DISTRICT OF COLUMBIA

BOARD OF ZONING ADJUSTMENT

In Re: Application 16987

REPLY OF PARTIES OPPONENT TO BRIEF IN SUPPORT OF

APPLICATION NO. 16987 FOR A SPECIAL EXCEPTION

Pursuant to 11 DCMR §3121.6, Larry Ewers and Robert Stofferson, parties opponent to the instant application, respond to the applicant's brief in support of his application as follows:

1. The applicant fails to address any of the contentions of the parties opponent concerning material defects in his application and in the reports submitted by the D.C. Office of Planning and Advisory Neighborhood Commission 1B. Most significantly, he fails to refute or deny that the granting of his application would result in a percentage of lot occupancy in excess of 70 per cent. He (while arguing the merits of the application with respect to 11 DCMR §223.2(a), (b), and (c) on pp. 2 through 5 of his brief) ignores 11 DCMR §223.3 (which the Office of Planning acknowledged as fundamental on p. 2 of its report) and the limits it places on the Board's authority to grant special exceptions. He appears to consider it unimportant that the covered front porch was not included in the dimensions presented with his application, despite his signed certification to the contrary on the plat, and equally unimportant that his plat shows the dwelling proper being some 3 feet shorter and the distance from the dwelling proper to the rear lot line 1.5 feet shorter than they demonstrably are, and the front porch reposing well inside the building restriction line while in reality it extends several feet beyond that line.

2. Instead, the applicant presents matters which are either irrelevant or misrepresented by his brief.

   a) He (on p. 2, ¶2 of his brief) talks of creating "a usable space in the rear yard," by putting a structure in it, ignoring the prohibition on structures occupying more than 50% of a rear yard (see 11 DCMR §199, definition of "yard, rear.") [It should be noted that, though he doesn't mention it and his photos don't reveal it, three of the four examples he cites in the

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neighborhood of deck structures ostensibly similar to his (see p. 5, ¶3 of his brief), namely 1204, 1206, and 1208 Euclid St., N.W., comply with 11 DCMR §199 in that respect, in that they are set back more than 10 feet from the alley, thus leaving more than 50% of the (20 ft.) required rear yard open to the sky from the ground up, and unobstructed for their entire width. The fourth example, 1114 Euclid St., N.W., appears to exceed 70% lot occupancy and is probably not legal unless it was constructed prior to the enactment of the zoning laws in question. In any event, none of the four examples is relevant to the instant case, since none is associated with a house located along the subject street frontage, as contemplated by 11 DCMR §223.2(c)].

b) He appears to seek to avoid the requirement of a 15 ft. wide court (see 11 DCMR §406.1) by characterizing his structure throughout his brief as a one-family dwelling (e.g. p.2, ¶3), notwithstanding the Office of Planning's finding and his representation in his Application that it is a (two-family) flat.

c) He submits photographs showing light incidence to the rear yards of abutting properties 1205 and 1209 Clifton St, a critique whereof here follows:

   1) With respect to 1205 Clifton St., the photographs clearly show significant light incidence to the rear yard at 7:30 a.m., 10:30 a.m., and 11:30 a.m. only. The photographs reveal no significant light incidence to the rear yard during the afternoon, when the applicant's deck is positioned between the sun and Mr. Ewers's rear yard. These photographs were taken on March 27, 2003, near the spring equinox, which falls on March 21. In the summer, the sun would be much higher (further north) in the sky, the rear yard would receive (potentially) more light, and the contrast would be even starker, with near full sun to much of the rear yard all morning, and a relative blackout for much of the afternoon, when it would be shaded by the applicant's deck. For an urban gardener already challenged by trying circumstances, this would be the straw that broke the camel's back, thus significantly reducing the value and utility of the property to anyone interested in gardening. While any neighbor could legally erect a fence which would also block light, provided it did not exceed height limits

imposed by building codes and zoning regulations, the subject deck is at least twice as high as a normal fence, and accordingly at least twice as significant as any such fence with respect to its impact in reducing light incidence to the rear yard.

