

**BEFORE THE BOARD OF ZONING ADJUSTMENT  
OF THE DISTRICT OF COLUMBIA**

Appeals of Michael Hays and  
Dupont East Civic Action Association

BZA Appeal Nos. 20452 & 20453  
ANC 2B04

**Perseus TDC, LLC’s Opposition to Appellants’ Joint Motion Add a New Claim**

Perseus TDC, LLC (“**Perseus**”) hereby respectfully requests that the Board of Zoning Adjustment (“**Board**”) deny the motion (“**Motion**”) of appellants Dupont East Civic Action Association (“**DECAA**”) and Michael Hays (collectively, the “**Appellants**”) to add a new claim to the above-referenced appeals (collectively, the “**Appeal**”) eight (8) months after filing the Appeal. The Motion proposes to add a new claim that the wall attached to the entry stairs and located on the south side of the Scottish Rite Temple (the “**Temple**”) violates Subtitle B § 324.1(a) of the Zoning Regulations. The Appellants’ proposal to add a new claim is untimely by any measure, and the Appellants’ argument that the wall is not permitted in the Temple’s rear yard is of no merit in any event because the wall is expressly permitted by Subtitle B §§ 324.1 (b) and (c), as discussed below. Accordingly, the Board should deny the Motion.

**I. Appellants’ New Claim Should Be Denied as Untimely.**

The subdivision at issue in this Appeal was approved on November 19, 2020. The Appellants filed the Appeal on January 18 and 19, 2021. The Appeal was originally scheduled for hearing on May 12, 2021. The hearing was subsequently rescheduled to July 28, 2021, and rescheduled again to November 10, 2021. Now, eight (8) months after the Appeal was initially filed, the Appellants wish to amend the Appeal to add a new claim.

Subtitle Y § 302.13 states in clear terms: “An appeal may not be amended to add new issues not identified in the statement of the issues on appeal submitted in response to Subtitle Y § 302.12(g) unless the appellee impeded the appellant’s ability to identify the new issues

identified.” The Appellants offer a lengthy and belabored set of explanations for why the Board should look past the straightforward prohibition set forth in Subtitle Y § 302.13. But all of the Appellants’ assertions that they were somehow impeded from previously identifying and raising their new claim regarding the south stair wall are rendered entirely hollow by the simple fact that their initial Appeal statements make clear that they were fully aware of the location of the Temple’s rear yard on the south side of the building. Indeed, their Appeal has largely centered around that very issue, with pages upon pages of argument devoted to the subject. Their initial filings even included an excerpt of plans that specifically identified the south side of the Temple lot as the rear yard, plans which were submitted during historic preservation proceedings that occurred in 2019 and in which the Appellants participated directly. *See* Brief of Michael Hays in Case No. 20452 at 20; Brief of DECAA in Case No. 20453 at 9. The Appellants cannot genuinely argue that they have been impeded from raising their new claim earlier when they have been aware of the location of the rear yard, not for months, but for years.

Even taking the Appellants’ assertions at face value — strictly for the sake of argument — by their own fantastic explanation they were aware of the basis for the new claim when Perseus and the District Department of Consumer and Regulatory Affairs (“**DCRA**”) filed prehearing statements on July 2, 2021. *See* Motion at 16–17. And yet the Appellants still waited another 78 days before requesting to add their new claim. (It is worth noting that, by comparison, the period of limitations for the initial filing of an appeal with the Board is 60 days.)

Clearly, allowing a new claim to be added to the Appeal at this late stage — 243 days after the Appeal was filed and 303 days after the subject subdivision was approved — would result in significant and unwarranted prejudice to Perseus. The Appellants’ attempt to endlessly raise new claims and arguments poses a very real scenario of indefinite delay and a continuing

cloud of uncertainty lingering over the entitlement approvals for Perseus' proposed residential development on the newly created eastern lot adjacent to the Temple. And, indeed, that is precisely the aim the Appellants have in mind and coincides directly with their overall strategy to use every possible channel of litigation to stop the residential project, including filing two ongoing court challenges to the historic preservation approvals the project received in 2019–2020. The Board should not allow the Appellants to abuse the zoning appeal process in this way and should deny their Motion to add a new claim eight (8) months late.

**II. Appellants' New Claim Should Be Denied for Administrative Efficiency Because the Claim Fails on the Merits as the Stair Wall Is Expressly Permitted in the Rear Yard Under Subtitle B § 324.1.**

In addition to having ample basis to deny the Motion as untimely, the Board is also justified in doing so out of administrative efficiency because the Appellants' new claim, on its face, fails on the merits under the clear terms of Subtitle B § 324.1. The Appellants argue that the wall that is attached to the entry stairs and extends from the Temple into the south portion of the Temple lot violates the provisions governing structures within required open spaces, specifically because the wall exceeds the four (4)-foot height limit prescribed by Subtitle B § 324.1(a). However, this argument ignores that the wall at issue is clearly allowed under both Subtitle B §§ 324.1(b) and (c), which permit the following to be located in required open spaces, including a rear yard:

- (b) A fence or retaining wall constructed in accordance with the Construction Code may occupy any yard required under the provisions of this title; and
- (c) Stairs leading to the ground from a door located on the story in which the principal entrance of a building is located may occupy any yard required under provisions of this title. The stairs shall include any railing required by the provisions of the Construction Code.

11 DCMR § 324.1.

The wall at issue qualifies as an exception to the general prohibition against structures in required open spaces under either of the above exemptions. The wall clearly constitutes a fence or retaining wall under subsection (b) above and can also be considered as part of the stairs to which it is attached and thus permitted under subsection (c). Accordingly, the Appellants' argument that the wall causes a nonconformity with respect to the rear yard is to no avail.<sup>1</sup> For this reason, in addition to the fact that the claim is being raised so remarkably late in the proceedings, the Board is well within reason to deny the Appellants' Motion for the sake of administrative efficiency.

### III. Conclusion

For all the reasons discussed above, Perseus respectfully requests that the Board deny the Appellants' Motion to add a new claim at this late juncture, eight (8) months after the Appeal was filed and over four (4) months after the original hearing date. As directly evidenced in their own filings, the Appellants have been well aware of the location of the Temple's rear yard since 2019. The onus was on them to timely raise any objections related to the rear yard within the period of limitations for the Appeal. In truth, the Appellants are bent on stretching this Appeal to its maximum possible scope — and indeed far beyond the proper scope of any zoning appeal before this Board — which is thoroughly demonstrated by the wide roving nature of each of their filings in this case. This dilatory tactic, used in every challenge they have brought to stop

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<sup>1</sup> Even if the Board were to determine that the wall did not qualify as one of the structures permitted to be located in the rear yard under Subtitle B §§ 324.1(b) and (c) and instead must be factored into the rear yard calculation, the Temple would still meet the minimum rear yard requirement. Under the applicable rules of measurement. “[t]he depth of the rear yard shall be measured as the **mean horizontal distance** between the rear line of a building and the rear lot line . . . .” 11 DCMR Subtitle B § 318.2 (emphasis added); *see also* 11 DCMR Subtitle B § 100.2 (defining “depth of rear yard” as “[t]he **mean horizontal distance** between the rear line of a building and the rear lot line . . . .”) (emphasis added). Because the rear yard is measured as the mean distance between the building and the rear lot line — i.e., the average measurement across the entirety of the lot — and the wall at issue is only three (3) feet, four (4) inches wide as compared to the full width of the Temple lot of 212 feet, the wall's impact on the rear yard calculation would be *de minimis* and would not result in the rear yard being nonconforming.



