

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

+ + + + +

PUBLIC HEARING

+ + + + +

-----:
 IN THE MATTER OF: :
 :
 Office of Planning - Text : Case No.
 Amendments to Define and : 13-06
 Regulate Retaining Walls in :
 R-1 through R-4 Districts :
 -----:

Monday,
July 22, 2013

Hearing Room 220 South
441 4th Street, N.W.
Washington, D.C.

The Public Hearing of Case No. 13-06
by the District of Columbia Zoning Commission
convened at 6:34 p.m. in the Jerrily R. Kress
Memorial Hearing Room at 441 4th Street, N.W.,
Washington, D.C., 20001, Anthony J. Hood,
Chairman, presiding.

ZONING COMMISSION MEMBERS PRESENT:

- ANTHONY J. HOOD, Chairman
- MARCIE COHEN, Vice Chair
- MICHAEL G. TURNBULL, FAIA, Commissioner
(AOC)
- PETER MAY, Commissioner (NPS)
- ROBERT MILLER, Commissioner

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN, Secretary

OFFICE OF PLANNING STAFF PRESENT:

BRANDICE ELLIOTT
JOEL LAWSON

The transcript constitutes the minutes
from the Public Hearing held on July 22, 2013.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

TABLE OF CONTENTS

Presentation by Office of Planning 7

Comments by the public in support

 By Alma Gates 21

 Report of ANC 26

Comments by the public in opposition 26

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 P-R-O-C-E-E-D-I-N-G-S

2 (6:31 p.m.)

3 CHAIRMAN HOOD: Good morning,
4 ladies and gentlemen. This is a public hearing
5 of the Zoning Commission for the District of
6 Columbia for Monday, July 22, 2013.

7 My name is Anthony Hood. Joining me
8 is Vice Chair Cohen, Commissioner Miller,
9 Commissioner Mayer, and Commissioner Turnbull.
10 We're also joined the Office of Zoning staff Ms.
11 Sharon Schilling and Office of Planning staff
12 Mr. Lawson and Ms. Elliott.

13 This proceeding is being recorded by
14 a court reporter. It is also being webcast
15 live. Accordingly, we must ask that to refrain
16 from any disruptive noises or actions in the
17 hearing room.

18 The subject of this evening's
19 hearing is Zoning Commission Case Number 13-06.
20 This is a request by the Office of Planning for
21 text amendments to the zoning regulations
22 related to retaining walls.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Notice of today's hearing was
2 published in the *DC Register* on May 10, 2013, and
3 copies of that announcement are available to my
4 left on the wall near the door.

5 The hearing will be conducted, in
6 accordance with the provisions of 11 DCMR 3021,
7 as follows:

8 Preliminary matters.

9 Presentation by the Office of
10 Planning.

11 Report of Other Government
12 Agencies.

13 Report of the ANC -- in this case,
14 it's all of them;

15 Organizations and Persons in
16 Support; and

17 Organizations and persons in
18 opposition.

19 The following time constraints will
20 be maintained in this hearing: Organizations,
21 five minutes; individuals, three minutes.

22 The Commission intends to adhere to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the time limits as strictly as possible in order
2 to hear the case in a reasonable period of time.

3 All persons appearing before the
4 commission are to fill out two witness cards.
5 These cards are located to my left on the table
6 near the door. Upon coming forward to speak to
7 the Commission, please give both cards to the
8 reporter sitting to my right before taking a seat
9 at the table.

10 When presenting information to the
11 Commission, please turn on and speak into your
12 microphone, first stating your name and home
13 address. When you are finished speaking,
14 please turn your microphone off so that your
15 microphone is no longer picking up sound or
16 background noise.

17 The decision of the Commission in
18 this case must be based exclusively on the public
19 record. To avoid any appearance to the
20 contrary, the Commission requests that persons
21 not engage the members the Commission in
22 conversation during any recess or at any time.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 The staff will be available
2 throughout the hearing to discuss procedural
3 questions.

4 Please turn off all beepers and cell
5 phones at this time so as not to disrupt these
6 proceedings.

7 At this time, the Commission will
8 consider any preliminary matters.

9 Does the Staff have any preliminary
10 matters?

11 (No response.)

