

TESTIMONY OF ALMA HARDY GATES
BOARD OF ZONING ADJUSTMENT
APPEAL # 17285
May 10, 2005

Good Afternoon Chairman Griffis and members of the Board. My name is Alma Gates, I am chair of ANC 3D. My home is located at 4911 Ashby Street, just southwest of the subject property.

Advisory Neighborhood Commission 3D submitted its letter to the Board on February 15, 2005. Our discussions did not stray into pending federal allegations against Mr. Economides in this case and therefore, the scope of the letter submitted by the Commission was limited to the commission's support of the appeal based on Title 11 and the Wesley Heights Overlay. With me today is George Watson, an environmental scientist and ornithologist, president of the Wesley Heights Historical Society and a founding member of ANC 3D's Zoning Committee.

Acclimation Park, Fulton Street Park, by whatever name you know it, has acquired a structure that would have made Abraham Lincoln proud, for, by the end of 1863, a series of sixty-eight enclosed forts and ninety-three batteries, known today as the Fort Circle Parks, surrounded Washington, DC. Among them is Battery Kemble, which is located directly across 49th Street from Wesley Heights Park at Fulton Street. Fulton Street Park, a narrow stretch of federal parkland that connects Glover-Archbold Park with Battery Kemble Park, has taken on the look of a Civil War encampment. Now almost complete, a fortress-like structure looms over the parkland and its irregular 30 foot wall threatens anyone walking or jogging on the path beneath it.

The wall at 4825 Dexter Terrace fails to meet the most basic objectives of the National Capital Open Space System that encourages the protection and restoration of the ecological values of environmentally sensitive areas such as steep slopes; the development of a continuous trail system for pedestrians by connecting the Fort Circle Parks; and, the protection of the park networks from adverse impacts. Further it states, "These natural areas should be protected from border development that would adversely impact their natural resources and visual quality. The use of generous building setbacks, height controls, the donation of scenic easements, or the transfer of development rights from adjacent landowners should be pursued to ensure protection."¹

The retaining wall is not in harmony with Title 11 § 1541, [the] Wesley Heights Overlay District. Prior to the construction of the wall, the rear yard of the 4825 Dexter Terrace property was wooded, park-like and steeply sloped. The adjacent parkland was enjoyed by hikers and joggers. Once the trees lost their leaves, the view of the park from 49th Street had changed irreversibly. Where there were trees, there now exists a huge structure that looms above the park. (Compare Carome Exhibit 29 to Carome Exhibit 31.)

¹ National Capital Planning Commission, Comprehensive Plan, "Parks, Open Space, Natural Features Element."

The retaining wall impacts Federal parkland. The federal parks within the region form its prime building blocks. Under Carome Exhibit 45 the NPS Boundary markers are shown with the wall almost touching them. There is clear evidence that the parkland has been impacted as a number of trees on federal property were felled (Carome Exhibit 29); silt has blocked the drain pipe that once allowed park run off to flow under 49th Street and into the creek in Battery Kemble Park (Carome Exhibit 43); and, a new stream of water spews silt laden water from the base of the wall and into the Fulton Street Park stream each time it rains. (Carome, April 4, Tab B, #B1 & B2.) George Watson and I watched during the last substantial rain as a torrent of water came pouring from the wall and ran into the Fulton Street Park stream and then broke through the silt dike under 49th Street. Not only are the region's prime building blocks being destroyed, the city's infrastructure is being undermined by excessive uncontrolled water from 4825 Dexter Terrace NW.

The commission noted that over the course of wall construction several permits were issued. Not one of the *Construction Permit Application[s] – Environmental Questionnaire[s]* answers question 6: “Will the proposed project involve construction that will disturb the sediment in rivers, streams or wetlands?” Each application checks that box, “NO.” (Carome Exhibits 51 and 56.) The attached 2001 and 2002 transcripts from the Department of Health Office of Adjudication and Hearings indicate failure to comply with an approved erosion and sedimentation control plan and stormwater management criteria for two properties on 47th Street. And in 2005, adverse impacts to surrounding properties and the environment are illustrated in the attached photographs taken of properties being developed in the 5500 block of MacArthur Boulevard by Economides Development.

