

Before the
DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Patrick J. Carome

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

BZA Appeal No. 17285

2005 MAY 27 PM 6:22

**The Objections of the Department of Consumer and Regulatory Affairs
To the National Park Service Witness Mr. Robert D. Pinciotti**

On May 3, 2005, the Board of Zoning Adjustment ("BZA" or "Board") held a public hearing on the appeal in the instant matter. At that hearing, the National Park Service (NPS), an intervenor, presented testimony from a professional engineer, Robert D. Pinciotti.¹ The Department of Consumer and Regulatory Affairs ("DCRA" or "Appellee") had no prior notice that Mr. Pinciotti would be called as a witness. Additionally, DCRA was not provided prior notice of Mr. Pinciotti qualifications to provide testimony on matters at issue in this appeal or prior notice as to the substance of his testimony. Given the lack of notice to DCRA, the BZA granted leave for DCRA to provide written objections. Its objections are contained herein.

1. Preliminary Matter.

DCRA objects to the BZA's designation of the NPS witness, Mr. Pinciotti, as an expert. More significantly, the testimony should be stricken given it is unlikely to provide any probative value to the Board in its review of pertinent facts.

The essence of the witness's testimony is: (a) the MESA wall constructed by the permit holder is not a structure akin to a dam rather than a retaining wall; (b) the dam

¹ / According to his written statement, Mr. Pinciotti consults for the National Park Service as part of project teams.

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structure is not governed by the buildings codes in the District of Columbia or other jurisdictions upon which he has worked (such as Maryland); (c) the DCRA should have been on notice the dam structure would encroach upon the federal parkland since the gravel leveling pad was designed to be constructed four feet wide for a structure built one foot from the property line; and (d) the Building Code which governs construction in the District of Columbia is 1996 BOCA Code.

As a procedural matter, Mr. Pinciotti testimony should be stricken since he is a witness who is unfamiliar with the legal standards in the jurisdiction that governs the work he is licensed to perform. In this regard, Mr. Pinciotti's admission that he did not know if 1996 BOCA Code was the prevailing law in the District of Columbia is alone a basis to strike his testimony.^{2/} Although, he indicated that he has worked on structural projects such as the MESA project, he lacks knowledge about the construction and building code which governs those projects in the District of Columbia. Such a weakness in his testimony should invalidate his 'expert' opinion. Similarly, a witness who alleges that *no* legal standard governs the work in the locality in which he is licensed provides little or no relevant facts to this appeal. Mr. Pinciotti's lack of knowledge about the minimum standards applied to construction projects in the District of Columbia, notwithstanding the project at issue here, is compounded by his assertion that no law applies to this project or other similar projects.

In the District of Columbia, Mr. Pinciotti is incorrect in his assertion that the MESA wall was not governed by the building codes and, similarly, that a building permit

^{2/} The 2003 D.C. Building Code, published in January 2004 entitled Construction Code, incorporates the 1993 and 1996 BOCA code and the IBC code. *See*, 12A DCMR § 101.1 (2004). The 1999 BOCA Code was never incorporated into the Construction Codes, as later proffered by the Appellant, Patrick Carome. Additionally, the 2004 IBC Code has been incorporated in the Building Code by reference.

was not needed to construct it. A structure cannot be constructed in the District of Columbia without a valid building permit. The D.C. Building Code provides, “[a] building permit is required for the following activities: (1) New construction, including constructing, adding to or moving a building or structure.” 12A DCMR § 105.1.4 (2004). A retaining wall is a structure,³ and therefore governed by the D.C. Building Code. The MESA wall, at issue here, is therefore a structure, and its construction requires a building permit.

2. Mr. Pinciotti incorrectly identified the role of the Zoning Administrator.

The role of the DCRA zoning department in the review of building permits is defined in Title 11 of the District of Columbia Municipal Regulations. The Zoning Regulations provide that a proposed project for erection, construction, conversion, or alteration must comply with Title 11. 11 DCMR § 3202.1 (2003). To obtain compliance with Title 11; the reviewer evaluates scaled drawings, building plats and, other information that is necessary. *Id.*, at § 3202.2. Mr. Pinciotti erroneously described the duty of the zoning reviewer extends to comparisons of the site plan dimensions and the design specifications⁴ for a mechanically stabilized earth structure before approving the application under Title 11. The need to compare these two documents is the genesis of NPS’ assertion that the retaining wall encroaches on federal parkland has no merit.

Mr. Pinciotti testified the ‘mechanically stabilized earth retaining structure’ is grounded in a gravel leveling pad. It is the gravel leveling pad that encroaches upon federal parkland several feet underground. He contends, it appears, that a comparison of

³ / As outlined by the Zoning Administrator in his testimony, the Zoning Regulations definition of structure includes the retaining wall. *See*, 11 DCMR § 199.1.

⁴ / All references to the design specifications related to the plans created by Ryan and Associates and submitted to DCRA by the property owner.

the design plan and the site plan indicated that some of the gravel-filled pad extends beyond the property line. His specific observation stems from the overhang created by the width of the footers when compared to the location of the wall.⁵ The overhang he asserts establishes an encroachment.

Building permits are reviewed by the zoning department to determine compliance with Title 11. In this regard, the use of the premises and the location of structures are primary factors. Here, the site plan indicated the wall would be constructed in its entirety within the property owner's lot. No encroachment existed. The footer, as described by Mr. Pinciotti, or more accurately described as a leveling pad consists of loose gravel. The loose gravel was not deemed a structure within the meaning of encroachment. The zoning review conducted at the time of the permit application does not extend to subsurface soil displacements. Further, encroachments or actions for trespass or encroachments in the District of Columbia do not typically encompass 'gravel'.⁶ The footers at issue here are not a concrete subterranean structure but loose gravel. While the DRCA was not provided a copy of the boring test survey upon which the witness relies, his statement indicated that most of the boring test results included fill and soil. Only one

^{5/} It is of note that the witness presumed, without evidence to support that presumption, that the site plan illustrated where the wall would be placed on the property, and not, where the wall structure would end. That is to say, the one foot boundary could have illustrated where the retaining wall and its leveling pads would stop, one foot within the property line.

