

District of Columbia Board of Zoning Adjustment
Appeal No. 17825

Appellant Patrick Carome's
Closing Presentation

BZA
Case No. 17285
Exhibit No. 88

May 24, 2005



Overview

- DCRA Made Two Kinds of Errors:
 - *An Overarching Error of Fact:* It Completely Misjudged What Kind of Structure(s) It Was Authorizing.
 - *Errors of Law:* It Misinterpreted Several Provisions of the Zoning Code.
- In Combination, these Errors Produced Many Clear Violations of Zoning Code.
- This Rebuttal Highlights Top 5 Violations.

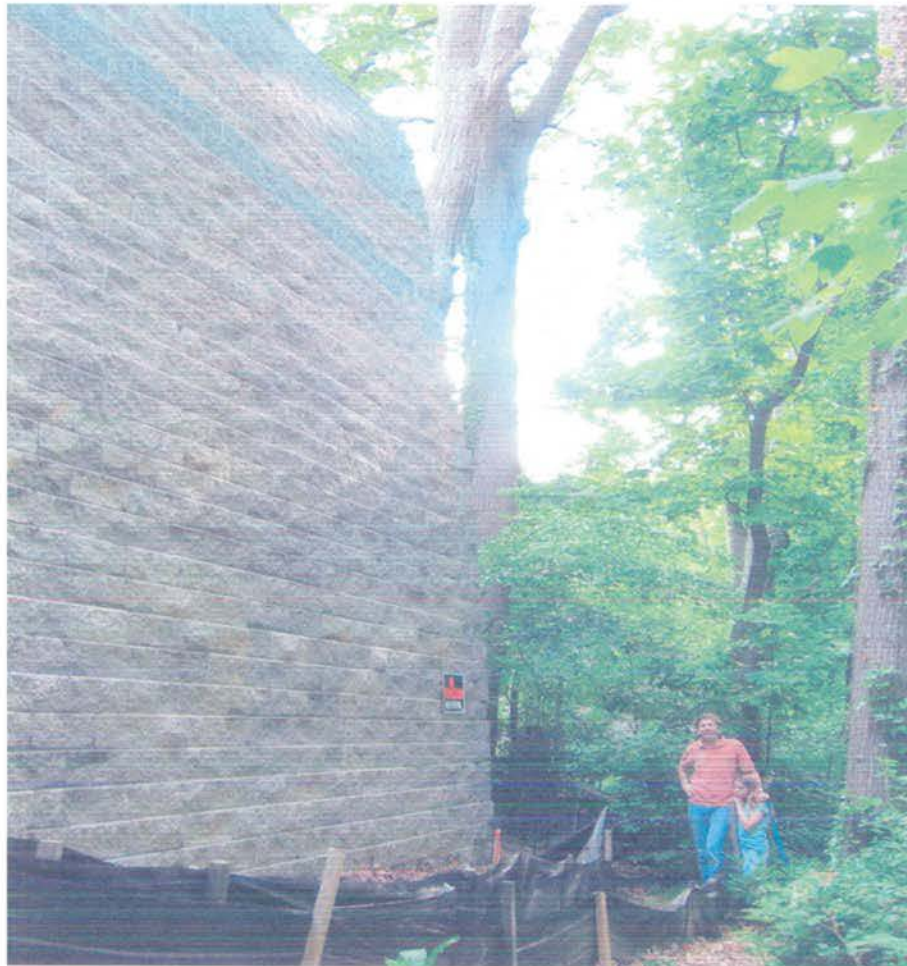
Overarching Error: Accepting Owners' Claim That This Is Just a "Retaining Wall"



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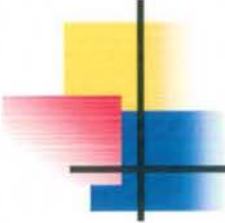
Overarching Error: Accepting Owners' Claim That This Is Just a "Retaining Wall"





DCRA's Overarching Error

- ZA's Office Assumed Structure Would Consist of Nothing More "Than Just the Exterior Masonry Blocks." (5/5 Tr. at 160)
- ZA's Office Deemed "Irrelevant":
 - Geogrid sheets
 - Layers of Specially Compacted Dirt
 - 6000+ Cubic Feet of Fill (5/5 Tr. at 160-62)
 - Hundreds of Truckloads of Fill (Ardon Testimony)
- ZA's Office Thus Ignored the Whole "Platform"