2) With respect to 1209 Clifton St., the photos show light incidence to the west half of the rear yard only (i.e. the half most remote from the applicant's deck, which shades the east half completely), at 9:30 a.m.; thus, light incidence is reduced by some 50% by the applicant's deck at that time. At 10:30 a.m., the few feet closest to the subject deck are still totally shaded by the subject deck, and at 11:30 a.m. a small portion is still shaded by the subject deck. In the summer, the sun would be higher (further north), and the other structures (lying generally toward the south, since the rear yards of properties adjacent to 1209 Clifton St. are largely unoccupied by structures), such as the deck of 1209 Clifton St., would shade the yard less, while the shading from the applicant's deck in the morning would remain relatively unchanged. The shading of the rear yard of 1209 Clifton St. by the applicant's deck is less than that of 1205 Clifton St. since the relative height of the deck is higher with respect to the rear yard of 1205 Clifton St., which is on the downhill side, and therefore lower than the yard of 1209 Clifton St.; however, it is still significant.

3) The applicant presents photographs of sun incidence to the front yards which are not relevant since those yards are unrelated to the deck addition.

4) The applicant presents photographs of an apartment building which is remote from the subject property and not relevant since the applicant's deck totally obscures the said building from view from the rear yard of 1205 Clifton St., and the said building is not in an R-4 zone and is therefore subject to different zoning standards. In any case, it does not shade the rear yard of 1205 Clifton St.

5) The applicant's statement (on p. 3, ¶3 of his brief) that the shadow cast by his deck is attributable to the portion of his deck closest to the building itself, is simply untrue. The rear of the building rises some 20 ft. above the deck floor, and some 16 ft. above the railing, while the floor of the deck is over 8 ft., and the railing some 12 ft., above

grade at that point. It is physically impossible for a portion of the deck a few feet from the house to shade a portion of the yard adjacent to the alley (i.e. over 20 feet from the house) at 2:30 in the afternoon when the sun is relatively high in the sky. In reality, the portion of the deck casting the shadow at that time is remote from the house, even in spring and fall. In the summer, the portion of the deck near the house would cast a shadow near the house, and the portion further back would cast a shadow near the alley. A clear illustration of the fallacy of the applicant's argument may be seen by close inspection of the indicated photograph. The shadow of the balustrades (i.e. the vertical slats just below the railing) of the subject deck is visible in the photograph. The balustrades are approximately vertical. As such, they cast discrete shadows, each of which points back to the point directly beneath the balustrade which cast it (this can be verified by holding a pencil vertically and observing the shadow cast by a single light bulb mounted in a ceiling fixture in a room, remembering that at the latitude of the District of Columbia, the sun is never directly overhead, even in summer, and at 2:30 in the afternoon in March, has passed significantly to the west, and is somewhat to the south. It will be seen that the extended line of the pencil's shadow intersects the line extended vertically downward from the base of the pencil. Similarly, the extended line of a balustrade's shadow on the rear yard intersects a point directly beneath the balustrade which cast the shadow. As such, it is clear that the section of deck casting the shadow in the subject photograph is remote (according to observation made at 2:30 p.m. on April 3, 2003 by Mr. Ewers, more than 9 feet) from the house.

d) The applicant's argument with respect to the privacy issue (pp. 4 –5 of his brief) misses the mark. While it is true that someone might be able to look into almost any window in an urban setting, the proximity of a prospective viewer and the angle of view with respect to the window are important factors which affect the subjective sense of privacy. To rely on curtains as the exclusive remedy is unreasonable, as that "remedy" itself interferes with the very light and air which is a stated zoning objective. The applicant's deck is both quite

elevated and quite proximate to the adjoining properties, and consequently reduces the subjective sense of privacy to occupants of the adjacent houses. Furthermore, positioned, as it is, to be able to overlook any reasonable fence bounding the adjacent yards, privacy which might normally be obtainable by fencing of those yards is totally obviated. Carrying the applicant's argument to its logical extreme, there would be no situation in which the granting of a special exception would infringe on neighbors' privacy, since everything could always be curtained or shrouded. Obviously, such an argument is absurd on its face, and makes a mockery of the zoning regulations.

