BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

APPEAL OF A DECISION OF THE ZONING ADMINISTRATOR FOR THE DISTRICT OF COLUMBIA, DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS SUBDIVISION OF LOT 108 ON SQUARE 192

In re Appeal of Dupont East Civic Action Association	)	Case No.20453
In re Appeal of Michael D. Hays	)	Case No. 20452

REPLY OF APPELLANTS DECAA AND MICHAEL D. HAYS TO OPPOSITIONS BY DCRA AND PERSEUS TO APPELLANTS' MOTION TO SUPPLEMENT THEIR STATEMENT OF ISSUES TO INCLUDE THE CLAIM THAT THE DECISION OF THE ZONING ADMINISTRATOR TO APPROVE THE SUBDIVISION OF LOT 108 VIOLATES 11-B DCMR § 324.1(a)

COME NOW Appellants DECAA and Michael D. Hays (collectively "DECAA") and jointly file this Reply to the Oppositions to the Motion to Supplement Their Statement of Issues to Specifically Include the Claim that the Decision of the Zoning Administrator to Approve the Subdivision of Lot 108 Violates the Rear Yard Requirements of 11-B DCMR § 324.1(a).

INTRODUCTION

Tellingly, unlike Perseus, DCRA does not dispute Appellants' claim that the Subdivision violates the requirements of 11-B DCMR § 324.1(a). There is an 11.5 ft wall in the rear yard when no structure of this type over *4 feet* above grade may occupy any part of a rear yard.

DCRA argues, however, that it should have been obvious to Appellants that there is a non-conforming 11.5 ft wall and column in the rear yard. But, if this was supposed to be so obvious and in "clear public view", why did the Zoning Administrator not notice this fact before he approved the Subdivision.

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This is simple. Either this fact was not 'obvious' to the Zoning Administrator in November 2020 (and to Appellants two months later) or the Zoning Administrator approved a Subdivision he knew violated the Zoning Regulations.

Further, DCRA's and Perseus' Oppositions to DECAA's Motion to Supplement do not dispute any of the facts upon which that Motion itself is based. They do not, and cannot claim, the Zoning Administrator disclosed the alleged basis upon which he approved the subdivision of Lot 108 until DCRA and Perseus filed their statements before this Board on July 2, 2021. Until that date, DCRA failed to provide DECAA with any rationale for the Subdivision approval. Thus, DECAA could only guess at the basis of approval. Denying DECAA a right to supplement its issues under these circumstances is a clear violation of its right to adequate notice. Forcing DECAA to guess is not adequate notice.

Further, the Zoning Administrator actively impeded DECAA's ability to analyze the basis for potential zoning violations. He issued a misleading "comprehensive" zoning determination letter that did not disclose that Perseus was designating S Street as the front of the building; failed to respond to DECAA's questions after promising to do so; and even allowed the attorney for the developer to write this misleading zoning determination letter. The Zoning Administrator changed not one word nor one punctuation mark in the letter Perseus' attorney wrote for the Zoning Administrator to sign.

Equally meritless is Perseus' claim, in which DCRA does not join, that the wall complies with the Zoning Regulations. As established below, it is not authorized by 11-B DCMR § 324.1(b) because it is not a fence or a retaining wall. Further, it is not authorized by 11-B DCMR § 324.1(c) because the wall is not the stairs, and the railing is independent of the wall.

For these and other reasons more fully set forth below, this Board should address DECAA's

contention that the Zoning Administrator's approval of the Subdivision of Lot 108 violates the rear yard requirements of 11-B DCMR § 324.1(a).

ARGUMENT

A. The Zoning Administrator Impeded Appellants' Ability To Identify the Zoning Issues, Including 11-B DCMR § 324.1(a).

11-Y DCMR § 302.13 embraces the notice requirement embeded in the constitutional right to due process of law. That fundamental principle requires the government to provide adequate notice of the basis for its action. *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 318 (D.C. Cir. 2014) ("noting that "the right to know the factual basis for the action" is an essential component[ ] of due process" (internal citations omitted)). Importantly, "[W]hen a notice requires its targets to guess among several possible bases for adverse government action, it has not served [the] fundamental purposes [of due process]." *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 599 (D.C. Cir. 1993)). As the DC Circuit has held:

> **Without notice or the specific reasons for the denial**, **a claimant is reduced to guessing what evidence can or should be submitted in response** and driven to responding to every possible argument against denial at the possible risk of missing the critical one altogether.