DCRA's Overarching Error

- In Fact, the Owners Built a “Platform”
 - Owners’ objective: a quarter-acre, flat terrace where once there was just air and trees.
 - As the Economides’ own expert testified: “The Mesa wall is a structure comprised of blocks, geogrid, gravel and compacted soils. It is a **‘unified mass’** exerting pressure downward onto the Economides property.” (Statler Affidavit, BZA Ex. 57)



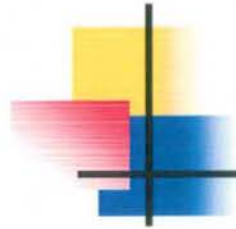
Zoning Code Definition of “Structure”

- **“Structure”:** *“anything constructed, including a building, **the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground and including**, among other things, radio and television towers, reviewing stands, **platforms**, flag poles, tanks, bins, gas holders, chimneys, bridges, and retaining walls.”* 11 DCMR § 199



Webster's Definition of "Platform"

- Webster's defines "**platform**" as "a natural or **constructed terrace**." (Carome Ex. 21)
- And it defines "**terrace**" as a "**relatively level paved or planted area adjoining a building** and in formal settings often surrounded by a balustrade." (Carome Ex. 21)
- The Economides' structure fits neatly within these two definitions.



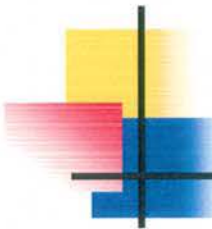
DCRA's Overarching Error

- Imagine Owners Had Achieved Same Effect With Concrete or Steel Posts/Girders
- Written question #4 posed this hypothetical to Mr. Bello.
- Question so flummoxed him that he completely ignored it.

DCRA's Overarching Error

- Owners Began With This:





DCRA's Overarching Error

- Owners Wanted This:





DCRA's Overarching Error

- Owners Built This:

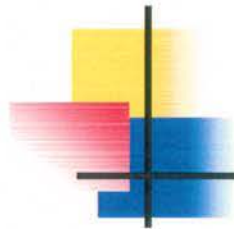




DCRA's Overarching Error

- If space below platform were filled to the top with concrete, it would not be just a "retaining wall."





DCRA's Overarching Error

- If the elevated surface were held up by beams and girders, it would not be just a "retaining wall."



DCRA's Overarching Error

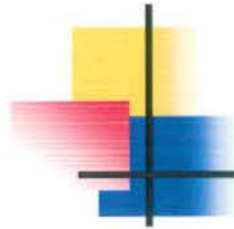
- So why should this be deemed just a "retaining wall"?





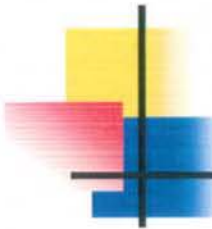
DCRA's Overarching Error

- Engineering Evidence from ***Both*** Sides Confirms that the Structure, ***as a Whole***, Is Not Just a Retaining Wall.
 - Owners' Engineer says the "structure" here is a "unified mass" "comprised of blocks, geogrid, gravel and compacted soils." (Statler Affidavit, BZA Ex. 57)
 - NPS's Engineer testified this is a "Mechanically Stabilized Earth Retaining System," or "MSE."
 - Industry texts recognize MSEs as distinct from, or at least more than, just a "retaining wall." (Carome Reb., Ex. F)



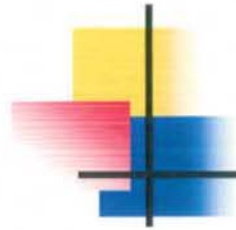
DCRA's Overarching Error

- Even the Exterior Wall Itself Is Not a "Retaining Wall."
 - NPS Engineer and Industry Texts say wall components of MSEs are mainly "facades" to prevent erosion at front edge. (Reb. Ex. F-4)
 - Wall here does not do what DCRA/owners say is essence of retaining wall: resistance against "lateral" pressure of earth.
 - Texts say "facing" of MSE only "plays a minor structural role in the stability of the structure" (Reb. Ex. F-4)
 - Bulk of structure would stand without exterior walls. (Pinchiotti)



DCRA's Overarching Error

- Courts Have Ruled that Erecting a Wall, then Filling Behind with Earth Where Previously There Was None, Does Not Create a "Retaining Wall."
 - *Ranson* (W.Va.): Where owners built wall then added artificial fill to level rear yard, structure did not qualify as "retaining wall" expressly exempt from fence height restrictions.
 - *Adler* (N.J.): Fence height limitations apply to structure comprised of wall plus artificial fill despite owner's argument that structure should be exempt as a retaining wall.