e) The applicant's argument with respect to the requirements of 11 DCMR §223(c) (p. 5 of his brief) ignores the clear and unambiguous wording of the regulation, omitting the key words "as viewed from the street, alley, and other public way. . . ." As such, the applicant's statement that "the statute does not require conformity along the alley" is false, as is his implication that houses along the subject street frontage have garages off the alley (any garages which may exist are not located on lots along the subject street frontage, which is all that is relevant or material under 11 DCMR §223.2(c). Concerning his mention of "off street parking facilities" (p. 5, ¶3 of his brief), if thereby he means driveways, that is not relevant to any issue in question, as driveways are not structures, as contemplated by the regulations. He notes that the alley has "a wide variety of deck sizes and or other structures," but fails to mention that none (of the houses along the subject street frontage, which is all that is relevant under §223(c)) except his occupies in excess of 50% of a required rear yard, as proscribed by 11 DCMR §199; in fact, none except his occupies in excess of 30%, whereas his occupies 100%.

3. The applicant's assertion (p. 1, ¶1 of his brief) that granting the application would be consistent with the general purpose and intent of the zoning regulations (as required by 11 DCMR §3104.1) fails to withstand scrutiny. 11 DCMR §101.1 provides that ". . . [i]n their interpretation and application, the provisions of this title shall be held to be the *minimum* requirements adopted . . . for the following purposes:

(a) To provide adequate light and air

(b) *To prevent* undue concentration of population and *overcrowding of land*; and

(c) *To provide* distribution of population, business and industry, and *use of land that will tend to create conditions favorable to* transportation, *protection of property*, civic activity, and recreational, educational, and cultural opportunities; and will tend to further economy and efficiency in the supply of public services. [Emphasis added.]

4. While the applicant's brief purports to address the requirements of 11 DCMR §223, it fails to acknowledge the independent mandates of 11 DCMR §3104.1, in derogation of both the express language of the respective regulations and the legislative history. The applicant misrepresents the language of 11 DCMR §223 on p. 2, ¶3 of his brief, omitting mention of the section's explicit reference to the arguably more stringent provisions of §3104.1. The legislative history indicates no intention that the strict language of §3104.1 (requiring that the granting of special exceptions not tend to adversely affect the use of neighboring property) should be abrogated by the more qualified language of §223.2 (see 48 DCR 8982, ¶4, which suggests that the requirements of both sections must be satisfied by strict application of the language of each considered independently). Specifically, while 11 DCMR §3104 provides for special exceptions for flats (two-family dwellings) subject to the provisions of 11 DCMR §223, §3104.1 permits special exceptions only *"where . . . the special exceptions . . . will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map . . . ."* [emphasis added]. The applicant's own photographs, showing shadows cast by the deck on the rear yards of neighboring properties, prove that the deck addition reduces light incidence to the neighboring properties and would affect adversely the use of neighboring property for purposes of gardening, which is a use in accordance with the zoning regulations and maps as contemplated by 11 DCMR §330.

5. Furthermore, the applicant's deck was constructed using lumber treated exclusively with a chemical, copper arsenate, which can reasonably be expected to contaminate the soil on the neighbors' properties, due to contaminated runoff, splashover, or wind-blown moisture or dust from the deck associated with rain, snow, and any deck washing, or sweeping (labels which are stapled to the lumber components of the deck read in part: "CAUTION: Arsenic is in the

pesticide applied to this wood"—see informational articles with respect to arsenic-treated wood included as attachments hereto). Similarly, neighbors' yards and soil are likely to be contaminated with any other chemicals which may be used for deck cleaning or other purposes. Due to the height of the deck above the level of the floor of the main floor of the building), and the construction of the deck virtually contiguous with the lot lines, any normal fence would be ineffective in containing or preventing such runoff and contamination, which could simply spill or be splashed or blown over any such fence. The arsenic in copper arsenate (and any other toxic chemicals present) would compromise the usability of the neighbors' soil and rear yards for gardening purposes, at least for purposes of raising vegetables and fruits, including any trees bearing edible fruit. In deference to such considerations, the Federal government (EPA) and industry have agreed to remove arsenic-treated wood from the residential market by December 2003, following similar action by other countries. As specifically noted on p. 2, ¶3 of the report by the Office of Planning, ' . . . Section 223.4 states that . . . "*The Board may require special treatment in the way of* design, screening, exterior or interior lighting, ***building materials***, or other features *for the protection of adjacent or nearby properties.*"' [emphasis added]. Accordingly, any grant of a special exception by the Board in the instant case should be conditioned on the exclusive use of building materials which have not been treated with arsenic-containing chemicals.