^{6/} To "encroach" may be defined in ordinary terms as "to enter by gradual steps or by stealth into the possessions or rights of another." Webster's Third New International Dictionary 747 (1976). The same source defines "encroachment" as "an instance of encroaching (as in the building of a structure in a public park or a fence that projects over a neighbor's land)." *Id.*; See, L'Enfant Plaza East, Inc. v. McShain, 359 A.2d 5, 6 (D.C. 1976). (describing as an "encroachment" steel-reinforced concrete extending 1 1/2 to 3 1/2 feet into the subject property at a depth of twenty-three feet below the surface of the ground).

test, Boring F includes gravel from the MESA wall, identified by the plastic sheeting. The MESA blocks do not extend onto the federal parkland nor is there clear evidence in the record that a substantial intrusion has incurred from the gravel padding. In absence of any evidence to the contrary, the zoning department acted reasonably when it concluded that the wall would be constructed entirely on the permit holder's property. The Zoning Administrator properly relied upon the dimension set out in the site plan.

3. Classification of the MESA Wall as a Retaining Wall

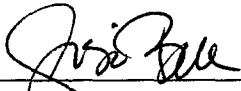
Mr. Pinciotti testified at length about the nature of the retaining wall and the mechanically stabilized earth structure. The centerpiece of his testimony is the characterization of the retaining wall as a mechanically stabilized earth structure. It is the view of the DCRA engineering staff that the MESA wall is a retaining wall, and as such the zoning division did not error in its classification of use. *See*, Affidavit of Abdullah Barrow, attached and incorporated herein by reference.

In general, Mr. Pinciotti's testimony and NPS failed to identify any error on behalf of the Zoning Administrator. As the Board is aware, the review process for building permits includes structural engineering as well as zoning. The zoning department properly evaluated the subject project on factors governing the use of land and the use, density, bulk and height of buildings or other structures. The retaining wall, as planned, did not violate any height or location restrictions. Further, it did not violate any restrictions regarding pre-existing grade evaluations or backfilling. It is essentially a wall which retains soil. The geogrid support system does not change the essential character of the wall. *See* Barrow Affidavit.

For these reasons, the appellant requests that the Board dismiss the appeal.

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Respectfully submitted,



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Certificate of Service

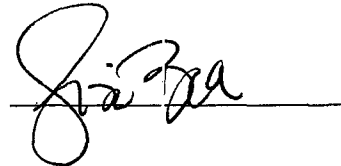
I hereby certify the Objections of the Department of Consumer and Regulatory
Affairs, was mailed, first class, postage prepaid, this day of May 27, 2005, to:

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AFFIDAVIT OF ADBULLAH BARROW

I, Abdullah Barrow, do depose and state to the best of my knowledge, information and belief as follows:

1. I am over the age of 18 years and competent to testify to the matters herein.
2. I am currently employed by the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"). I am a structural engineer in the Building and Land Administration. I hold a Bachelor's Degree and a Master's Degree in Science. I am also member of the American Academy of Civil Engineers.
3. I have been asked to review the statement provided by Mr. Robert Pinciotti in this appeal. My review included the statements prepared by Mr. Pinciotti, his markings on the appellant's exhibit as well as the site plan and design specifications submitted to DCRA in the application package for the retaining wall on the 4825 Dexter Terrace property.
4. It is my opinion that the wall at issue here is a retaining wall that

can be classified as an mechanically stabilized earth structure. The wall does not lose its character to retain the earth if it is included in a geogrid system of the MESA wall. The structure meets the definitions for retaining wall set out in the BOCA code, referred to in the IBC Code and adopted in the D.C. Building Code.

5. In my experience as an engineer, a wall that is erected to retain soil, such as this one, does not change its function if the soil used to backfill the project is added to the site. Moreover, a MESA wall as designed does not include a footer. The portion of the wall which serves as a grounding for the wall is a leveling pad. According to the design specifications in this project, the leveling project is comprised of loose gravel.¹ The level pad beings before the wall and extends a few inches beyond the wall. In effect, it creates a pad for the wall to rest in the middle. On the outside wall, the leveling pad extends a few inches beyond the wall toward the lot line.

6. My review of the design plan also indicates the backfill soil is a silty sand consistency.² Given the content of the soil, the removal of the retaining wall would result in the erosion of the site. Mr. Pinciotti has indicated that the compacted soil used to backfill the wall, between the geogrid, would create enough pressure to stop any erosion once the 'façade' was removed. In my view, the silty sand consistency would not be compacted to produce that result. Moreover, any backfilled site consists of 8 to 12 inch layers (lifts) and the layers are compacted. The system of filling in a site in lifts is not unique to the MESA wall or a geogrid system.

¹ / In my view, the design plans suggest the soil is similar to gravel, crushed recycled concrete or 57 stone.

² / Based upon a friction angle, the soil consistency is 28 degrees.

7. There is nothing in the D.C. Building Code which prohibits a property owner from backfilling a site. Moreover, since a retaining wall is erected to retain earth, the D.C. Building Code does not limit its height.

I hereby attest that the information I have provided is true to the best of my knowledge.

DATE: _____
Abdullah Barrows