all the property owners in the community and cannot serve as the basis to be granted standing.

The appellant's standing² to bring this appeal is ill-conceived for yet another reason. Mr. Carome's home is more than 200 feet away from the subject property.³ While the regulations do not set a hard and fast rule for defining participation in a BZA appeal by virtue of the location of a party, the clear expectation of the regulations is that a person can present a reasonable basis to be considered a party-in-interest.

Mr. Carone resides on Fulton Street, N.W., Washington, D.C. His residence is more than two streets below the Economides property. He is not a next door neighbor nor does he share the same street. He is not an ANC representative nor does he appear to raise all of the concerns of the ANC. He has stated a personal basis for his interest in the Economides permits. He is arguing that his quiet enjoyment in his view has been disrupted and his enjoyment of the foliage has been altered. He has failed to present either a substantially, distinctive or unique harm that resulted from this project. Indeed, any new construction will result in the affect impacts upon which Mr. Carome relies as his basis to challenge the Zoning Administrator. Given the appellant's failure to meet his burden established by § 3106.3, the Board should not grant him party status.

C. Timeliness of the appeal.

Appellant Carome asserts his claim is timely "within the meaning of 11 DCMR § 3112.2 (2004). Attachment to Carome Appeal, at pg. 2, §8. (Att.) The regulation upon which Mr. Carome's relies provides only that he *may* file an appeal not that his appeal is timely. In its pertinent part, the regulation states:

Any person aggrieved by any order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration of enforcement of the Zoning Regulations may file a timely appeal with the Board.

Id., at § 3112.2.

Indeed, it is clear from the record and the materials filed with the Carome appeal that it is untimely. The timely filing of an appeal with the BZA is mandatory and

² / A party, under the zoning regulations, is defined as an applicant, or the Advisory Neighborhood Commission for the area within which the property that is subject of the contested case is located, or any person who is admitted as a party by the Commission pursuant to Section 3022.

³ / The BZA typically reviews several factors to determine participation in contested case proceedings. One important factor is the location of the person seeking party status and the subject property. Since the requirement for the Commission to provide notice to interested property owners is restricted to 200 feet from the subject property, the 200 foot rule has been commonly applied to consider party status. § 3022. The conclusion that Mr. Carome is more than 200 feet from the subject property is an estimate from a review of the zoning map.

jurisdictional." Mendelson v. District of Columbia Board of Zoning Adjustment, 645 A.2d 1090, 1093 (D.C. 1994); Woodley Park Community Ass'n v. District of Columbia Bd. of Zoning Adjustment, 490 A.2d 628, 635 (D.C. 1985) ("if [petitioner's] appeal was not timely filed, the BZA was without power to consider it"); Goto v. District of Columbia Bd. of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980) ("question of timeliness is jurisdictional"). As we stated in District of Columbia Pub. Employee Relations Bd. v. District of Columbia Metro. Police, 593 A.2d 641 (D.C. 1991): "The time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters (citations omitted)." *Id.* at 643. In the past the BZA did not adopt a specific time limit on appeals, and a standard of reasonableness was applied in determining whether an appeal is timely. See, Woodley Park Community Ass'n, supra, 490 A.2d at 636; Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment, 775 A.2d 1117, 1122 (D.C. 2001). The reasonableness standard established the "the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of." *Id.* In addition, the BZA's conclusion with regard to the timeliness of an appeal is entitled to special deference because the agency is interpreting its own internal rules of procedure. *Id.*

As a result of these cases, the Zoning Commission published a proposed new regulation which would require an appeal to be filed with the BZA with two months. The language of the change reads:

"within sixty (60) days from the date the person appealing . . . had notice or knowledge of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier."

Proposed 31 DCMR § 3112.2 (a), 49 D.C. Register 4884 (May 24, 2002).

Utilizing that framework, the subject appeal herein is untimely. The building permit for the retaining wall was issued on April 2004. The subject appeal was filed with the BZA on December 13, 2004, more than eight months later. The eight month delay in filing the appeal is unreasonable for two reasons. First, the construction on the Economides began in December 2003. The construction continued for more than year. The stop work orders and other enforcement action taken by BLRA began in November 2004. The Appellant observed the construction during the period leading up to issuance of the retaining wall permit and thereafter.

Appellant was on constructive notice of the project and it is the basis to attribute "chargeable notice" pursuant to the regulation. The appellant admits he observed the razing of the house and the construction of the new house at 4825 Dexter Terrace, N.W., Washington, D.C. around December 2002 and "sometime in 2003".⁴ Att. at pg. 4, § 17. The appellant was aware of this activity at the Economides home because he resides in the line of sight at 4747 Fulton Street, N.W., Washington, D.C. His line of sight perspective, "the quality and appearance of this view at this time has been greatly

⁴ / Building Permit No. B425076 was issued on November 26, 2002 to the Economides to renovate and add to the single family dwelling. Building plans were submitted with the permit application.

diminished as a result of these massive, towering building.” Att. At pg. 5, § 21.1. Therefore, it is reasonable to infer if the appellant was aware of construction on the house he would also be able to observe construction of the retaining wall. Though, he may be unable to discern when construction began, he would certainly have known when construction was underway; particularly given the size and size of the retaining. (Appellant, in his appeal described the retaining wall as a “rather bizarre, 30-foot tall, 200-foot long and approximately 75 feet-deep, irregularly shaped, multi-walled superstructure.”)

Moreover, the appellant provided photos of the property, before the wall was constructed, in support their appeal. The appellant admitted watched the construction and challenged earlier phases of the project. (See Appellant’s Exh. 68). The BZA can infer the appellant had constructive notice of placement of the wall and the extent of its footings. Since the appellant is able to view the subject property from his home he cannot now successfully argue he was unaware of the construction project to timely challenge its validity.

