**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

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

**SUPPLEMENTAL EXPERT REPORT OF**
**PROFESSOR JAMES MCCRERY REGARDING**
**VIOLATION OF 11-B DCMR § 100.2 AND 11-B DCMR § 324.1**

I am Professor James McCrery. I am submitting the following expert report that establishes that the decision of the Zoning Administrator to approve the subdivision of Lot 108 ("Subdivision") allegedly based on the designation of the north side of the Temple as its "front" renders the new rear yard ("New Rear Yard") in violation of the rear yard requirements of 11-B DCMR § 100.2 and 11-B DCMR § 324.1. In support of this conclusion, I state as follows:

## SUMMARY OF CONCLUSIONS

- The Zoning Regulations provide that a rear yard "shall be unoccupied, except as specifically provided in this title." 11-B DCMR § 100.2 (definition of "yard, rear"). 11-B DCMR § 324.1(a), in turn, exempts from this requirement "any structure less than four (4) feet in height, [which] is permitted to be located within a required side or rear 'yard.'" Here, the wall to the south of the Temple ("Wall") and a large stone column ("Stone Column") occupy a portion of the re-designated New Rear Yard in violation of 11-B DCMR § 100.2 and 11-B DCMR § 324.1(a). The Wall and the Stone Column are at least 11'6" above grade and 7'8" above the stone platform on the west side of the Wall.
- 11-B DCMR § 324.1(b) also exempts from this requirement a "fence." Neither the Wall nor the Stone Column in question is a fence. The term "fence" is not defined

in the Zoning Regulations, and thus we turn to Webster's Dictionary for a definition. *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, neither the Wall nor the Stone Column prevents "escape or intrusion" nor does either "mark a boundary."
- 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.
- The 11'6" high Wall and Stone Column in this case are solid stone, with a solid stone foundation running along their entire length, exceeding the maximum height allowed for any fence in a residential district.

➢ 11-B DCMR § 324.1(b) also exempts from this requirement a "retaining wall." Neither the 11'6" Wall nor the Stone Column is 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. A retaining wall is a structure designed to restrain soil or other materials to a slope that would not naturally be sustained.

- As shown below, the Wall and the Stone Column do not "resist the lateral displacement of soil or any other materials" because, among other things, there is nothing but air for at least 7'8" of the height on both sides of the Wall and the Stone Column.

➢ Finally, 11-B DCMR § 324.1(c) exempts from 11-B DCMR § 100.2's requirement: "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." Neither the Wall nor the Stone Column comes within this exemption as neither constitute stairs.

## DISCUSSION

### A. The Subdivision Violates 11-B DCMR § 100.2 and 11-B DCMR § 324.1 Because the New Rear Yard Contains a Wall and a Stone Column at Least 11'6" Above Grade.

The Zoning Regulations provide that a rear yard "shall be unoccupied, except as specifically provided in this title." 11-B DCMR § 100.2 (definition of "yard, rear"). 11-B DCMR § 324.1, in turn, exempts from this requirement:

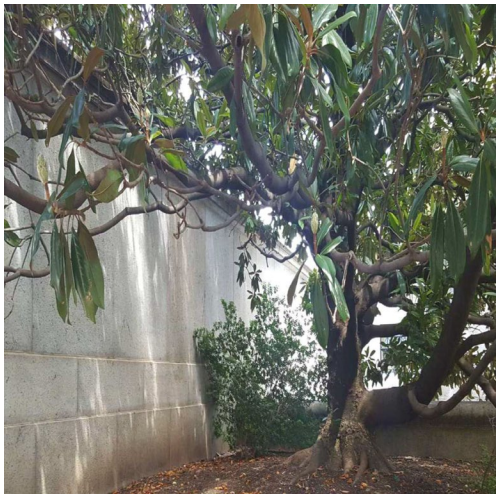
(a) A structure, not including a building no part of which is more than four feet (4 ft.) above the grade at any point, may occupy any yard required under the provisions of this title. Any railing required by the D.C. Construction Code Supplements, Title 12 DCMR, shall not be calculated in the measurement of this height;

(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.

The Wall in Photo 1 below, which is at least 11'6" above grade, occupies a portion of the Temple's re-designated New Rear Yard to the south in violation of 11-B DCMR § 324.1(a).