12 COMMISSIONER HOOD: Okay. If not,
13 let's go to the Office of Planning.

14 Ms. Elliot, if you could go ahead,
15 we will wait for your presentation.

16 MS. ELLIOTT: Thank you.

17 PRESENTATION

18 BY OFFICE OF PLANNING

19 MS. ELLIOTT: Good evening, Mister
20 Chairman and members of the Commission.

21 The proposed text amendment before
22 you is generally the same as it was at the end

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of March. There have been a couple of
2 modifications, and I'll go through those in
3 just a moment.

4 The amendment is intended to
5 regulate retaining walls by implementing a
6 clear definition and some design criteria.
7 The design criteria would limit the location
8 and height of retaining walls, permitting lower
9 walls, up to four feet in height, closer to
10 property lines, and allowing taller walls, up
11 to six feet in height, located in areas further
12 from the property lines. This is actually
13 intended to limit impact on neighboring
14 properties.

15 At the direction of the of the
16 Zoning Commission, the proposed regulations
17 would discourage platform structures by
18 expanding lot occupancy to include retaining
19 walls that have been backfilled, and elevate
20 the train.

21 Also, terraced walls would be
22 permitted, provided that a four-foot-wide

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 permeable landscape area is provided in between
2 walls.

3 Since set-down, the Office of
4 Planning has revisited the text amendment and
5 has made it a couple of modifications. The
6 first revision is intended to further clarify
7 the definition of a retaining wall,
8 distinguishing it from a fence and then also
9 further clarifying how the height of the wall
10 is to be to be measured, which is generally the
11 exposed portion of the wall measured from grade
12 to the top of the wall.

13 The second change to the text is
14 intended to preserve neighborhood character by
15 limiting the height of retaining walls located
16 on private property, along street frontages, to
17 the height of existing retaining walls along
18 the same block.

19 A couple of other modifications
20 have been made, just to establish some
21 consistency in the language.

22 I believe that summarizes the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 amendment, and I would be happy to answer any
2 questions you may have.

3 COMMISSIONER HOOD: Okay, thank
4 you.

5 Commissioners, any questions of the
6 Office of Planning?

7 Mr. Turnbull?

8 COMMISSIONER TURNBULL: Yes.

9 I just have one, and it's a minor
10 one.

11 I don't know how many times it would
12 actually happen -- I mean, we're assuming a
13 uniform retaining wall height along, from a
14 grade coming down.

15 If there is a possibility that the
16 retaining wall slopes -- and I'm not sure how
17 that would happen from a berm standpoint or
18 whatever -- but would you take the average
19 height or the middle?

20 I think it's a fine point. I'm
21 assuming that that four-point is still the
22 governing feature of the wall, no matter what.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. LAWSON: As written, I believe
2 it would be the maximum height of the retaining
3 wall.

4 COMMISSIONER TURNBULL: But that's
5 what I thought. No matter what, whether it was
6 a sloping wall or what, four feet would be the
7 maximum height.

8 MR. LAWSON: Correct. So, in a
9 situation where the retaining wall is going
10 down the slope --

11 COMMISSIONER TURNBULL: Right.

12 MR. LAWSON: -- and itself may have
13 to did on that slope, they could tier the wall
14 --

15 COMMISSIONER TURNBULL: Yes.

16 MR. LAWSON: -- I guess. I
17 suppose, in theory, they could actually slope
18 the top of the wall, even.

19 But the height would be measured
20 from, you know, at any point along the wall.

21 COMMISSIONER TURNBULL: No matter
22 where it is, the maximum height --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. LAWSON: We can certainly, yes,
2 we can certainly clarify that, to make sure that
3 it's really clear how height is measured in a
4 case like that.

5 COMMISSIONER TURNBULL: Okay,
6 thank you.

7 CHAIRMAN HOOD: Okay, any other
8 questions?

9 Commissioner May?

10 COMMISSIONER MAY: Yes.

11 First of all, this is applicable in
12 R1 through R4 districts.

13 Can you explain why you think it's
14 not necessary in R5 or other zones?

15 MS. ELLIOTT: The text amendment
16 was actually in response to some concerns about
17 retaining walls in the single-family district.