The Wesley Heights Overlay is meant to preserve and enhance the low density character of Wesley Heights by regulating construction and alteration of residential and other buildings in the area. “Wesley Heights was built in the 1920s as a development created and controlled by WC & AN Miller... The original Wesley Heights architects strongly valued balance – between a home's design and the topography of the home's lot – as well as balance between each home and the whole neighborhood... Situated among four parks,² Wesley Heights imparted a special sylvan quality that was successfully maintained while still providing the flexibility to meet the changing needs of those who live in the neighborhood.”³ The combined wall structure and residence represent more than the 30 percent lot coverage permitted in the Overlay District. These combined structures increase density; restrict access to air and light for the neighboring properties and are precisely what the overlay is meant to prevent (Carome Exhibit 3.)

The wall is built on the rear and side property lines and does not meet the setback requirements set out in Title 11 §§ 404 and 405. The wall has provided the entire rear of the 4825 Dexter Terrace with a three dimensional quality. The required setbacks have been raised and sit thirty feet in the air. Section 403.2 states: “No structure, including its accessory building, shall occupy its lot in excess of the percentage of lot occupancy set

² Acclimation Park/ Wesley Heights Park, Battery Kemble Park, Glover Archbold Park and Whitehaven Park.

³ Ayres, Merribel S. Wesley Heights Historical Society. June 7, 1993, p. 5.

forth...” Given that the retaining wall is built on the property line, exceeds four feet in height and its geogrid interior constitutes an attached structure that extends to the edges of the property, the rear and side yard set back requirements are not being met.

Richard Aguglia, attorney for the Economides, made a point of telling ANC 3D that the soil that was trucked in to backfill the retaining wall was “more absorbent” than other soils and originated in Spring Valley. This news raised concern given the potential for chemicals of concern – warfare agents (mustard and lewisite) as well as arsenic being present in Spring Valley soil. Some properties in Spring Valley have not been sampled by the Army Corps of Engineers. Given the proximity of the 4825 Dexter Terrace property to Wesley Heights Park, the silt and water runoff that is entering Wesley Heights Park and the potential for contamination, the commission sent Mr. Aguglia a letter requesting that his client take the following steps:

1. Identify the site/s from which the soil originated in Spring Valley;
2. Request the soil be sampled by the US Army Corps of Engineers (USACE) to ensure it does not contain chemical contaminants; and
3. Furnish ANC 3D with a letter from the USACE stating that the soil has been sampled and determined to be free of chemical contaminants.

Mr. Aguglia has not responded to the commission’s request.

The Zoning Administrator did err in permitting this walled structure. It is attached to a geogrid core interspersed with compacted soil that is similar in nature to a retaining wall filled with concrete and topped with grass. The walled structure and its attendant house occupy considerably more than 30 percent of the lot and therefore violate the provisions of the Wesley Heights Overlay District. Every tree on the rear lot was cut down to construct the walled structure in an overlay district established to preserve existing trees and access to air and light. The structure is clearly more than four feet high within the required rear yard and in its elevated state does not meet the set back requirements for a rear yard or a side yard. And despite a track record of inadequate implementation of erosion control and stormwater management measures on previous construction sites, permits were issued that have resulted in adverse impacts to federal parkland, to immediate neighbors and to the community surrounding 4825 Dexter Terrace. The walled structure should be removed.

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

ECONOMIDES DEVELOPMENT and
FRANK ECONOMIDES
Respondents

Case No.: I-02-12061

FINAL ORDER

I. Introduction

On July 2, 2002, the Government served a Notice of Infraction on Respondents Economides Development and Frank Economides, alleging that they violated 21 DCMR 502.1, by failing to obtain a permit before engaging in land disturbing activities, and 21 DCMR 539.4, by failing to have adequate erosion control measures in place before and during exposure. The Notice of Infraction alleged that the violations occurred on June 4, 2002 at 4825 Dexter Terrace, N.W. The Government sought a fine of \$500 for the § 502.1 violation and a fine of \$100 for the § 539.4 violation.

Respondents filed a timely answer with a plea of Deny, and I issued an order setting a hearing on September 19, 2002 at 9:30 AM. Peter Nwangu, the inspector who issued the Notice of Infraction, appeared at the hearing on behalf of the Government. There was no appearance for Respondents. After waiting for approximately fifteen minutes, the deputy clerk telephoned Mr. Economides, who told her that he thought the hearing was scheduled for September 20, and requested a continuance, as he obviously would not be able to appear for the scheduled hearing.

The Civil Infractions Act, D.C. Official Code § 2-1802.03(b), provides:

If a respondent fails, without good cause, to appear at a hearing of which the respondent has been served a notice, the administrative law judge or attorney examiner may proceed with the hearing and enter a final order in the case.