6. Finally, 11 DCMR §3104.3 dictates consideration of the fact that the existing covered front porch extends more than 5 ft. past the building restriction line for substantially the full width of the lot in deciding whether to grant the special exception. If, under a strict construction of the 11 DCMR §199 definition, occupancy of that portion of the lot outside the building restriction line is not to be included in the percentage of lot occupancy calculation, then the area occupied by that nonconforming portion of the structure (i.e. part of the covered front porch, in this case 87.5 sq. ft., or 4.2 % of the total lot area) which lies outside the building restriction line should reasonably be subtracted from the maximum percentage of lot occupancy (i.e. 70%) allowable under §223.3, effectively reducing the maximum allowable percentage of lot occupancy to 65.8%, if the portion of the structure occupying the area outside the building restriction line is to remain. Otherwise, the intent of §3104.3 would clearly be defeated.
7. In closing (p. 5 of his brief), the applicant states that he has met his burden of proof. In consideration of the foregoing, the parties opponent respectfully suggest that he has not.

ATTACHMENTS:

The parties opponent attach hereto a revision of their previously filed plat, which contained typographic errors. The previously filed plat was prepared prior to discovering the availability of a professionally prepared plat in the possession of party opponent Robert Stofferson, which shows 1209 Clifton St. and a portion of 1207 Clifton St. (the subject), and which was attached as an exhibit to the previously filed Report Of Parties Opponent Concerning Linear And Area Measurements And Other Characteristics As They Relate To Zoning Requirements. The fact that the plat prepared by the parties opponent and the professionally prepared plat agree to within approximately 1 ft. in critical dimensions (as opposed to variance of as much as 7.5 feet vis a vis the applicant's proferred dimensions -- i.e., the derived distance from the front lot line to the front edge of the front porch is 32 ft. according to the applicant's plat, vs. 24.5 ft. according to the parties' opponent plat and 25.9 ft. based on the professionally prepared plat), is considered by the parties opponent to be an apparent validation of the relative accuracy and reliability of their plat, and by inference, also of the calculations, such as percentage of lot occupancy calculations, based theron, and accordingly also to be a refutation of the reliability of the applicant's plat, measurements, and calculations (such as percentage of lot occupancy calculations) based thereon. In fact, it appears that the

applicant's proferred dimensions, and the calculations based thereon, are so spurious as to be devoid of significance or value as a basis for decision on the application.

Additionally, the parties opponent attach hereto informational articles published by the New York Times and the Wall Street Journal concerning arsenic-treated wood, which were obtained from the Environmental Working Group, 1436 U St., N.W., Suite 100, Washington, D.C. 20009 (info @ewg org).

Respectfully submitted,

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CERTIFICATION

We, Larry Ewers and Robert Stofferson, hereby certify, under penalty of law, that the above statements, and those contained in previous documents filed by us jointly and/or severally, are true and correct to the best of our knowledge and belief. Measurements presented were personally verified as being reasonably accurate by Larry Ewers and / or Robert Stofferson, using standard measuring equipment (tape measures).