18 If it's something you think we
19 should apply to other districts, we, I think we
20 --

21 COMMISSIONER MAY: I'm not sure
22 that I would. I just think it's something we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 ought to make a willful decision about, as
2 opposed to just, you know, knowing that there
3 was a problem there and they want a fix here.
4 We should look more broadly and say, well, is
5 it something we want to do in R5 or other zones?

6 One of the things it triggered for
7 me is a consideration of some of years where
8 we've seen some large retainer walls that were
9 part of PUDs.

10 I'm thinking of like Sheridan
11 Station, which is along Suitland Parkway. I
12 think that's the, that was that development --
13 I can't remember if I have right one or not, but
14 you know what I'm talking about -- and there
15 were very large retaining walls that were
16 internal to the property. So they didn't
17 affect neighboring property; in fact, they were
18 necessary to retain earth for the neighboring
19 property. And certainly, we have seen some
20 other PUDs that have large retaining walls.
21 They tend to be in C zones.

22 I'm not sure what the right strategy

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 is. I just think that's something we ought to
2 make a deliberate decision about.

3 And then I wanted to clarify one
4 thing. When it comes to measuring lot
5 occupancy for structures, it only applies when
6 you've got more than four feet but less than six
7 feet because you can't go more than six feet,
8 no matter what; right?

9 MS. ELLIOTT: Correct.

10 COMMISSIONER MAY: Okay. And so,
11 as soon as you go over four feet, then pretty
12 much all of the earth that's fill becomes part
13 of that lot occupancy calculation.

14 MS. ELLIOTT: That is correct.

15 COMMISSIONER MAY: Okay; as
16 opposed to, you know, when you get back as far
17 as four feet, it doesn't count anymore or
18 anything like that. It's the entire thing.

19 MS. ELLIOTT: It was intended that
20 it would be the entire structure at that point.

21 COMMISSIONER MAY: Okay. And I
22 mean I think that's a heavier burden, but I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 think that's probably the only thing they can
2 be easily measured.

3 It is something that would have to
4 be memorialized in the permitting process so
5 that, in perpetuity, everyone knows where the
6 retaining wall is, and how that calculation was
7 done because, otherwise, somebody could come
8 back in five years and say, you know, gee, my
9 lot occupancy is only this amount because I've
10 slipped it up elsewhere.

11 The last thing is, have you all had
12 a chance to review the letter that we received
13 from Holland & Knight about this text
14 amendment?

15 MR. LAWSON: We have. We've also
16 have some discussions with the Office of
17 Attorney General on some of these provisions.

18 In general, the Office of Attorney
19 General -- I shouldn't speak for them, but since
20 they're not here -- they felt that we could make
21 the changes we're proposing. Certainly, some
22 of the changes were proposed by Holland & Knight

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 would, would change the very character of the
2 provision itself.

3 They did certainly suggest some
4 wording changes that we think are worth
5 looking, and appropriate. In particular, for
6 example, if you look at their report, the first
7 recommendation regarding Section 412.3, the
8 addition of the words, _in height, we think is
9 a good change.

10 And we think, also, a clarification
11 of the yard question is also important. We
12 kind of, to some extent, got ahead of ourselves
13 a little bit in that we're recommending some
14 changes through ZRR regarding how the yards are
15 going to be measured.

16 COMMISSIONER MAY: Right.

17 MR. LAWSON: These kind of take
18 that into account, but they're not quite
19 approved yet.

20 So I think we'll have to come up with
21 some kind of an interim language to address
22 that, until ZRR is approved and how we measure

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 yours is --

2 COMMISSIONER MAY: Right.

3 MR. LAWSON: -- presuming that the
4 Zoning Commission does that, we would measure
5 it after the changes.

6 COMMISSIONER MAY: Okay, good.
7 I'm very interested in seeing how that turns out
8 because I think that was probably the most
9 substantive issue that they had raised.

10 The other ones seem to be attempts to, you
11 know, undermine what we're trying to do in the
12 clarifications and making it clear what
13 retaining wall really is and what it isn't. I
14 mean the fact that it doesn't include geo-grid
15 sheets, I mean, please; it doesn't really
16 matter. Whether it includes geo-grid sheets
17 or not, what you're concerned about is the
18 impact of having a large retaining wall next to
19 you in a neighboring property. It doesn't
20 matter what the structure of it is.