DCRA's Overarching Error

- Contrary to Economides' Assertions, Appellant's Expert, Mr. Kilsheimer, Did Not Testify That the Structure is a Retaining Wall.
 - "The structure is a large geostructure type wall relying on earth characteristics and gravity for support in an acceptable bootstraps approach." (BZA Ex. 46)



DCRA's Overarching Error

- DCRA's Own Favored Definition of "Retaining Wall" Excludes This Structure:
 - "A wall that is **not laterally supported at the top**, designed to resist lateral soil load." (BOCA 1996 & 1999)
 - Here, the exterior walls are "supported at the top."



DCRA's Overarching Error

From DCRA's Presentation (BZA Ex. 64):

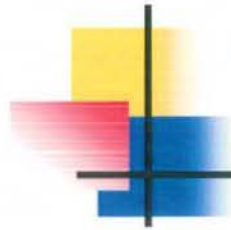
[
Retaining Walls
]

- Not specifically defined in the District of Columbia Zoning Regulations or District of Columbia Construction Code but included in the definition of structure
- Dictionary definition – 11 DCMR § 199.2(g)
- Working definition: “A wall designed to resist lateral displacement of soils and other materials” BOCA 1993
- **“A wall that is not laterally supported at the top, designed to resist lateral soil load.” BOCA 1996**



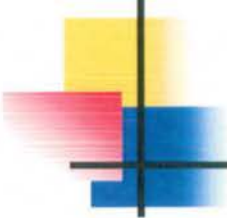
DCRA's Overarching Error

- DCRA and NPS's Expert Were Correct to Focus on This Definition.
 - The 1996 & 1999 BOCA definition is the most recent definition of "retaining wall" set forth in a building code adopted by the District. (Reb. Ex. G)
 - Because IBC (currently in effect) does not contain a definition of "retaining wall," the most recent BOCA definition is a sensible guide for determining what, as a factual matter, the structure is.



Top Five Zoning Violations

- #1: Impermissible Structure In Required Yard
- #2: Structure Occupying More Than 50% of Required Yard
- #3: Wall Exceeds 7 Feet Height Limit
- #4: Structure Violates WHOD's Purposes
- #5: Structure Exceeds WHOD's Maximum Lot Occupancy



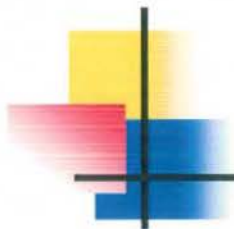
Zoning Violation #1:

- The Elevated Platform Is Located in a Required Yard Yet Fits Within No Exception to § 2503.



Violation #1: Impermissible Structure In Required Yard

- The Governing Zoning Provisions:
 - **"Yard** - an exterior space . . . on the same lot with a building or other structures. **A yard 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." (ZC §199.)



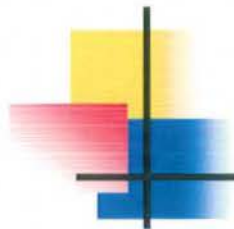
Violation #1: Impermissible Structure In Required Yard

- The Governing Zoning Provisions (cont.):
 - § 199: “**Yard, rear** - a yard *between the rear line of a building or other structure and the rear lot line*, except as provided elsewhere in this title. The *rear yard* shall be for the full width of the lot and *shall be unoccupied*, except as specifically authorized in this title.”
 - § 404.1: “A rear yard shall be provided for each structure located in a Residence District, the *minimum depth* of which shall be [25 ft in R-1-A].”



Violation #1: Impermissible Structure In Required Yard

- The Governing Zoning Provisions (cont.):
 - § 2503.1: "Except for the structures and exceptions specified in this section, every part of a yard required under this title shall be open and unobstructed to the sky from the ground up."
 - § 2503.2: "A structure, not including a building[,], no part of which is more than four feet (4 ft.) above the grade at any point, may occupy any yard required under the provisions of this title. . . ."
 - § 2503.3: "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."