**Photo 1**
**East Side of 11'6" Wall**



In addition to the Wall shown above, a large stone column ("Stone Column") that I have been advised is also more than 11'6" above grade will occupy a part of the above required Rear Yard. The Stone Column is entirely inside the New Rear Yard as it is both inside the property line to the west and several feet from the alleyway on the south side of Lot 111. Note that Photo 2 below shows a separate bronze hand railing for the stairs which is not attached to either the Wall or to the Stone Column.

**Photo 2**
**11'6" Wall and Stone Column**

The steps, the 11'6" Wall, and the huge Stone Column in Photo 2 are all in the New Rear Yard if S Street is designated the front of this historic landmark. Thus, the New Rear Yard created by the Subdivision violates 11-B DCMR § 100.2 and 11-B DCMR § 324.1 and does not come within the exemption of 11-B DCMR § 324.1(a) because it is occupied by the Wall and the Stone Column, each of which is in excess of 11'6" tall.

Finally, Photo 3 below shows a person sitting on a stone bench in the front of this national landmark.

**Photo 3**
**West Side of Wall**

As shown above, designating S Street as the front puts a significant part of the monumental front entrance into the New "[R]ear [Y]ard", *an absurd outcome*.

### B. The Subdivision Violates 11-B DCMR § 100.2 and 11-B DCMR § 324.1 Because the New Rear Yard Contains a Wall and Stone Column in Excess of 11'6", Neither of Which Is a Fence.

As noted above, the Zoning Regulations exempt from the requirements of 11-B DCMR § 100.2 a structure that is a "fence." 11-B DCMR § 324.1(b). The term "fence" is not defined in the Zoning Regulations. Accordingly, under 11-B DCMR § 100.1(g), we must consult Webster's Dictionary for a definition. Webster's defines "fence" as "a barrier intended to prevent escape or intrusion or to mark a boundary." Here, neither the Wall nor the Stone Column prevents "escape or intrusion" as they are open ended and do not enclose anything and neither "mark[s] a boundary" as they are wholly well within the New Year 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*.

*See, e.g.,* Zoning Regulations of adjacent jurisdiction Prince George's County at https://www.princegeorgescountymd.gov/1506/Fences (emphasis added). This definition provides additional support for the conclusion that the 11'6" high Wall and Stone Column do not constitute a fence because they are solid stone, with a solid stone foundation running along their entire length, exceeding the maximum height allowed for any fence in a residential district.

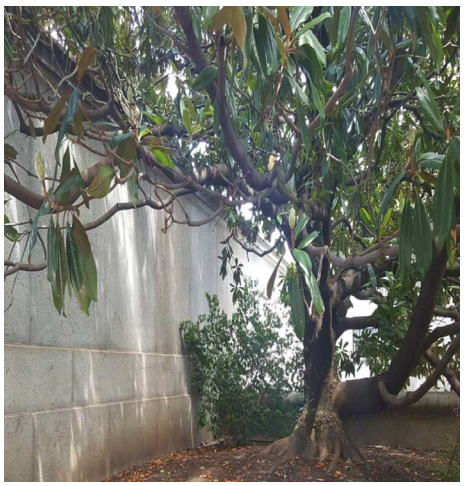
### C. The Subdivision Violates 11-B DCMR § 100.2 and 11-B DCMR § 324.1 Because the New Rear Yard Contains an 11'6" Wall and Stone Column Neither of Which Is a "Retaining Wall."

As noted above, the Zoning Regulations also exempt from the requirements of 11-B DCMR § 100.2 a structure that is a "retaining wall." 11-B DCMR § 324.1(b). The Zoning Regulations define a "retaining wall" as:

> 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 (emphasis added). As the below photos establish, neither the Wall nor the Stone Column "resist[s] the lateral displacement of soil or other materials." Photo 1 reproduced below is the east side of the Wall, rising 11'6" feet above grade:

**Photo 1**
**East Side of 11'6" Wall**



The 1913 photo shown below (Photo 4) was taken during the construction of the Temple and is published by the Masons in their book "*A Guidebook to the House of the Temple*". Photo 4, along with Photo 1, clearly show the above 11'6" Wall and Stone Column retain nothing on either their west or east sides of the Wall and Stone Column and their construction was obviously

not "designed to resist the lateral displacement of soil or other materials." In the 1913 construction photo below the horse drawn wagon is on the south side (alley side) of lot 108 and is sitting approximately where the 11'6" foot Wall and Stone Column are today. The grade is approximately the same on all four sides of the wagon.