21 MR. LAWSON: Yes, we'd certainly be
22 happy to take a closer look at these, refine

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 some of the language as appropriate, and have
2 that back to the Zoning Commission before you
3 take proposed actions or final action, or
4 however you want to proceed.

5 COMMISSIONER MAY: Yeah, that
6 would be great, particularly given the court
7 precedents that they had cited in their first
8 issue that they've raised.

9 So that's helpful. Thanks.

10 CHAIRMAN HOOD: Let me just
11 piggyback on the Holland & Knight letter.

12 While I appreciate Holland & Knight
13 weighing in -- I, I do think, at least in one
14 instance, they bring something of substance to
15 the table -- a lot of times, it's at a
16 disadvantage when they give us a letter like
17 this tonight, and they don't show up, I mean,
18 when we might want to ask some questions and get
19 clarification about what they have in the
20 letter.

21 I don't think that's very,
22 necessarily fair to the Office of Planning or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to the Zoning Commission, so I want to put that
2 on the record. They may be watching, or maybe
3 tomorrow when they're bored, they may be
4 watching this.

5 This is not the first time they've
6 done this. I mean, while we appreciate the
7 information, and as Mr. Lawson just mentioned,
8 Mr. at least one of the issues, they were able
9 to take heed to. Sometimes, we may have
10 questions -- I know I did -- on the back end,
11 but they're not here for us to ask them.

12 I think Commissioner May covered a
13 lot in this letter, so that's good.

14 Okay, are there any other
15 questions?

16 (No response.)

17 CHAIRMAN HOOD: Okay.

18 Do we have anyone here from any
19 other government agencies?

20 (No response.)

21 CHAIRMAN HOOD: I didn't miss
22 anything.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Anyone here from the ANC?

2 (No response.)

3 CHAIRMAN HOOD: Okay, let's bring
4 up any witnesses from the audience who would
5 like to testify.

6 Since we have so many, if you do find
7 room at the table -- any members?

8 (Whereupon, an off-mic comment was
9 made on the record.)

10 CHAIRMAN HOOD: Okay, let's bring
11 up any witnesses from the audience who would
12 like to testify.

13 Ms. Lincoln or Ms. Gates? Okay.

14 (Whereupon, the witnesses
15 approached the microphone.)

16 CHAIRMAN HOOD: I always get
17 nervous when I see a transcript. I look to see
18 if my name is on it; luckily, I wasn't on this
19 one.

20 We're going to go ahead and start
21 with Ms. Gates if you're ready.

22 COMMENTS IN SUPPORT

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

BY ALMA GATES

MS. GATES: Good evening, members of the Commission. My name is Alma Gates. I'm here this evening in support of text amendments to define and regulate retaining walls in the R1 through R4 districts.

Currently, retaining walls are included in the definition of structure as having permanent location on the ground. That scarcity of information has been problematic and is why the addition of a definition in Section 412 to the Zoning Code is necessary and timely.

At the April 8, 2013 meeting of the Commission, when the immediate case was set down, Commissioner May mentioned a particular residential retaining wall which, since 2004, has loomed over federal parkland like one of Mr. Lincoln's forts casts a giant shadow on the earth beneath it, diverted runoff onto parkland and neighboring properties, and affected nearby vegetation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 This 30-foot retaining wall was the
2 subject of multiple hearings before the BZA.
3 It serves as an example of why retaining walls,
4 especially those with stabilized earth, need to
5 be regulated and that they are structures,
6 rather than just earth being held back by a wall
7 of stone, brick, or wood.

8 In their proposed definition of
9 retaining wall to be added to Section 199 of
10 the current Zoning Code, mechanically
11 stabilized earth systems, MSEs, are included to
12 address a type of wall addressed in the
13 aforementioned BZA case. MSEs are built using
14 earth compacted between multiple layers of
15 geo-grid which are faced with Mesa blocks.
16 Even if the block-facing were removed, this
17 stabilized earth structure would continue to
18 stand.

19 The other types of stabilized
20 retaining walls listed in the proposed
21 definition may not have the same lasting
22 qualities as MSEs, but these walls are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 nevertheless structures by virtue of their
2 construction, as well as having permanent
3 location on the ground.