Gray Panthers v. Schweiker , 652 F.2d 146, 168–69, 172 (D.C. Cir. 1980).

Here, far from complying with these fundamental principles of adequate notice, it is undipsuted that DCRA literally provided DECAA with *no notice* of the basis for its approval of the Subdivision. The Oppositions fail to address how this failure could remotely comply with due process. As in *Gray Panthers,* DECAA was "reduced to guessing what evidence can or should be submitted in response[.]" *Id.,* 652 F.2d at 168–69, 172. This conduct violates due process.

The factual record establishing the the Zoning Administrator's impedence is overwhelming and *undisputed*. Neither DCRA nor Perseus dispute that:

- The Zoning Admininstrator failed to respond to DECAA's questions regarding the Subdivsion at an in-person meeting;

- Following the in-person meeting the Zoning Admininstrator failed to respond to DECAA's written questions regarding the Subdivsion, despite the fact he promised to do so;

- The Zoning Administrator allowed Perseus to write its own zoning determination letter. That letter included only favorable facts, hid unfavorable facts (e.g., that there was a new rear yard that did not comply with 11-B DCMR § 324.1(a) and that the basis for the zoning approval was that the 332 ton roof was an "embellishment"), and thus impeded the public in general, and DECAA in particular, from fully understanding this project and identifying all the zoning violations, including that the rear yard did not comply with 11-B DCMR § 324.1(a).

- The Zoning Administrator issued the developer's misleading zoning determination letter, which the Zoning Administrator characterized as a "comprehensive determination for your client's project at 1733 16th Street, NW (Square 192, Lot 108)[.]" However, the letter cleverly defines the "Project" as only the new Luxury Project to be constructed on what is now Lot 111, thus disguising the alleged basis for the compliance of the Temple on the new Western Lot after the Subdivision.

- *The so-called "comprehensive determination" letter fails to advise that Perseus had selected S Street to be the new "front" of the Temple, disguising that the new year yard was to be south side of the Temple, thus implicating the issue of whether the new rear yard complied with 11-B DCMR § 324.1(a).*

- Contrary to his ordinary practice, and dispute the public controversy surrounding the Subdivision, the Zoning Administrator failed to issue a zoning determination letter regarding the compliance of the Western Lot after Subdivision.

- DCRA failed to provide any documents pursuant to an FOIA requests. Thus, DCRA either falsified a response to DECAA's FOIA requests, or that there was literally no basis for the Zoning Administrator's approval of the Subdivision. If the latter is the case, then Appellants are entitled to summary reversal. In either case, DCRA's actions impeded Appellants' ability to analyze the applicable zoning issues, including the compliance of the Subdivision with 11-B DCMR § 324.1(a).

The Oppositions' attempts to deflect this Board's attention from this impedance fails. *First,* DCRA points to DECAA's previous filings. DCRA Opp. at 2. But those filings were based upon DECAA's "guess" as to the basis for the Zoning Administrator's approval. *See, e.g., Gray Panthers,* 652 F.2d at 168–69, 172 (D.C. Cir. 1980) (forcing an petitioner to "guess[] what

evidence can or should be submitted" violates due process). DCRA points to no DCRA document that remotely provided DECAA with the required information as to the basis of the Zoning Administrator's approval of the Subdivision until it submitted its filings on July 2, 2021.[1]

Second, DCRA disingenuously claims that DECAA was on notice because the new rear yard is "in clear public view[.]" DCRA Opp. at 2. However, what was not in clear public view was the fact that DCRA based its zoning approval on a new front and rear yard, a fact carefully omitted from any DCRA document, including the October 30, 2018 "Zoning Determination Letter" written for the Zoning Administrator by the attorney for the developer (Perseus). And, the developer had a clear and overwhelming financial interest in disguising the basis for the zoning approval of this non-conforming Subdivision in that October 30, 2018 letter.

Third, after DCRA requested an extension of over three months to which Perseus quickly consented, Perseus now claims it is now somehow prejudiced by permitting the supplemental issue.

DCRA, the respondent, does not join in this claim of unspecified prejudice, which alone is telling. In any event, Perseus conveniently forgets that DECAA promptly gave notice of the supplemental issue in its reply statements filed in July, over two months ago, and that Perseus has not uttered a word regarding any so-called prejudice in the interim.