If a party receives proper notice of a hearing date, his or her mistake about the date of the hearing does not constitute “good cause” for failing to appear. *Gardner v. District of Columbia Department of Employment Servs.*, 736 A.2d 1012 (D.C. 1999). The Case Management Order, filed July 30 2002, informs Respondents that the hearing was “scheduled for September 19, 2002 at 9:30 AM” (underlining in original). Setting a new hearing date would inconvenience both the Government and this administrative court and Respondents’ carelessness is an insufficient reason for imposing such inconveniences. “[C]ontinuances can upset an agency’s attempts to control its workload and to dispose of the cases before it expeditiously.” *Ammerman v. District of Columbia Rental Accommodations Comm.*, 375 A.2d 1060, 1063 (D.C. 1977) (footnote omitted). Accordingly, I exercised the discretion granted by § 2-1802.03(b) to proceed with the hearing in Respondents’ absence.

Based upon the testimony of the Government’s witness, my evaluation of his credibility, and the exhibits admitted into evidence, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

On June 4, 2002, Mr. Nwangu inspected the property at 4825 Dexter Terrace, N.W. in response to a complaint. The property is occupied by a detached, single-family house. The rear of the property slopes downward toward a stream. Several large trees had been cut down on the property, and Mr. Nwangu observed a large pile of dirt on the property. Respondent Frank

Economides, a principal in Respondent Economides Development, was present during Mr. Nwangu's inspection, and admitted to Mr. Nwangu that he had arranged for truckloads of dirt to be brought to the property. There were no erosion control measures, such as silt fences, straw bales or plastic covering on the dirt, to prevent erosion of the dirt from the pile into the nearby stream. Mr. Nwangu subsequently checked with the records custodians at the Department of Consumer and Regulatory Affairs, and determined that no building permit had been issued authorizing the deposit of dirt at the property.

III. Conclusions of Law

The first rule at issue is 21 DCMR 502.1, which provides:

No person may engage in any land disturbing activity on any property within the District unless that person has secured a building permit from the District. Approval of a building permit shall be conditioned upon submission by the permit applicant of an erosion and sedimentation plan which has been reviewed and approved by the Department.

The definition of "land disturbing activity" includes "filling of land," 21 DCMR 599.1. In turn, "landfilling" (the equivalent of "filling of land") is defined as "any act by which soil is deposited, placed or pushed, where it had not previously been located." *Id.* Therefore, depositing a pile of soil at a property is "land disturbing activity" within the meaning of § 502.1, and must be authorized by a building permit. *DOH v. Keen*, OAH No. I-00-10183 at 3 (Final Order, June 5, 2001); *DOH v. Sheriff Mews ("Sheriff Mews I")* OAH No. I-00-10009 at 6 (Final Order, September 8, 2000). Because Respondents did not have such a permit, they violated § 502.1 by arranging for the deposit of the pile of dirt at the property. The fine for violating § 502.1 is \$500 for a first offense. 16 DCMR 3234.1(a); 16 DCMR 3201. I will impose a fine in that amount.

The second rule at issue is 21 DCMR 539.4, which provides:

Adequate erosion control measures shall be in place prior to and during the time of exposure.

This section requires appropriate erosion control measures to be in place before erodible materials are exposed to the elements. *See also* 21 DCMR 539.1. (“Erosion and sediment control measures shall be applied to erodible material exposed by any project activity.”) Because there were no erosion controls in place to prevent the dirt from being washed into the nearby stream, Respondents violated § 539.4. Pursuant to 16 DCMR 3234.2(y), and 16 DCMR 3201, the fine for a first violation of that rule is \$100, and I will impose a fine in that amount.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2003:

ORDERED, that Respondents, who are jointly and severally liable, shall pay a total of **SIX HUNDRED DOLLARS (\$600)** in accordance with the attached instructions within 20 calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondents fail to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Official Code § 2-1802.03 (i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including

the suspension of Respondents' licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondents pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondents' business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

/s/ 02/12/03

John P. Dean
Administrative Judge

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

ECONOMIDES DEVELOPMENT and
FRANK ECONOMIDES
Respondents

Case No.: I-00-10648

FINAL ORDER

I. Introduction

On July 6, 2001, the Government served a Notice of Infraction charging Respondents with violating nine regulations relating to storm water management and soil erosion and sedimentation control at a construction site for a single family home at 1829 47th Place, N.W.¹ The Notice of Infraction alleged that the violations occurred on June 28, 2001, and sought a total of \$2,000 in fines. On July 24, 2001, Respondents filed a timely answer with a plea of Deny to each of the charges.