4 The height and location of
5 retaining walls will also be regulated under
6 this proposal and will help prevent destruction
7 on public or private property, similar to that
8 previously mentioned.

9 A few clarifications to the text may
10 be helpful. Section 412.2 sets a height limit
11 for retaining walls at four feet in any required
12 side or rear yard. But Section 412.4 sets,
13 sets a maximum of six feet, regardless of
14 location. The Commission may wish to clarify
15 Section 412.4 so that it is complementary
16 rather than in conflict with Section 412.2.

17 Section 412.7 states, _The
18 landscape area shall be pervious and may not be
19 paved or otherwise covered._ Does this
20 definition mean to exclude the use of pervious
21 pavers? The Commission may wish to consider
22 the practical difficulty of maintaining grass

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 or other types of vegetative groundcover in
2 certain circumstances where pervious pavers
3 might be more appropriate or effective.

4 I have a few additional things if I
5 can go off-script. I realize I'm taking more
6 than my five minutes, probably, but -- we are
7 so crowded tonight.

8 In, in particular, I'm looking at
9 412.3. _A retaining wall taller than four feet
10 shall not be located in any required yard as
11 measured from the property line inward along
12 the street frontage, and I thought perhaps, _or
13 in public space_ might be helpful.

14 Also, in 412.5, the retaining wall:
15 _ . . . four feet or more in height that elevates
16 the drain and is backfilled with dirt and other
17 stabilizing material shall be considered a
18 structure included in lot occupancy, and its
19 area shall be as follows. . . _

20 Thank you for the opportunity to
21 offer comments in support on the definition of
22 proposed text amendments. As stated earlier

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in this testimony, this section is necessary
2 and timely. I am pleased to support it.

3 CHAIRMAN HOOD: Okay.

4 Thank you, Ms. Gates. Hold your
5 seat; we may have some questions.

6 Mr. Eckenwiler.

7 MR. ECKENWILER: Thank you, Mister
8 Chairman and members of the Commission.

9 REPORT OF ANC

10 MR. ECKENWILER: My name is Mark
11 Eckenwiler. I'm a commissioner on ANC 6C,
12 although I am appearing tonight in my
13 individual capacity.

14 I am not only testifying in
15 opposition (because you have to choose one or
16 the other), but really, my comments go to what
17 I think are a couple of fairly technical issues
18 with the proposal that I wanted to make sure the
19 Commission focuses on.

20 The first of those is, in Section
21 412.3, there is an outright prohibition on the
22 construction of a retaining wall taller than

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 four feet in any required yard as measured from
2 the property line inward. And I think this
3 creates, if not an outright conflict, at least
4 something of an anomaly with the existing
5 regulation.

6 Section 2500.3 allows an accessory
7 building to occupy up to 30 percent of the area
8 of a required rear yard. Now that is not this
9 is not in direct conflict because a retaining
10 wall is not a building, and therefore, it can't
11 be an accessory building. So these are
12 formally compatible.

13 But it does seem a little peculiar
14 to suggest that a property owner can build a
15 garage or other accessory structure up to 15
16 feet tall that could occupy up to 30 percent of
17 the area of a required rear yard, but could not
18 build a four-foot-tall retaining wall in that
19 same required rear yard.

20 The second point, somewhat similar
21 to the first, is, in proposed Section 412.5, the
22 statement that particular retaining walls four

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 feet or taller elevating the terrain with
2 backfill material or other fill material _shall
3 be considered a structure included in lot
4 occupancy._

5 What is curious about this is, of
6 course, that the definition of _lot occupancy_
7 -- there's a series of nasty definitions in the
8 definitional provision in 199.1 -- percentage
9 of law occupancy is of course based in turn on
10 the definition of _building area._

11 If you look to the definition of
12 _building area,_ there is a very significant
13 exclusion in building area of _portions of a
14 building that do not extend above the level of
15 the main floor of the main building._

16 Now, in practical terms, what that
17 means is if there is a property with a grade
18 change, with a significant slope from front to
19 rear, where the backyard is much lower than the
20 front, or you may even have a structure -- we
21 have a lot of these, of course, row house
22 neighborhoods like Capitol Hill -- where the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 main floor, the parlor floor, is elevated above
2 grade and you've got a tall front stoop that
3 takes you up to that parlor floor, you may have
4 some significant structure in the back which is
5 still below the parlor floor -- it doesn't rise
6 above it -- and therefore, under the current
7 regulations, does not go at all two words
8 building area.