Perseus' claim of unspecified prejudice rings hollow. It has undoubtedly known of the 11-B DCMR § 324.1(a) problem since it conceived of the Project years ago, and had no difficulty providing its response on the merits to the supplemental issue within a week after DECAA filed

[1] Perseus, but not DCRA, points to the excerpt of plans that DECAA submitted. That excerpt, as DCRA obviously recognized, was not a government document, and cannot provide the required notice. More importantly, according to DCRA, which failed to provide any documents pursuant to DECAA's FOIA request, Perseus never submitted that document to the Zoning Administrator and thus it could not provide the basis for the Zoning Administrator's approval of the Subdivision.

its Motion to Supplement. Further, at the time DECAA filed its Motion to Supplement, almost two months remained until the hearing, and Perseus has not asked for a further extension to address the supplemental issue. Thus, Perseus' unspecified claim of prejudice is wholly meritless.

B. The District and Perseus Opened The Door To The 11-B DCMR § 324.1(a) Issue.

Neither DCRA nor Perseus responded to DECAA's assertion that they have opened the door to the 11-B DCMR § 324.1(a) issue. As DECAA noted in its Motion to Supplement in their Pre-Hearing Statements filed on July 2, 2021, both DCRA and Perseus *sua sponte* raised the issue of whether the new "rear" yard violates 11-B DCMR § 324.1(a). Thus, DCRA and Perseus clearly opened the door to whether or not the new "rear yard" meets the restrictions of §324.1(a). By failing to respond to this argument, DCRA and Perseus must be deemed to have conceded it.

C. The 11-B DCMR § 324.1(a) Issue Is Proper Rebuttal.

Similarly, neither DCRA nor Perseus responded to DECAA's assertion that the 11-B DCMR § 324.1(a) issue is permissible under 11-Y DCMR 300.16 as "rebuttal" evidence to counter DCRA and Perseus' assertion that the new "rear" yard meets the requirements of 11-B DCMR § 324.1(a). Thus, they must be deemed to have conceded this argument.

D. DECAA's Experts Will Submit Supporting Expert Reports At The Appropriate Time.

The District, but not Perseus, illogically claims that DECAA's Motion to Supplement must be denied because it has not yet submitted expert reports in support of its 11-B DCMR § 324.1(a) issue. This procedural gambit is obviously meritless. DECAA will submit supporting expert reports shortly.

E. Perseus Claim That The Wall Is Authorized Under 11-B DCMR § 324.1(b) and (c) Is Meritless.

Apparently already having recognized that the wall poses at least a potential violation of 11-B DCMR § 324.1(a), Perseus asserts two arguments as to why that 11'6" looming solid stonewall is authorized. Neither has any merit.

First, Perseus claims that the 11'6" looming stonewall is either "a fence or retaining wall" (apparently, Perseus is unsure which). Perseus Opp. at 4. In fact, it is neither. The term "fence" is not defined in the Zoning Regulations, and thus we turn once again to Webster's Dictionary. *See* 11-B DCMR § 100.1(g). It defines "fence" as "a barrier intended to prevent escape or intrusion or to mark a boundary." Here, the Wall does not prevent "escape or intrusion" and does not "mark a boundary" as it is in the middle of the back yard.

Further, a fence differs from a wall in that a fence does not having a *solid foundation along its whole length*.

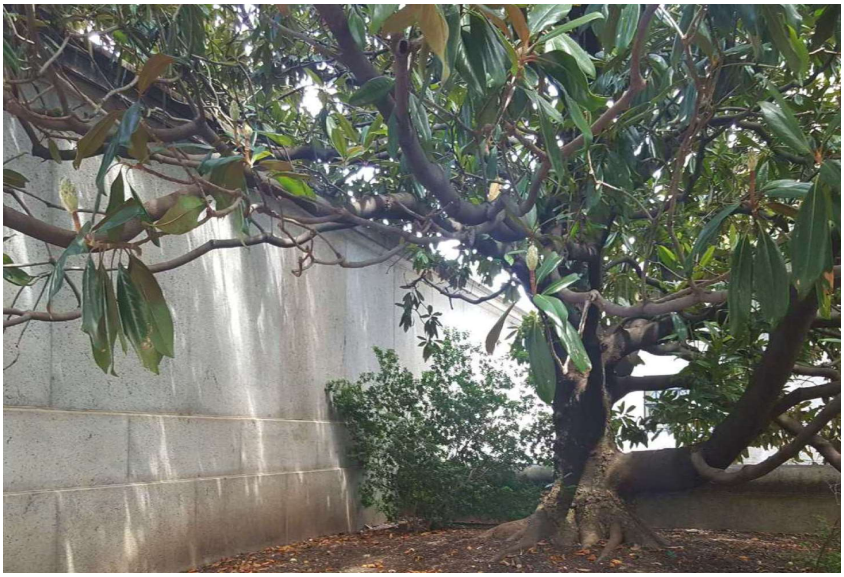
> "A fence is a structure that encloses an area, typically outdoors, and is usually constructed from posts that are connected by boards, rails or netting. A fence differs from a wall in not having a solid foundation along its whole length."
> https://www.princegeorgescountymd.gov/1506/Fences

The 11.5 ft high structure in this case is a solid stone wall, with a solid stone foundation running along its entire length, exceeding the maximum height allowed for any fence in a residential district.