Violation #1: Impermissible Structure In Required Yard

- The Violation Is Clearcut:
 - The Platform Is in a Required Yard.
 - The Platform Is Not a "Fence or Retaining Wall."
 - The Platform Falls Outside § 2503.2
Because It Is More Than 4 ft. above grade.
- Yet, DCRA Erroneously Treated Platform as Irrelevant to Zoning Decision.



Zoning Violation #2

- The Structure Occupies More than 50% of a Required Yard in Violation of the Last Sentence of the Definition of "Yard." (ZC §199)



Violation #2: Structure Occupying More Than 50% of Required Yard

- The elevated platform occupies the great majority of the rear yard.
- The platform occupies an area of nearly 15,000 sq. ft.
 - Figure includes all portions that are elevated more than 2 ft. above existing grade. (Reb. Exs. C-2, C-6)

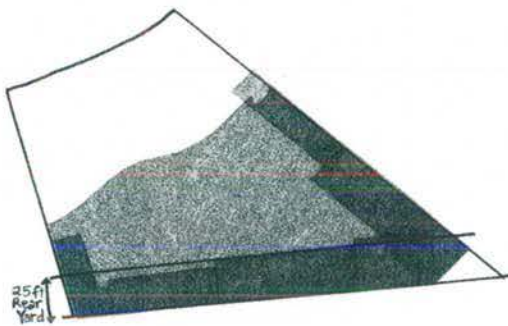
Violation #2: Structure Occupying More Than 50% of Required Yard

- Limit Far Exceeded Under Each Competing View of What Is the Required Rear Yard.

“Code” Method

“Whole Yard” Method

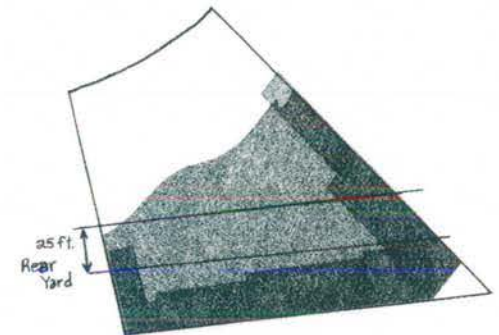
“Bello” Method



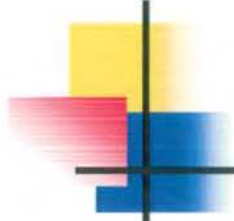
94.6%



94.9%



94.4%



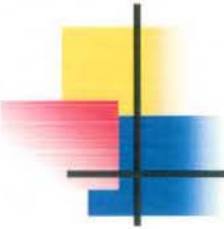
Violation #2: Structure Occupying More Than 50% of Required Yard

- Correct Interpretation: The “required” rear yard extends from the rear property line inward toward the the building (1st box on prior slide).
 - The BZA and Court of Appeals authorities submitted today recognize this. (Reb. Exs. D1-D6)
 - This conforms to the language of the Code.
 - § 404.1 creates “the minimum” — that is, “required” — depth of the yard.



Violation #2: Structure Occupying More Than 50% of Required Yard

- Measuring “**required** rear yard” from lot line conforms with common sense.
 - When a rear yard exceeds the “required” depth, the owner may extend his dwelling further into the rear yard until the minimum is reached.
 - The area which may be absorbed through an addition is “excess” rear yard — a term that Mr. Bello himself uses. (May 23 Letter at 2)
 - The area that may not be so absorbed, and which is required to be left open from the ground up, is the area 25 feet from the rear lot line.



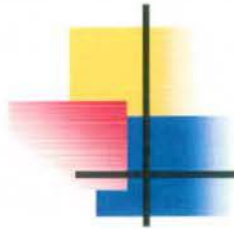
Violation #2: Structure Occupying More Than 50% of Required Yard

- It also is most consistent with the purposes of the Zoning Code.
 - A principal reason for the 1977 rear yard amendments was to protect neighboring properties from encroachments. (BZA Ex. 47)
 - The key purpose for “required” yards is creation of a buffer between adjoining properties.



Violation #2: Structure Occupying More Than 50% of Required Yard

- Legal analysis here is straightforward:
 - § 199: "No building or structure shall occupy in excess of 50% of a yard required by this title."
 - DCRA concedes 50% limit applies to structures authorized under § 2503.2. (4/5 Tr. at 140)
 - DCRA's position that fences and walls subject to § 2503.3 may not be subject to same 50% limitation is illogical and contrary to the language of the Code. (Bello May 23 ltr.)



