United States Department of the Interior

NATIONAL PARK SERVICE
National Capital Region
1100 Ohio Drive, S.W.
Washington, D.C. 20242

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Mr. Geoffrey Griffis
Chairman
Government of District of Columbia
Board of Zoning Adjustment
441 4th Street, N.W., Suite 210-S
Washington, D.C. 20001

Dear Mr. Griffis:

Enclosed for inclusion in the record is our statement pertaining to Appeal No. 17285. We respectfully request that the board waive its rules pertaining to the timing of document submission due to unforeseen delays in preparing our materials.

Thank you for your cooperation in this matter.

Sincerely,

Sara Bluementhal

Acting

Regional Director, National Capital Region

Enclosure

BZA
Case No. 17285
Exhibit No. 50

TAKE PRIDE IN AMERICA

Board of Zoning Adjustment
District of Columbia
CASE NO. 17285
EXHIBIT NO. 50

Board of Zoning Adjustment Appeal No. 17285; Comments of Intervenor National Park Service

This serves as the statement of the National Park Service,(NPS) in support of its intervention in the Board of Zoning Adjustment (BZA) appeal No. 17285. The matter at hand concerns the erroneous issuance of a permit by the Department of Consumer and Regulatory Affairs (DCRA) for the construction of a walled structure, a portion of which encroaches upon Wesley Heights Park (Park), a unit of the National Park System. Due to construction of this wall by Park neighbors Frank and Dina Economides (the Economides), the Park's resources have been, and continue to be, harmed. The NPS contends that the issuance of a permit for this walled structure violates District of Columbia law and that this Board has jurisdiction to redress the error. Also, NPS concurs in and adopts the positions of Appellant, Mr. Carome, in this matter.

I. The Walled Structure Is Not Solely A Retaining Wall And May Not Be Permitted.

Retaining walls are traditionally used to keep existing yards from eroding. In some cases relatively minor amounts of soil are added behind retaining walls to assist in landscaping. In stark contrast, the structure at issue is an enormous, synthetic, platform or deck, topped with sod.

The structure was made from untold tons of new soil, mesa block, stone, and synthetic geogrid fabric. At its highest point the structure reaches approximately 32 feet above grade[1]. Additionally, the geogrid fabric and other construction and structural support materials that are part of the structure extending back from the interior of the wall towards the Economides residence between 13.5 to 27 feet.

A platform or deck structure of this size is clearly barred by the District's zoning regulations. Specifically, this structure may not be permitted under 11 DCMR §§ 404.1, 405.9 which establishs minimum rear and side yard size requirements. Additionally, the structure violates the text and intent of the Wesley Heights Overlay that sets the maximum lot occupancy of structures at 30 percent, and preserves, among other things, trees. NPS estimates that approximately 15 large trees, e.g., greater than 18 inches in diameter measured 4.5 feet above grade, were cut down on the Economides lot for this project.

Carpeting an otherwise illegal platform or deck with sod does not change the fact that the platform or deck is illegal. In light of the foregoing, the DCRA should have looked beyond the term "retaining wall" on the Economides's permit application, thoughtfully evaluated the construction specifications, and concluded that this was a prohibited structure under the Zoning Code.

[1]. The bulk of the wall effectively shades a strip of parkland approximately 30 feet wide. This causes permanent negative ecological impact on parkland due to deprivation of light and air currents, and disruption of water and nutrient flow.

II. The DCRA Permit Should Be Held Invalid Because DCRA Lacked Authority to Permit the Location of the Walled Structure on NPS Property.

The DCRA was obligated to read the engineering specification, to recognize that the walled structure was supported by parkland, and to conclude therefore that the footer extended well into NPS property. Ultimately, the DCRA should have reached the conclusion that it could not permit the structure.

A footer is a foundation supporting a structure. The footer supporting the massive structure at issue is comprised of two components, 1) a gravel base that extends in front of the wall, and 2) United States Park property that the wall relies on for structural support. The following examines the size of the encroachment onto federal property by the footer[2].

The outer-wall of the structure ranges from between approximately 4 inches and 2.5 feet from the Park boundary. The blocks of the wall extend below ground "a minimum of 1 inch buried for every one foot of wall exposed." Specifications for Segmental Retaining Wall System at 5; Carome Brief Exhibit 24. Thus, at the tallest point of the wall there are at least 32 inches of block buried below ground. The blocks stack-slope toward parkland. Id. The greater the slope the closer the blocks below ground are to Park property. Id. Additionally, the specifications for the wall indicate that the gravel component of the footer extends approximately 6 inches from the last buried block toward Park property. Since at least some portions of the wall are within inches of the boundary, it is clear that at least some of the gravel component of the footer is on Park property.

The second component of the footer is the earth down slope of the wall that is largely within the Park. The specifications for the wall provide that:

> The owner or owner's representative is responsible for ensuring that construction adjacent to the wall by others does not disturb the wall or place temporary construction loads on the wall that exceed design loads, including loads such as water pressure, temporary grades, or equipment loading. . . .

Specifications for Segmental Retaining Wall System at 8; Carome Brief Exhibit 24. Thus, the wall clearly relies on NPS property for its stability.[3]

The Economides failed to describe this support lent to the structure by reliance on NPS property as a footer in the retaining wall specification. It is a part of the footer

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[2] In his brief, counsel for the Economides notes that Mr. Joseph Kish, boundary specialist with the NPS recently "reiterated that there was no finding that the wall encroached over federal park land." Economides brief at 6. The NPS since has determined that the walled structure significantly encroaches onto NPS lands.