Nor is this 11.5 ft wall a retaining wall. The Zoning Regulations define a retaining wall as follows:

> A vertical, self-supporting structure constructed of concrete, durable wood, masonry or other materials, designed to resist the lateral displacement of soil or other materials. The term shall include concrete walls, crib and bin walls, reinforced or mechanically stabilized earth systems, anchored walls, soil nail walls, multi-tiered systems, boulter walls, or other retaining structures. 11-B DCMR § 100.2.

As shown in the below photos, the wall does not "resist the lateral displacement of soil or other materials." The photo below is the east side of the wall, shown rising 11.5 ft above the ground:



The below 1913 photo taken during the construction of the Temple is from *A Guidebook to the House of the Temple* published by the Masons themselves. The photo clearly shows the above 11.5 ft wall retains nothing on *either* its west or east sides and its construction was not "designed to resist the lateral displacement of soil or other materials." In the construction photo below the horse drawn cart is approximately where the 11.5 ft wall and column are today.

Nor does 11-B DCMR § 324.1(c) authorize the wall. That section provides that the following may occupy a rear yard:

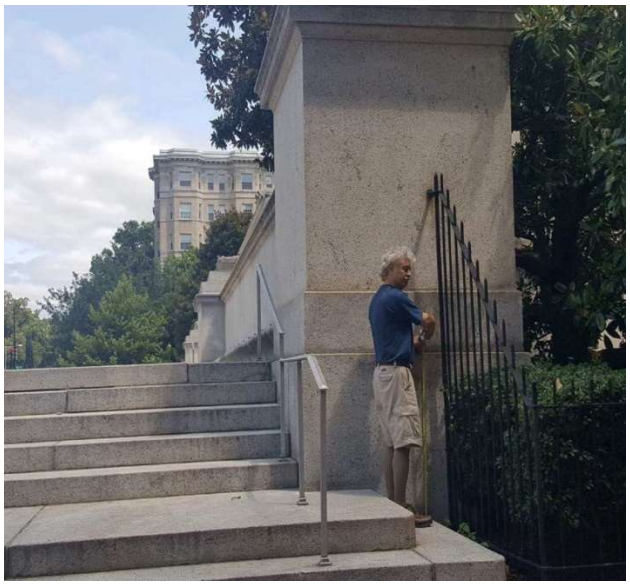
> Stairs leading to the ground from a door located on the story in which the principal entrance of a building is located may occupy any yard required under provisions of this title. The stairs shall include any railing required by the provisions of the Construction Code.

The 11.5 ft wall is not the "stairs." The wall has neither risers nor treads. The term "stairs" is not a defined term in the Zoning Regulations. Websters Dictionary defines "stairs" as

> "a series of steps or flights of steps for passing from one level to another —often used in plural but singular or plural in construction"

This wall, 11.5 ft in height, obviously does not meet Websters' definition of 'stairs' as "steps for passing from one level to another".

Further, as the below photo establishes, the wall is not authorized by the provision stating that "the stairs shall include any railing required by the provisions of the Construction Code." *Id.* Here, a separate bronze hand railing for the stairs is shown in the photo which clearly is not attached to either the 11.5 foot wall or to the stone column. The railing is separate and distinct from the 11.5 ft wall and the column.



CONCLUSION

Accordingly, Appellants request that their Motion to Supplement be granted, and that the issue of whether the Subdivision complies with 11-B DCMR § 324.1(a) be added to these proceedings.

Respectfully submitted,

For Dupont East Civic Action Association

/s/ *Edward V. Hanlon*
Edward V. Hanlon

For Michael D. Hays

/s/ *Michael D. Hays*
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Certificate of Service

I certify that on the below date I served a copy the foregoing Motion via email to:

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I further certify that on this date I served a copy of the foregoing Motion via first class mail postage prepaid to:

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Date: September 30, 2021