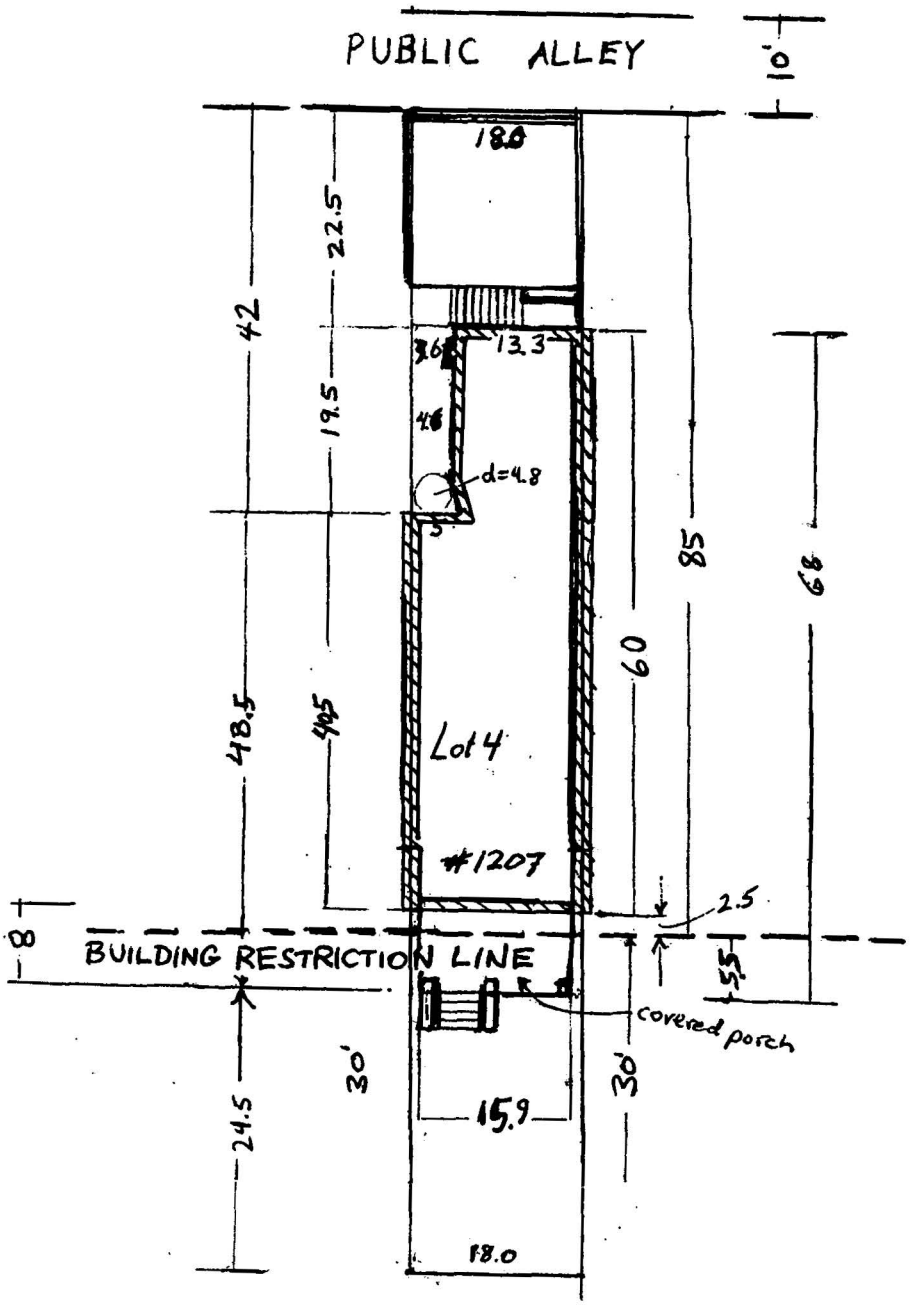
Larry Ewers

Robert Stofferson

SQUARE 2865 LOT 41

Scale: 1 inch = 20 feet

PLAT



EWG in the News

The dangers of touching arsenic treated wood

From EWG's report *Poisonwood Rivals*

(printable version)

Treated-Wood Precautions

By: John Leland
The New York Times
July 4, 2002

At the Home Depot in Decatur, Ga., the signs over stacks of pressure-treated lumber warn, "Caution: Arsenic is in the pesticide applied to this wood." Arsenic is a poison known to cause cancer of the lungs, bladder and skin. Keith Forrester, a carpenter, paid little notice this week.

"I've known about the arsenic for a while," said Mr. Forrester, 21, loading his van with treated lumber. While he appreciated the warning, he had his doubts. "It doesn't seem like there are substantial reports about it," he said. "They're not saying exactly what it can do to you."