I held a hearing on August 28, 2001. Peter Nwangwu, the inspector who issued the Notices of Infraction, appeared on behalf of the Government. Also testifying for the

¹ The Notice of Infraction charged Respondents with violating: 21 DCMR 526.1, by engaging in land disturbing activity without instituting appropriate storm water management measures; 21 DCMR 506.2, by failing to comply with an approved erosion and sedimentation control plan; 21 DCMR 532.4(b), by failing to comply with a condition upon which a waiver was granted; 21 DCMR 529.1, by failing to comply with storm water management criteria before developing land; 21 DCMR 531.1, by failing to submit a storm water management plan; 21 DCMR 538.1(k), by failing to establish temporary cover by seeding or mulching a graded area; 21 DCMR 539.5, by creating a period of exposure exceeding 120 days; 21 DCMR 539.6, by failing to provide temporary or permanent stabilization during or after rough grading; and 21 DCMR 541.2, by failing to place excavated material on the uphill side of a trench.

Government was Massoud Massoumi, a Department of Health engineer assigned to this site. Respondent Frank Economides appeared on his own behalf and on behalf of Respondent Economides Development, LLC, in which he is a principal. At the commencement of the hearing, Respondents moved to change their plea to Admit with Explanation and I granted that motion without objection from the Government.

II. Summary of the Evidence

Respondents did not dispute in any way the Government's claim that they committed the nine violations charged in the Notice of Infraction. Instead, their primary argument was that the fine should be suspended or reduced because the Government inspector, Mr. Nwangwu, unfairly singled them out. Mr. Economides testified that Mr. Nwangwu was "hounding" him, and had a vendetta because Respondent was a small developer. Mr. Economides claimed that the big developers in the area did not "have any problems" with Mr. Nwangwu. Mr. Economides claimed that this was "blatant discrimination" in that "big guys on other jobs have violations," but that they have never even heard of Mr. Nwangwu. Respondents did not provide any evidence corroborating the suggestion that other developers were violating regulations but were not given Notices of Infractions.

Respondents also argued that the fine should be suspended or reduced because the situation at the site was not representative of normal conditions. Mr. Economides speculated that there may have been a delivery of material that morning, which may have required the displacement of dirt and hay. Mr. Economides also suggested that it might have been raining that morning, implying that this would have further excused the violations. Respondents did not provide any evidence, such as records of subcontractor deliveries or testimony of a delivery truck

driver, corroborating the speculation that there was a delivery of material that displaced dirt and hay. Nor did they provide any evidence supporting their belief that it was raining that morning. In fact, the photographs entered into evidence as Petitioner's Exhibit ("PX") 100 reflect a sunny day, as can be seen by the shadows cast by buildings and poles. There is no sign of wet pavement that would have indicated an earlier rain that morning.

Finally, Respondents claim that the fines for the violations should be reduced because they were not aware of the regulations at issue. Mr. Economides testified that complying with the regulations was "a learning process for me," at one point stating, "You guys know the regs; I don't."

I take judicial notice, from a review of the Office of Adjudication and Hearings records, that Respondents previously violated three of the regulations at issue here (21 DCMR 526.1, 21 DCMR 506.2, and 21 DCMR 532.4(b)) on December 12, 2000 at this same location. Respondents pleaded Admit to those charges and paid the applicable fines. *DOH v. Economides*, OAH No. I-00-11002 (Partial Closure Order, February 1, 2001).

III. Findings of Fact

1. Respondent Frank Economides is a principal in Respondent Economides Development, LLC, and has been in the construction business in Washington, DC for twenty years.

2. On June 28, 2001, Respondents were involved in the construction of a single-family home at 1829 47th Place, N.W.

3. Respondents admitted violating the following regulations on June 28, 2001 at 1829 47th Place, NW: 21 DCMR 526.1; 21 DCMR 506.2; 21 DCMR 532.4(b); 21 DCMR 529.1; 21 DCMR 531.1; 21 DCMR 538.1(k); 21 DCMR 539.5; 21 DCMR 539.6; and 21 DCMR 541.2.

4. Respondents claim that they were treated differently than other developers, but have not submitted any evidence to support that claim.

5. Respondents claim that the conditions at the site on the morning of June 28, 2001 may not have been representative of the normal site conditions, because there may have been a delivery of material and there may have been rain, but they have not submitted any evidence to support that speculation. In fact, the photographs in evidence as PX 100 show a sunny day at the time of the violation.