Violation #2: Structure Occupying More Than 50% of Required Yard

- DCRA's position that only "buildings" can have a "percentage of *lot* occupancy" is irrelevant to determining if a *structure* "occup[ies] in excess of 50% of a *yard*."
 - "Percentage of Lot Occupancy" is used only in Section 403.
 - Mr. Bello conceded this point. (4/5 Tr. at 140)



Violation #2: Structure Occupying More Than 50% of Required Yard

- Indeed, the 50% *yard* occupancy limit was adopted in 1977 (simultaneously with § 2503) specifically to restrict the size of low structures in rear yards.
 - “The thrust of [§ 2503] is to allow low structures, **fences** and stairs in yards as a matter-of-right ***with a restriction on occupancy to insure that at least 50 percent of a yard is left open.***” (BZA Ex.47)



Zoning Violation #3

- Even If the Structure Were Nothing More than Just a “Retaining Wall,” It Still Would Not Be Permitted Under Section 2503.3 Because It Violates the Building Code’s Seven Foot Height Limitation.



Violation #3: Wall Height Exceeds Allowable Limit of 7 Feet

- The Zoning Code subjects fences and retaining walls to the height limits spelled out in the D.C. Building Code.
 - ZC § 2503.3 applies only to “[a] fence or retaining wall *constructed in accordance with the D.C. Building Code. . . .*”
 - Building Code bars fences and fence walls in excess of 7 feet within 10 ft. of lot lines or in a required yard. (BC § § 3110.3.3 & 3110.3.4)
- DCRA’s Sole Response: This Is Not a Zoning Issue.



Violation #3: Wall Height Exceeds Allowable Limit of 7 Feet

- **This clearly is a *Zoning* Issue.**
 - DCRA position impermissibly renders the phrase “constructed in accordance with the D.C. Building Code” utterly meaningless.
 - In *Grinstead*, this Board made clear that fence walls not built in accordance with the Building Code also violate the Zoning Code.
 - In other jurisdictions, heights of fences and walls are a routine ***zoning*** issue. See, e.g., *Adler* and *Ranson*, Carome Exs. 19 & 20.



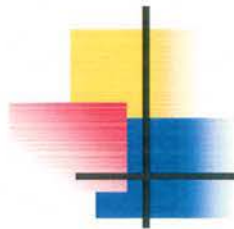
Violation #3: Wall Height Exceeds Allowable Limit of 7 Feet

- Drafters of § 2503.3 intended the phrase “constructed in accordance with the D.C. Building Code” to incorporate ***into the Zoning Code*** the height limitations established in the Building Code for fences and walls.
 - Director of Municipal Planning Office described § 2503.3 as allowing, as a matter of right, “[a] fence or retaining wall ***up to the heights established by the Building Code.***” (BZA Ex. 48, Tab C, p. 4.)



Violation #3: Wall Height Exceeds Allowable Limit of 7 Feet

- **The violation of the height limit here is clear:**
 - DCRA has not even attempted to argue that the 7 ft. limit is satisfied here.
 - This structure is more than **5 times** the maximum height:
 - Wall is more than 30 feet, and newly added fence more than 36 feet, above pre-construction grade.