Besides, he added, what choice did he have? "When you're using wood outdoors, you need it treated. If not, it will rot."

Of the many problems facing homeowners these days, few are more perplexing than the one presented by pressure-treated wood, the material used in most wooden decks, play equipment and other outdoor structures. This wood has been associated with serious health problems and is at the center of a growing body of product liability litigation.

Researchers are divided on the risks, but agree that simple measures like tablecloths, sealants and common sense can reduce arsenic exposure. Few suggest throwing the deck out.

According to the American Wood Preservers Institute, a trade association, Americans last year bought about seven billion board feet of pressure-treated wood, or $4 billion worth, most of it treated with a pesticide called chromated copper arsenate, or C.C.A.

The treatment kills termites and micro-organisms that cause decay. Yet, it also raises the specter of health risks, especially for young children. The Centers for Disease Control and Prevention lists arsenic as the toxic chemical posing the greatest threat to public health. In February, the industry agreed to start phasing C.C.A. out.

The Environmental Protection Agency is now studying the risks of C.C.A. - how much gets into the environment, how much gets into the body, how it affects cancer rates. "It's a surprisingly understudied area," said Steven Roberts, a toxicologist at the University of Florida, who headed a 2001 scientific panel to advise the agency.

Until the study is complete, the E.P.A. is offering no conclusions about any health problems caused by the wood treatment, said David Deegan, an agency spokesman. The Consumer Products Safety Commission is engaged in a similar study.

Since the late 1970's, environmental groups have pushed for a ban on C.C.A. In February, the industry, without quantifying the health risks of C.C.A., told the environmental agency it would stop treating wood with it for residential use after December 2003.

"We're reacting to a change in public perceptions," said Mel Pine, a spokesman for the treated-wood industry. He added that the product was safe if used properly.

Woods treated with other chemicals, including alkaline copper quat, known as A.C.Q.,

and copper azole, or C.A., have no arsenic but cost 15 to 30 percent more, said Ron Jarvis, the vice president for merchandise at the Home Depot. Redwood and cedar do not require pesticides.

Burning, sanding or sawing the C.C.A.-treated wood releases the arsenic as smoke, ash or sawdust. The environmental agency recommends never burning the treated wood and sawing or sanding outdoors, where there is ample ventilation.

Carpenters should wear gloves, goggles and a dust mask and wash all work clothes separately before wearing them again, the agency recommends.

The agency also recommends not allowing food or water to come into contact with the treated wood.

Arsenic in treated wood can form what are called "dislodgeable particles." Children playing on the wood can get the particles into their mouths. A small percentage can be absorbed through the skin.

The chemical also leaches into soil, where it can travel to mouths and skin. How big a problem is this? Researchers, again, are divided. One study, led by Helena Solo-Gabriele of the University of Miami, found that the soil under treated wood had 14 to 28 times as much arsenic as the soil around it.

A study of fruits and vegetables grown in arsenic-heavy soil, done for the Connecticut Agricultural Experiment Station, shows that certain types, notably mustard greens, retain high levels of arsenic. In other plants, including tomatoes and corn, the arsenic stays in the roots and stems. The study was led by David Stilwell, an analytical chemist.

The E.P.A. and environmental groups suggest a number of ways for consumers to protect themselves:

• Seal it: Painting or staining a deck or play equipment can immobilize most of the loose particles and stem at least some of the leaching. Stan Lebow, a research forest products technologist at the Forest Service Products Laboratory, recommended oil-based stains that penetrate the wood and do not require sanding or scraping, which stir up the arsenic. The sealant should be applied every year or two. Water-based sealants seem not to work.

• Cover it: Put a tablecloth on picnic tables.

• Don't overwash: Bleach and other oxidizing cleaners can release arsenic. They also convert the chromium in C.C.A. into its more toxic form, hexavalent chromium, which is the subject of the movie "Erin Brockovich."

• Lather: Wash hands after touching treated wood.

• Wipe it off: Amy Goldsmith, director of the New Jersey Environmental Federation, recommends keeping a towel by the door for wiping feet. If young children crawl on the deck or sit on pressure-treated wood benches, she recommends putting down a sheet or blanket.