6. Even if relevant, Mr. Economides' claim that he was not aware of the regulations at issue is not credible. Respondents previously had pleaded Admit to violating three of the rules at issue in this case – 21 DCMR 526.1, 21 DCMR 506.2, and 21 DCMR 532.4(b) – at the same property at issue here.

IV. Conclusions of Law

1. On June 28, 2001, Respondents violated 21 DCMR 526.1; 21 DCMR 506.2; 21 DCMR 532.4(b); 21 DCMR 529.1; 21 DCMR 531.1; 21 DCMR 538.1(k); 21 DCMR 539.5; 21 DCMR 539.6; and 21 DCMR 541.2 at 1829 47th Place, N.W. Violations of §§ 529.1, 531.1, 538.1(k), 539.4, 539.5, 539.6 and 541.2 are Class 3 infractions, punishable by a fine of \$100 each for a first offense. 16 DCMR 3201, 3234.2(d), (g), (w), (z), (aa), (cc). Violations of §§ 506.2 and 532.4(b) also are Class 3 infractions, 16 DCMR 3234.2(c), (j). Because this is

Respondents' second violation of those provisions, the authorized fine is \$200 for each violation. 16 DCMR 3201. Violation of § 526.1 is a Class 2 infraction. 16 DCMR 3234.1(c). Because this is Respondents' second violation of that provision, the authorized fine is \$1,000. 16 DCMR 3201. The total fine amount authorized, therefore, is \$2,000.

2. Respondents' claim that they were treated differently than other developers has no evidentiary support in the record, and therefore does not warrant suspension or reduction of the fines. Even if there were such evidence, it would not help Respondents. A government legitimately can enforce its law against a few persons, or even just one, to conserve resources, to establish a precedent or for other legitimate reasons. *Falls v. Dyers*, 875 F.2d 146, 148 (7th Cir. 1989). Absent evidence of improper motive (and Respondents have proffered none), a claim that others have not been prosecuted for the same violation does not provide a basis for suspending or reducing a fine. *DOH v. Popeye's/Faris Enterprises*, OAH No. I-00-70252 at 3-5 (Final Order, August 8, 2001).

3. Respondents' claim that conditions at the site on the morning of June 28, 2001 may not have been representative of the normal site conditions, either due to a possible delivery of materials and/or a rain storm, has no support in the record, and therefore is not a basis for reducing or suspending the fines.²

4. Respondents' claim that they were not aware of the regulations is not a basis for suspending or reducing the fine. *DOH v. The Rolyn Companies*, OAH No. I-00-10325 (Final Order, November 3, 2000) (Respondents should have been aware of the requirement to obtain a

² I note that these conditions, even if proven to have occurred, were foreseeable events that would not excuse the imposition of a fine. Indeed, occurrences such as deliveries and rain are among the reasons for the storm water management and soil erosion control regulations.

permit; suspension of the fine would send a message to Respondents and other contractors that they need not make a thorough inquiry about applicable regulations before starting work in the District of Columbia). Such a claim is especially unavailing from experienced contractors such as Respondents who previously had admitted violating some of the same regulations at the same site at issue here. "Persons conducting business in the District of Columbia are expected to be aware of, and to comply with, laws regulating their business." *DOH v. VIP Adventures Seniors Unlimited, Inc.*, OAH No. I-00-11215 at 2 (Final Order, June 5, 2002), citing *DOH v. Bigbee Steel and Tank Co.*, OAH No. I-00-11217 at 3-4 (Final Order, May 16, 2002); *DOH v. Bloch & Guggenheimer, Inc.*, OAH No. I-00-10439 at 3-4 (Final Order, April 18, 2001).

5. Although Respondents have changed their plea to Admit with Explanation, I will not reduce the fine based on an acceptance of responsibility. I conclude that Respondents have not truly accepted responsibility but rather have made an unwarranted attempt to shift the blame for their unlawful conduct. Accordingly, I will impose the full amount of the authorized fines.

V. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2003:

ORDERED, that Respondents, who are jointly and severally liable, shall pay a total of **TWO THOUSAND DOLLARS (\$2,000)** in accordance with the attached instructions within 20 calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondents fail to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Official Code § 2-1802.03 (i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondents pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondents' business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

/s/ 02/13/03

John P. Dean
Administrative Judge



Alley at Macomb St. looking toward Cathedral



Silt river flows to properties across from 5524 MacArthur



5526/5528 MacArthur's stormwater mgmt system fails



Pipe thru wall discharges to rear of 5524 MacArthur



Infiltration trench backs up into 5528's yard and spills over into alley



5524 MacArthur's silty runoff flows downhill to alley