Violation #3: Wall Height Exceeds Allowable Limit of 7 Feet

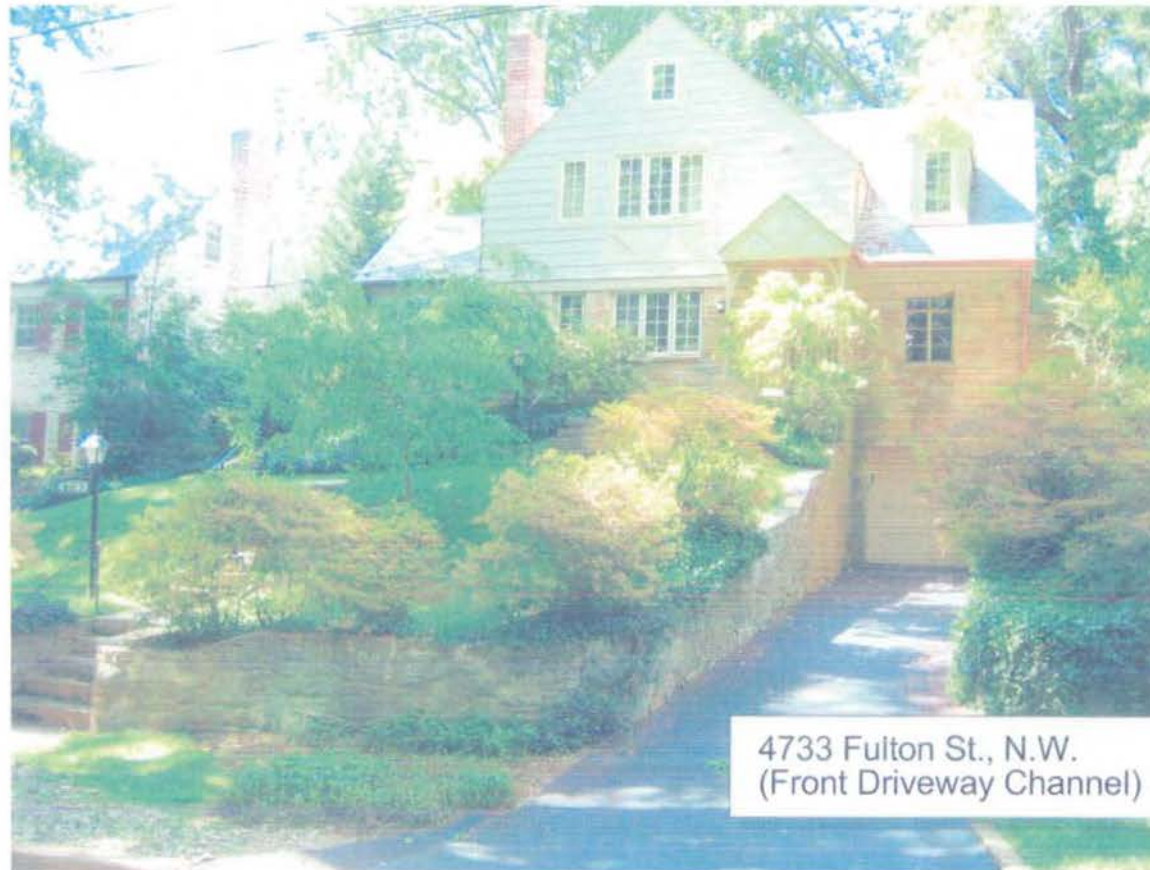
- There is no merit to Economides' assertion that the entire structure is below grade because grade is measured from the front of the house.
 - Building Code unambiguously states that height is measured from "the top of the fence to grade, on the side of the fence where grade level is higher." (BC § 3110.1.3)



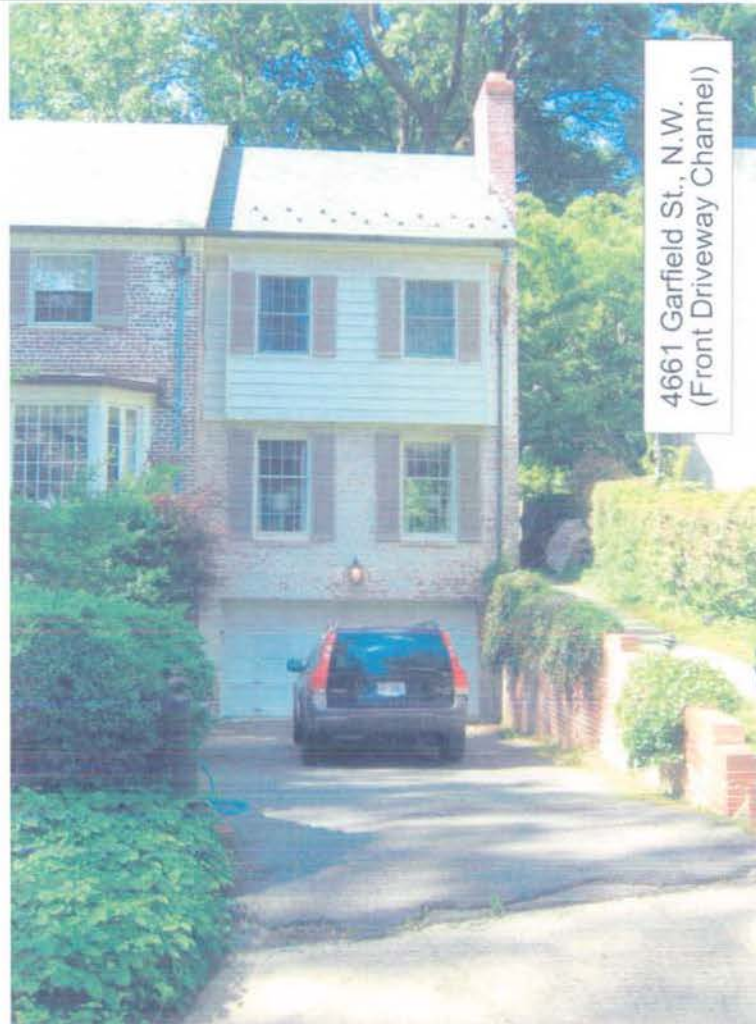
Violation #3: Wall Height Exceeds Allowable Limit of 7 Feet