• Line it: If you have wooden dividers in your garden, put a layer of plastic between the rails and the plants.

• Move it: Do not store children's toys under decks or allow children or animals to play there.

• Till: Arsenic stays close to the soil's surface. Turning the soil and covering it with topsoil or mulch reduces risk. However, John D. Schert, the executive director of the Florida Center for Solid and Hazardous Waste Management at the University of Florida, warns that some mulch has C.C.A.-treated wood in it. "Make sure you ask for virgin mulch," he said.

It is not necessary for people to be tested for arsenic poisoning unless they feel sick, Mr. Deegan of the E.P.A. said.

If you have questions, the National Pesticide Information Center, which is operated by the agency and Oregon State University, provides telephone access to a doctor, at (800) 858-7378. Hours are 9:30 a.m. to 7:30 p.m. Eastern Daylight Time, seven days a week.

EWG in the News

The dangers of touching arsenic treated wood

From EWG's report *Poisonwood Rivals*

(printable version)

Homeowners Scramble as EPA Ends Sales of Treated Wood

By: EILEEN WHITE READ
Wall Street Journal
May 10, 2002

Last year, William Koegel shelled out $1,500 for a giant climbing gym made of special lumber for his backyard. Guaranteed to stand up to the weather, it was a big hit with Mr. Koegel and his four kids. That is, until the government announced the wood it's made from could be a health hazard and is being pulled off the market.

"What am I supposed to do with this thing now?" asks the puzzled Washington, D.C., attorney.

He's not the only one asking that question. As if the drought in much of the country this year weren't bad enough, many Americans are now learning that much of the stuff on their lawns -- from playsets to gazebos to even garden mulch -- could be leaching harmful arsenic. The culprit: pressure-treated lumber, which is in an estimated half of American yards. After years of complaints from environmentalists and states, the Environmental Protection Agency announced in February it was taking it off the market, a move that has homeowners across the country scrambling to figure out what to do with it.

Some consumers are rushing to get the wood out of their yards, and sales of everything from lumber preserved without arsenic to composite decking (a mix of recycled wood and plastic) have jumped in recent months, say retailers and makers. Since CedarWorks, a playset maker, began touting its cedar structures as "safe" and "without toxic chemicals," sales have risen by 30%. But other companies say many worried homeowners are at a standstill. Zaragosa Barbosa, who owns an Austin, Texas, lumberyard says even contractors have been asking for advice on whether pressure-treated decks should be replaced. His answer? "We still don't know," he says.

Garden Borders

Virginia gardener Margaret Simpson is among the confused. She's used pressure-treated lumber as a border for her raised vegetable beds for 20 years and never thought there'd be a problem. So is the biology professor ripping it out? Not quite. She's leaving her old beds alone, but won't plant veggies -- they're going in a new bed bordered with untreated pine. The new wood will rot, but "I plan to replace it every few years," she says. And when Timothy Bause put in pressure-treated borders in his Napa, Calif., garden he lined them with heavy plastic to prevent any leaching. "I thought the plastic would mean we wouldn't worry," he says. "Should we?"

How did a workhorse of the American backyard -- in an estimated 80% of decks and 90% of playsets -- suddenly become such a source of high anxiety for homeowners? The debate actually dates back to the mid-'90s, when Florida's environmental-resources agency discovered that the lumber, made by soaking pressurized pine in a mixture of chemicals, including arsenic, was leaching the known carcinogen. When other state studies also found problems, concerns over the wood escalated, and some towns closed playgrounds and yanked out pressure-treated jungle gyms.

The $4 billion preserved-wood industry says all the fears have been overblown. "The fundamental safety of the wood hasn't changed," says Mel Pine, a spokesman for the American Wood Preservers Institute. "But perceptions in the marketplace have." Despite

its decision, the EPA hasn't found that the wood "poses any unreasonable risk," though the agency has yet to do its own evaluation, which could take years. Still, in February, with the industry facing lawsuits and the EPA under pressure from Congress, the agency and lumber makers cut a deal to take the wood off the home market by the end of 2003. "We are talking about arsenic here," says EPA spokesman David Deegan. "It's almost intuitive that lowering the exposure is a good idea."