[3] In light of the above design specification, on February 23, 2005, the construction contractor for the Economides told NPS personnel visiting the site that he would not excavate on NPS property abutting the wall to remove all encroaching gravel and construction waste without the presence and approval of a structural engineer. Thus, NPS cannot excavate near the wall to ascertain the full extent to which the gravel portion of the footer encroaches onto NPS property.

nonetheless because the gravel portion of the footer bonds with, and places pressure upon the soil within the park. Indeed, counsel for the Economides alleges that the gravel "becomes part of the soil." Economides brief at 6.

As noted, the exact area of parkland converted into a footer by the Economides' structure is not clear. However, it appears that a portion of parkland ranging from at least 7.4 feet to 9.6 feet wide and paralleling the face of the wall may be subject to this illegal constructive easement. This estimate is based on the engineering specification's prohibition on operation of equipment with wheel loads in excess of 150 pounds per square foot within 10 feet of the face of the wall. Specifications for Segmental Retaining Wall System at 8; Carome Brief Exhibit 24. The actual size of the encroachment may be larger.

NPS has a right to take lawful actions on federal property that benefit the public interest. These actions include installing paved bike paths, granting underground utility or water supply rights-of-way, undertaking ground disturbing archeological or cultural resource studies, etc. Given the constructive encroachment caused by the Economides' converting NPS property into a structural support for their wall, NPS cannot undertake such projects without risking damage to the wall. Such damage could risk public health, safety and the environment, and may cause liability for the NPS. Therefore, the permit authorizing the encroachment should not be allowed to stand.

III. NPS Did Not Grant Its Permission For the Construction of A Party Wall On NPS Property.

The DCRA cannot permit a party wall on Park property without receiving the prior written approval of NPS. Pursuant to 12 DCMR § 3110.2:

> those portions of a length of fence [or fence wall which under the code could be built of brick] *including footings*, which are partly on each side of a party line, shall be considered as party fences. Permit applications for party fences shall be signed by the owners of the property on which the fence is to be located.

Emphasis added.

As noted, the footer consists of both the encroaching gravel footer and the parkland that was converted into a footer by design. The DCRA did not seek, nor to our knowledge did it direct the Economides to seek, NPS permission to place the wall on and burden NPS property. Thus, the DCRA issued a permit for the party wall in violation of applicable regulations without the written permission of NPS. Therefore, the BZA has jurisdiction under the DC Zoning Code to correct the DCRA's error.

IV. A Permit Should Not Have Been Issued For A Structure Exceeding Applicable Height and Setback Requirements.

The encroachment issues might have been avoided had the DCRA followed applicable regulations regarding the height and location of fence walls. The NPS concurs in and adopts Mr. Carome's compelling argument that the walled structure at issue should be considered a fence wall as defined in the Building Code, and therefore should have been subject to the 10 foot setback and 7-foot height limitation requirements of 12 DCMR § 3110.3.3. Carome Brief at 47-52. Compliance with the Building Code is expressly incorporated into the Zoning Code by 11 DCMR § 2503.3.

With respect to the height limitation, the conclusion that the wall could be no more than 7-feet high is supported by the drafting history of 11 DCMR § 2503.3. In a letter to the D.C. Zoning Commission from the Ben W. Gilbert, Director of the Municipal Planning Office, dated September 1, 1976, Mr. Gilbert described the intent of the rule now promulgated at 11 DCMR § 2503.3. as follows: "a fence or retaining wall [may be constructed] up to the heights established by the Building Code." The Building Code height limitation of seven feet tall retaining walls is contained in 12 DCMR § 3110.3.3. It is reasonable to conclude that the same holds true for the ten foot setback requirement of 12 DCMR § 3110.3.3.

In adopting the above view, the BZA would be exercising limited, focused, and appropriate jurisdiction over interpretation of Zoning Code and Building Code provisions that must be construed together.

V. A Retaining Wall Is Subject To The Four Foot Height Limitation of the Zoning Code.

If the structure were to be considered a simple retaining wall, and not a fence wall, its height would be limited to 4-feet by the Zoning Code. The Zoning Code permits as a matter of right the construction of structures less than 4-feet in height. 11 DCMR § 2503.2. A retaining wall is a structure. 11 DCMR § 199.1. Therefore, a retaining wall cannot be greater than 4-feet in height unless the BZA has granted a variance. The BZA has not. Therefore, the retaining wall structure was permitted in error and the BZA can correct the error.

It can be argued that there is tension between 11 DCMR 2503.2 (which limits the height of retaining walls to 4-feet) and 11 DCMR 2503.3 (which permits retaining walls that are consistent with the Building Code, and the Building Code arguably does not contain height limitations). In this case, the DCRA should have construed the two provisions of the Zoning Code and Building code together, to reach the logical conclusion that in the absence of a height limitation in the Building Code, the height limitation of the Zoning Code should apply to retaining walls.

Conclusion

There is a long and close partnership between the District and NPS with respect to management, protection, and stewardship of parklands. This partnership will be diminished if the NPS cannot rely on the District Government to carefully evaluate projects impacting parklands, and to deny permit applications that negatively impact parklands. Therefore, the NPS respectfully requests that the BZA take measures within its jurisdiction to declare the issuance of the permit to the Economides in error, void the permit, and require remediation and restoration of the area that conforms with the Zoning Code, and eliminates harm to the Park.