- The vast majority of other walls in WHOD cited by owners support *preexisting* earth.
- Such walls have a height of *zero* under Building Code.
- The 7 ft. height limit on retaining walls only comes into play in rare circumstances when wall rises above *pre-existing* grade.

Violation #3: Wall Height Exceeds Allowable Limit of 7 Feet



Violation #3: Wall Height Exceeds Allowable Limit of 7 Feet





Violation #3: Wall Height Exceeds Allowable Limit of 7 Feet

- DCRA's Position Would Produce an Absurd Result.
 - Would allow retaining walls 100's of feet high abutting property lines.
 - Obviously contrary to clear purpose of the height restrictions.

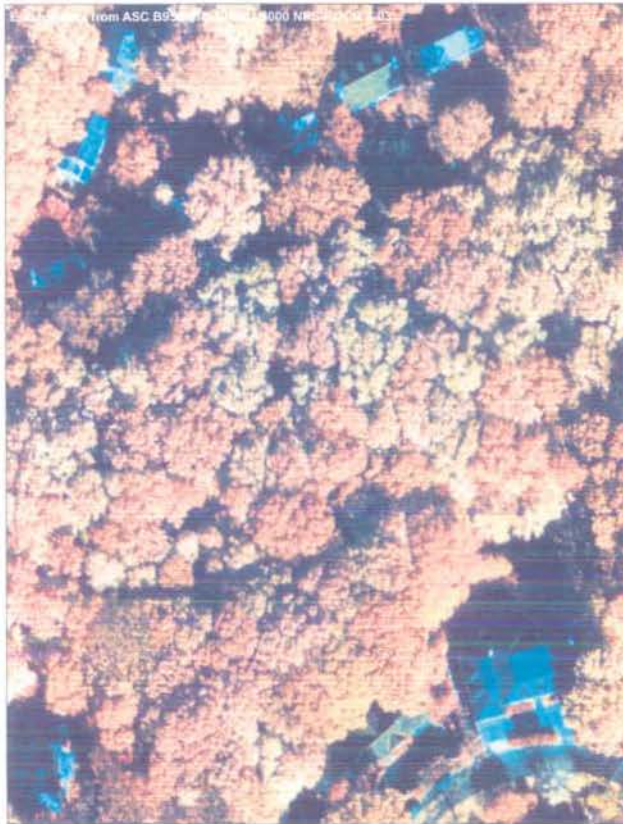


Violation #4: Structure Violates WHOD's Purposes

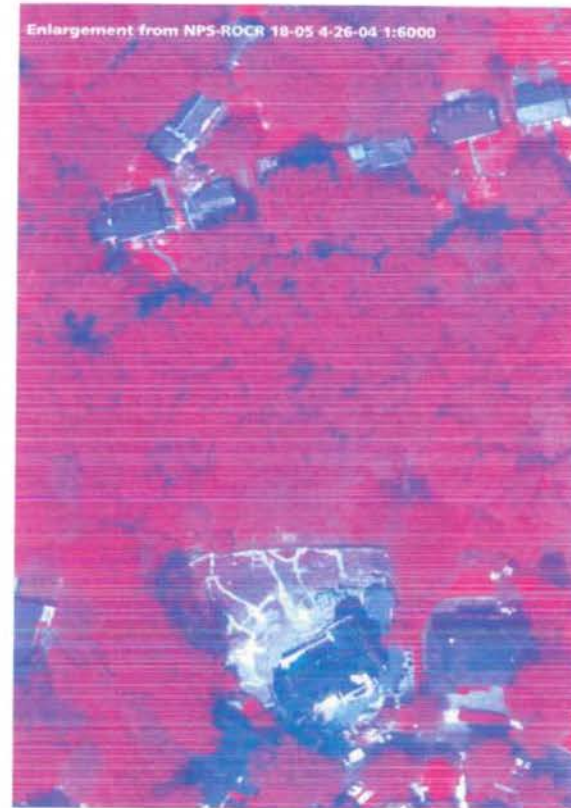
- The Walled Platform Structure Is Totally Anathema to Overlay's Core Purposes:
 - ZC § 1541.3(a): "to preserve the current density of the neighborhood"
 - ZC § 1541.3(c): "to preserve existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood"

Violation #4: Structure Violates WHOD's Purposes

Before:



After:



Violation #4: Structure Violates WHOD's Purposes



Violation #4: Structure Violates WHOD's Purposes



Violation #4: Structure Violates WHOD's Purposes



Violation #4: Structure Violates WHOD's Purposes





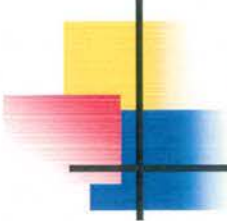
Violation #5: Structure Exceeds WHOD Lot Occupancy Limit

- **ZC § 1543.2: “No structure, including accessory buildings, shall occupy an area in excess of thirty percent (30%) of the lot.”**
- Elevated platform occupies more than 14,000 sq. ft., which is more than 54% of the whole lot (25,811 sq. ft.)



Violation #5: Structure Exceeds WHOD Lot Occupancy Limit

- DCRA's basis for deeming WHOD "irrelevant" is clearly wrong.
 - DCRA erroneously claims WH Overlay applies only to buildings, and not to all structures. (4/5 Tr. at 97-98, 216).
 - § 1543.2 explicitly applies to "structures," which **by definition** encompasses more than buildings, including both "platforms" and "retaining walls."