In the meantime every piece of preserved wood for sale between now and 2003 is supposed to carry a label cautioning do-it-yourselfers to wear a dust mask, goggles and gloves when cutting it, to be careful around sawdust, and to wash work clothing separately. Some chemicals may "be dislodged from wood surface upon contact with skin," it says. For those who can't easily replace the wood, the agency suggests precautions like coating pressure-treated items with oil-based stains, which it says "may reduce" the risk of arsenic exposure.

Switching to Redwood

That may sound worrisome, but Home Depot, the nation's biggest seller of the lumber, says its customers are still buying the old wood, according to spokesman Donald Harrison (the company also says it'll pull the wood before the December 2003 deadline). Still, the warnings were enough to scare away John Tentler, a Westminster, Colo., research scientist, who shopped for deck-building materials at his local store. He went for redwood for the floor, stairs and railings -- "anywhere kids might put their hands, and therefore, mouths," he says -- and for the supports he bought a new version of pressure-treated wood, called ACQ, that doesn't contain arsenic. He's not the only one: The industry expects to sell billions of board feet of ACQ wood over the next few years.

But the alternatives don't come cheap. ACQ runs about 10% more than the old lumber, while the naturally rot-resistant redwood Mr. Tentler bought costs 75% more; even composite materials can cost 20% more. And prices are only going to go up: New duties on imported cedar are expected to increase its cost by 30% over the next few months. Still, many people, especially parents, are willing to shell out. The biggest change at CedarWorks, where the playsets cost about a third more than pressure-treated ones? "Callers no longer ask, 'Why are your playsets so expensive compared to pine?' " says owner Barrett Brown.

Cheryl Lasiowski of suburban Atlanta wasn't thinking about arsenic when she bought a pricey $2,000 pine playset from Play Nation earlier this year. In fact, it wasn't until a month ago that she learned that the maker uses the safer ACQ wood. "I never heard there might be arsenic in children's toys," says the mother of four. "We got lucky."

Item/Store	Price	Comments
Cast-aluminum hexagonal gazebo www.patiolife.com 877-897-2846	$3,395 for 14 1/2-foot model	Cast aluminum has come a long way since the ' rustproof substitute for wrought iron, this alumi in five colors, topped by an outdoor-fabric awni
Nyatoh wood outdoor table www.eddiebauer.com 800-625-7935	$379	Many picnic tables are made from pressure-trea Indonesian hardwood version has leaves that e feet.
Cocoa shell mulch www.mellingers.com 800-321-7444	$7.75 for a 25-pound bag	Recycled-wood mulch could contain arsenic. Thi gives off a rich chocolate scent while also holdin keeping down weeds.
Fiberon decking www.fibercomposites.com 800-990-3099	About $7,000 for a 900-square-foot deck	Materials only. Wood-plastic composites are the the U.S. This version, sold at 1,000 retail outlet more than pine but the maker says it requires n maintenance.
Redwood Rainbow Castle www.rainbowplay.com 800-724-6269	$2,500 and up	This line of children's outdoor play structures, a dealers throughout the U.S., combines painted outdoor fabrics with redwood, which is naturally
Cedar gardening bed kit www.gardeners.com 800-427-3363	$175 for 3-foot by 6-foot bed	Raised beds allow gardeners to control soil cont made of cedar, which naturally resists decay an comes with decorative copper corner caps and

CERTIFICATE OF SERVICE

I, Larry Ewers, hereby certify that I mailed this 8th day of April, 2003, first class postage prepaid, a copy of the foregoing REPLY OF PARTIES OPPONENT TO BRIEF IN SUPPORT OF APPLICATION NO. 16987 FOR A SPECIAL EXCEPTION, with attachments, to Pablo Martinez, 1207 Clifton St., N.W., Washington, D.C. 20009; and additionally that I hand-delivered a copy addressed to Pablo Martinez to premises 1207 Clifton St., N.W., Washington, D.C. this 8th day of April, 2003.