9 Now there may be other
10 considerations. You know, the required rear
11 yard; obviously, with this structure and so on.
12 But for purposes of lot occupancy, such
13 structures do not count. They are expressly
14 excluded from the definition of _building
15 area,_ and therefore, would not go toward that
16 occupancy that lot occupancy calculation.

17 So once again, we have, I think,
18 with the proposed regulation, not a formal
19 conflict. Again, a retaining wall is not a
20 building. But this would create a situation in
21 which someone can have an accessory building.
22 As long as it's not higher than the main floor

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the main building, you're fine; it doesn't
2 impact lot occupancy calculation at all. But
3 a retaining wall of four feet of height in every
4 case, as I read Section 412.5, would go towards
5 lot occupancy. That seems to me a little
6 anomalous.

7 I think the Commission would want to
8 think carefully before it adopts that seeming
9 inconsistency.

10 That's the substance of my
11 testimony. Good.

12 CHAIRMAN HOOD: Can you just
13 comment quickly -- I haven't had a chance to
14 look at this transcript that you had in the back
15 -- would you just comment on that, briefly?

16 MR. ECKENWILER: Certainly, Mister
17 Chairman.

18 There was a case in 2004 before the
19 Board of Zoning Adjustment, BZA 17087, the
20 *Kwaterski* case, which I suspect Commissioner
21 May recalls because he sat on that panel --

22 In which your --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 COMMISSIONER MAY: Yes, I remember
2 everything in 2004.

3 MR. ECKENWILER: I, your memory is
4 renowned and prodigious, Commissioner.

5 COMMISSIONER MAY: This is the
6 garage case in the back, where we looked at the
7 whole issue that you raise, of the parlor world
8 floor and the height of it relative to that.

9 MR. ECKENWILER: Precisely, and in
10 fact, the Board reconsider this case *sua*
11 *sponte*. There had been, I believe, a grant of
12 a variance. The Board reconsidered on its own
13 initiative and decided that the appropriate
14 standard to apply was in fact a special
15 exception.

16 And I believe -- I think I'm
17 characterizing your view correctly,
18 Commissioner May -- you were opposed to the
19 variance. You thought that this application
20 did not meet the variance test. You thought it
21 was fine as a special exception. I think
22 that's reflected in the transcript that I've

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 attached to that to the back of my testimony.

2 So, Mister Chairman, the reason
3 I've attached the transcript for *Kwaterski* is
4 just to underscore the fact that these are not
5 purely theoretical concerns. This definition
6 of _building area_ and the exclusion they're
7 in, in fact, comes into play in a fair number
8 of cases in actual practice, as we've seen in
9 cases like *Kwaterski* before BZA.

10 CHAIRMAN HOOD: Okay, thank you
11 very much.

12 Commissioners, do you have any
13 questions of Ms. Gates and Mr. Eckenwiler? Any
14 questions or comments?

15 COMMISSIONER MAY: No, but I mean I
16 don't have specific question, but I would be
17 interested in hearing what the Office of
18 Planning has to say on a couple of those points.

19 On Ms. Gates's concern about the
20 inconsistency of the maximum height of six feet
21 regardless of location, I take that to mean --
22 I don't take that to mean that you can have a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 six-foot retaining wall in a side yard because
2 I thought the other statement controls that.

3 Is that your understanding?

4 MR. LAWSON: That's exactly right.
5 Right.

6 COMMISSIONER MAY: Okay.

7 And I get the point about pervious
8 pavement and the issue of maintaining anything
9 that's growing in a terraced wall.

10 MR. LAWSON: I think our intent was
11 to address storm water management more.

12 So, certainly, having pervious
13 pavers -- I don't think it would be prevented
14 would be prevented by the language that we've
15 proposed, but we can certainly clarify that, to
16 make sure that's clearer.

17 COMMISSIONER MAY: I would think
18 that makes perfect sense. We certainly don't
19 want to have these things concreted up and have
20 the water sheeting off of terraced walls.

21 But, you know, having had to deal
22 with some terraces and maintaining things like

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that in my life, I appreciate the difficulty of
2 doing that sort of maintenance.