 - There is no basis here to read § 1543.2 other than in accordance with its clear terms.



Violation #5: Structure Exceeds WHOD Lot Occupancy Limit

- DCRA wrongly assumes that WHOD calculates “maximum lot occupancy” just as ZC § 403 does.
 - DCRA says § 403 applies only to “buildings” because the provision uses the term “percentage of lot occupancy,” which in turn references “building area.”
 - WHOD, however, conspicuously avoids using either of those defined terms.
 - The different language of WHOD, as well as its protective purposes, dictates that § 1543.2 says what it means and applies to all “structures.”



Violation #5: Structure Exceeds WHOD Lot Occupancy Limit

Comparison of § 403 with § 1543.2

- § 403: "No structure, including its accessory buildings, shall occupy its lot in excess of the percentage of lot occupancy. . . ."
- § 1543.2: "No structure, including accessory buildings, shall occupy an area in excess of thirty percent (30%) of the lot."



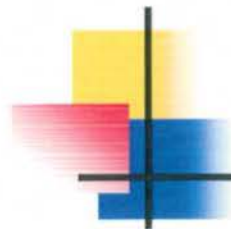
Final Considerations: ANC Support of Appeal

- This board must give “great weight” to the ANC’s report. (ZC § 3115.2)
- ANC broadly supports Appellant’s arguments of violation, including:
 - Impermissible structure in rear yard
 - Violation of 7 foot height restriction
 - Violation of core purposes of WHOD
 - Violation of WHOD occupancy limitation



Final Considerations: The Stakes Here Are High

- Affirming DCRA Here Would Present a Great Threat to the Community.
 - It would put every homeowner at risk of walls and platforms of unlimited height abutting their property.
 - The community's scarce park land, typically in valleys adjacent to residential areas, would be at grave risk of similar damage.



Requested Remedy

- Remedy must include an order directing the owners to dismantle the structure and restoration of rear yard.
 - Only such a remedy will cure the violation.
 - To carry out its decision, the Board has authority to issue any order that DCRA would have power to issue. ZC § 3100.4.
 - DCRA has recently asserted authority to order dismantling after rescission of a permit.