Given the progress of the construction, more than a three year period, appellant’s longstanding objections to the project, and the fact the construction would have been visible from the street, it is reasonable to conclude the appellant would be “chargeable with notice” of the construction of the retaining wall to trigger the need to file an appeal of the building permit before December 13, 2004. *See Woodley Park Community Ass’n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 636-637 (D.C. 1985).

The seven month delay in filing the appeal is unreasonable. Indeed, the BZA has concluded in the past that a seven-month delay from the issuance of the permits to the filing of an appeal was not reasonable. *See Waste Management*, 775 A.2d at 1122 (delay of “one or two months” may be reasonable (citing cases), but delay of four months probably is not); *Woodley Park*, 490 A.2d at 637 (delay of one year unreasonable); *Maroney v. Friere*, 74 Misc. 2d 339, 340, 343 N.Y.S.2d 183, 185 (N.Y. Sup. Ct. 1973) (delay of 127 days unreasonable); cf. *Sisson V. District of Columbia Board of Zoning Adjustment*,

The proposed BZA rule regarding timely appeals does allow for an exception. The amendment to § 3112.2 reads:

- (c) The 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 that 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.

In this case, the "exceptional circumstances" provision is not applicable. The appellant has failed to state or demonstrate any conditions that prevented him for obtaining information about the construction on the property. Permits issued by DCRA are available for public review and appellant could obtain copies through the Freedom of Information Act, (FOIA).⁵ the BZA to extend the sixty-day period, upon a showing that "the extension . . . will not prejudice the parties to the appeal"

Moreover, DCRA and BLRA officials will be prejudiced by the grant to extend the time given to the appellant to make this appeal. As noted by the appellant, BLRA is monitoring the construction at the subject property and inspected the site. Any resources which DCRA must divert from its official duties to defend this untimely action hinder its ability to service other citizens of the District of Columbia. For these reasons, the appeal should be dismissed as untimely.

C. Retaining Wall as Landscape.

Notwithstanding its untimeliness, the appeal is grounded upon two false premises. The first premise argued by appellant is that a retaining wall must be located on the lot in a specific place with side and rear yard limitations. The second premise asserts the retaining wall is structurally unsound and the agency's failure to monitor the construction of the wall created that result. The appellant's arguments are specious on both counts.

The Zoning Regulations do not define "retaining wall." Pursuant to the rule of interpretation when zoning terms are not defined in the regulation, we look to the dictionary definition. Here, the term "retaining" is defined to mean "to keep or hold in one's possessions," and wall is defined to mean "an upright structure of building material, as masonry, wood or plaster, serving to enclose, divide or protect an area, esp., a vertical construction forming an inner partition or exterior siding of a building." Webster's Unabridged Dictionary. 11 DCMR § 199.2(g). Given those definitions, a retaining wall is a structure for the purposes of the zoning regulations. As a structure, the regulations define its placement on a lot in relationship to property boundary lots. Contrary to the appellant's assertion, the zoning regulations 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 (emphasis added).

Id., 11 DCMR § 2503.3 (2004).

The placement of a retaining wall, according to the zoning regulations, is not restricted to the same limitations of a side yard or rear yard in comparison to buildings. In terms of

⁵ / Appellant has already availed himself of the Freedom of Information Act request for DCRA documents, pursuant to his January, 2005 request.

this discussion it is helpful to set out how “yard” is defined in the zoning regulations. It is explained as:

An exterior space, other than a court, on the same lot with a building, or other structure. A yard that is 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*. No building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title (emphasis added).

Id., at § 199.1 (2004).

A rear yard is defined as the “horizontal distance between the rear line of a building and the rear lot line, except as provided elsewhere in this title” and a side yard is defined as “yard between any portion of a building or other structure and the adjacent side lot line, extending for the full depth of the building or structure.” *Id.* These definitions help to more clearly describe the circumstances at issue here. The rear and side yards are inclusive in the definition of *yard*. The ‘yard’ description allows building or structures - - specifically provided in the title. A retaining wall is a structure, pursuant § 2503.3 that allows a retaining wall to be placed in the open spaces of the yard. It is the exception granted by the title. As such, the zoning regulations do not prohibit its existence at that lot line.

Finally, the appellant also challenges the structural integrity of the retaining wall. Any legal issue asserting problems with the structural integrity of the retaining wall is not a zoning issue because it is not a legal issue governed by the zoning regulations or the Zoning Map. Further any error in construction, if existed, would not be an error of the Zoning Administrator or the issuance of the building permit. Therefore, a challenge of this nature is not a proper basis for this appeal and should be dismissed.

Although the Zoning Administrator has no role in the determination of the structural soundness of the retaining wall or any other structure, it is important to note the wall was certified by a professional engineer.⁶ The engineering report was provided to the Building and Land Administration (BLRA) and BLRA officials reviewed the report. It is not dispositive that BLRA did not conduct interim inspections or did not certify the wall upon completion where, as in this case, the wall was certified by a third-party professional engineer.

For these reasons, DCRA urges the Board to affirm its decision to issue the

⁶ / Certification was provided by Patrick S. Norton, P.E. and Charles R. Mitchell, P.E., of Specialized Engineering by letter of December 15, 2004.

building permit for construction of a retaining wall to Frank and Dina Economides.

Respectfully submitted:

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Certificate of Service

Appellant, Patrick Carmone and counsel for Frank and Dina Economides, Esquire, were served through electronic transmission on February 28, 2005.

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DCRA's Pre-hearing Statement

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