3 And so, for --

4 CHAIRMAN HOOD: Let me ask this .

5 Before we leave Ms. Gates, since
6 we're asking, I would agree with Ms. Gates about
7 the clarification because when I was reading
8 this over again, it did look like 412.2 was
9 contradictory to 412.4, so we may want to try
10 to clarify that, as she mentioned in her letter.

11 Okay.

12 COMMISSIONER MAY: Okay.

13 So, at least in my mind, much of what
14 was behind the conception of this regulation
15 was to get a handle on retaining walls that were
16 being used to create large flat spaces in what
17 have typically been low-density residential
18 zones, as opposed to row house zones. In
19 starting to see them in terms of row houses, it
20 is apparent, there are some issues that we would
21 want to be a little bit more precise about.

22 I don't know that I would want to go

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 so far as to say that it doesn't count against
2 lot occupancy, period, because of this concern,
3 but maybe it's something where it counts
4 against lot occupancy in R1 zones and R2 zones,
5 or something like that, but not in R3 and R4.
6 That might address it, I'm thinking. Maybe Mr.
7 Eckenwiler has an opinion about that.

8 But I'm thinking that in R4 zones,
9 typically, you have a real lot occupancy issue,
10 and in R1 zones, the issue is more people. You
11 know, it isn't so much lot occupancy being --
12 the properties are not maxed out on lot
13 occupancy with as great frequency in R1 and R2
14 as they are in R3 and R4, I think.

15 But anyway, maybe Mr. Eckenwiler
16 could --

17 MR. ECKENWILER: I can how I wish I
18 could offer some deep thoughts on that.
19 Really, my view is colored by living in an R4
20 zone and living on the north side of the Hill,
21 where we do have a pretty significant grade
22 change.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 COMMISSIONER MAY: Right.

2 MR. ECKENWILER: And there are
3 obviously a lot of properties, including mine,
4 where the backyard slopes away. And there
5 would be significant impacts on a lot of people.
6 If they wanted to put in even, you know, a small
7 retaining wall, it certainly would trigger a
8 need for zoning relief, where --

9 COMMISSIONER MAY: Right.

10 MR. ECKENWILER: I think it's a
11 little perverse if, as I say, you can erect some
12 very large structure in the back, but, you know,
13 because it holds back dirt, that's somehow
14 different and needs to be treated more
15 severely. It just seems perverse.

16 COMMISSIONER MAY: Okay.

17 I mean, I can see where it could
18 cause some problems in some circumstances.

19 I think one of the other defining
20 factors here is that you are also dealing with
21 circumstances in R4 neighborhoods typically
22 where you're abutting an alley, and there

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 really isn't a lot of opportunity to do anything
2 but retaining walls to deal with the kind of
3 grade changes that you have.

4 So maybe, you know, abutting an
5 alley has something to do with how we address
6 retaining walls. Not that you would have an
7 open right to do a retaining wall abutting an
8 alley, but there are going to be some cases
9 circumstances where it's a necessity, and we
10 don't want to create a lot of nonconformity.

11 I'm not sure what the answer is.
12 That's a good point.

13 Ms. Gates?

14 MS. GATES: Is it possible that the
15 retaining wall that is simply holding dirt,
16 just dirt, so that you've got a situation maybe
17 where a driveway has been put in, and you put
18 up a retaining wall -- there's nothing
19 stabilizing that other than the wall --

20 COMMISSIONER MAY: See, the --

21 MS. GATES: -- it's a natural --

22 COMMISSIONER MAY: Yes, the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 circumstance that raises is that you can make
2 that while 30 feet tall --

3 MS. GATES: No --

4 COMMISSIONER MAY: -- with just
5 dirt in it. Yes, you can. You can engineer a
6 concrete wall 30 feet tall with nothing but dirt
7 behind it.

8 MS. GATES: Okay. I accept that.

9 COMMISSIONER MAY: And that's
10 where I have -- I've actually had that problem,
11 you know, in that circumstance. I won't go
12 into any detail on that, but that is one of the
13 things that I think we don't want to have.

14 MS. GATES: Okay, I, I didn't
15 realize you could have a wall that tall --

16 COMMISSIONER MAY: Yes.

17 MS. GATES: -- and not have some
18 sort of stabilizing.

19 COMMISSIONER MAY: Yes. It's
20 certainly less expensive to try to build
21 something with the geo-grid and the block and
22 all that sort of stuff, but you could engineer

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 a solid concrete wall that would hold back that
2 earth.

3 MS. GATES: Thank you.

4 CHAIRMAN HOOD: Other comments?

5 Commissioner Turnbull.

6 COMMISSIONER TURNBULL: I just had
7 one.

8 Ms. Gates had a comment, in 412.3,
9 about adding _or in public space._ I think
10 we're talking about private property. I think
11 that that's what OP has really related it to,
12 is that in order --

13 MR. LAWSON: That's correct. We
14 can't put in the regulations that would cover
15 retaining walls in public space.

16 COMMISSIONER TURNBULL: Right.

17 MR. LAWSON: But such retaining
18 walls, or any wall, is subject to review by the
19 Public Space Committee.

20 COMMISSIONER TURNBULL: Right.

21 Okay, I just wanted to clarify that.

22 CHAIRMAN HOOD: Any other comments

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for either Office of Planning or Ms. Gates or
2 Mr. Eckenwiler?

3 Commissioner Miller.

4 COMMISSIONER MILLER: Just a quick
5 win, Mister Chairman.

6 I appreciate the comments that we
7 received from Mr. Eckenwiler and Ms. Gates and
8 from Holland & Knight today, and I would look
9 forward to seeing maybe an OP-written response
10 to each of them, and what clarifications and/or
11 other changes they think should be necessary.

12 I'd be more comfortable seeing that
13 before we take any action on that. I don't if
14 know my colleagues are, maybe my colleagues are
15 not ready to go forward tonight, but I would
16 feel more comfortable seeing --

17 COMMISSIONER MAY: No, I agree with
18 you. I'd want to see maybe not everything in
19 detail, but certainly the ones that we talked
20 about so far. It would be helpful to me.

21 CHAIRMAN HOOD: I don't want
22 Holland & Knight to take my comments wrong, but

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 there may have been questions that we may have
2 had for them.

3 I appreciate them. Again,
4 understand, I don't want them to thinking that
5 the Chairman said don't send letters in,
6 because I didn't say that.

7 What I said was, you've got a lot of
8 good information in here. Some we can take;
9 some we probably won't. It would be good
10 sometime if we can kind of expound on it, as
11 we've done with these two witnesses. It would
12 help us out and clarify their submission.

13 We'll now assign to the Office of
14 Planning, and they now they have a little
15 homework to do.

16 Okay, any other questions?

17 (No response.)

18 CHAIRMAN HOOD: All right, Ms.
19 Schellin, do we have any proposed dates?

20 MS. SCHELLIN: Yes.

21 Obviously, we're not going to get to
22 this until September. So, if the record is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 closed except for supplemental report from the
2 Office of Planning, if we could get that by
3 three o'clock p.m. August 12, then we can put
4 this on the Commission's agenda for
5 consideration, for proposed action at the
6 September 9 meeting.

7 Does that work for OP?

8 Do you want later?

9 COMMISSIONER MAY: There doesn't
10 have to be response time; right? So you have
11 more --

12 MS. SCHELLIN: They don't need a
13 response time. There are no parties. So we
14 could do it later if you want, because of the
15 ZRR. Okay.

16 I know you guys are working on that.

17 We could do it the 26th. Does that
18 work better? Okay, so August 26, and then
19 we'll put it on for September 9.

20 CHAIRMAN HOOD: And then when we
21 take action, there will be another 30-day
22 comment period if you want to expound any

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 further.

2 MS. SCHELLIN: Correct; then it
3 will be open up again for the public, yes, once
4 it's published in the *Register*.

5 CHAIRMAN HOOD: Okay.

6 Do we have anything else?

7 (No response.)

8 CHAIRMAN HOOD: Are we all on the
9 same page?

10 (No response.)

11 CHAIRMAN HOOD: Okay, I went thank
12 everyone for their comments tonight.

13 This hearing is adjourned.

14 (Whereupon, the hearing adjourned
15 at 7:07 p.m.)

16

17

18

19

20

21

22

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1
2
3
4
5
6
7
8

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com