**Photo 4**
**South Side of Temple**
**1913 Construction Photo**


Further, as shown in the below photo, the height of the Wall above the stone platform on the west side of the Temple is 7'8". There is nothing but air on either side of this 7'8" portion of the Wall and the Stone Column, which provides additional evidence that they were neither designed nor could serve as a "retaining wall."

**Photo 5**
**West Side of Wall and Stone Column**
**With 7'8" Measurement Above Stone Platform Level**
**on West Side of Temple**


Accordingly, neither the Wall nor the Stone Column come within the exception to 11-B DCMR § 100.2 set forth in 11-B DCMR § 324.1(b) for a "retaining wall."

### D. 11-B DCMR § 324.1(c) Does Not Authorize the Wall or the Stone Column.

11-B DCMR § 324.1(c) likewise does not authorize the Wall or the Stone Column. That section, in providing an exception to 11-B DCMR § 100.2 for "stairs," provides as follows:

> 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-B DCMR § 324.1(c).

Here, neither the 11'6" Wall nor the Stone Column constitute "stairs." The term "stairs" is not a defined term in the Zoning Regulations. Thus, we again turn to Webster's Dictionary, which 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."

The Wall and the Stone Column, more than 11'6" in height, obviously do not meet Webster's definition of 'stairs' as "steps for passing from one level to another." Neither the Wall nor the Stone Column have risers or treads.

Further, as Photo 2 establishes, neither the Wall nor the Stone Column is authorized by the zoning provision stating that "the stairs shall include any railing required by the provisions of the Construction Code." Here, a separate bronze hand railing for the stairs is shown in Photo 2 reprinted below that clearly is not attached to either the 11'6" Wall or to the Stone Column. The railing is separate and distinct from the 11'6" Wall and the Stone Column.

"Railing" is not a defined term in the Zoning Regulations. Webster's defines railing as "a barrier consisting of a rail and supports" and defines "rail" as "a bar extending from one post or support to another and serving as a guard or barrier". Obviously, the 11'6" Wall and Stone Column do not fit the definition of "railing."

**Photo 2**
**Showing Detached Hand Railing**

**NOVEMBER 10, 2021 HEARING**

At the November 10, 2021 Hearing, I reserve the right to make use of any Exhibit entered by any party on the IZIS docket or offered at the hearing to further illustrate and support the opinions I have offered in my reports which have been filed with the Board of Zoning Adjustment.

**CONCLUSION**

For the above reasons, it is my opinion that the new rear yard resulting from the designation of the Temple's S Street side as its front violates 11-B DCMR § 100.2 and 11-B DCMR § 324.1.

Respectfully submitted,

/s/James McCrery
James McCrery

Dated: October 19, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that on October 19, 2021 I served via email a copy the foregoing Supplemental Expert Report of Professor James McCrery Regarding Violation of 11-B DCMR § 100.2 and 11-B DCMR § 324.1 to:

Hugh Green
OGC Department of Consumer and Regulatory Affairs
1100 4th St SW, 5th Floor,
Washington, DC 20024
hugh.green@dc.gov

Matthew Holden, Chairperson ANC 2B
2146 Florida Ave, NW
Washington, DC 20008
2B@anc.dc.gov

Moshe Pasternak, Commissioner ANC SMD 2B04
1630 R Street, NW
Washington, DC 20009
2B04@anc.dc.gov

John Fanning, Chairperson ANC 2F
1307 12th Street, NW #505
Washington, DC 20005
2F@anc.dc.gov

Alan V. Rusin, Esq.
Goulston & Storrs, PC
400 Atlantic Ave.
Boston, MA 02110
arusin@goulstonstorrs.com
*Counsel for Lessee Perseus TDC*

Andrew Zimmitti, Esq.
Manatt, Phelps & Phillips, LLP
1050 Connecticut Ave., NW Suite 600
Washington, D.C. 20036 202 585-6505
azimmitti@manatt.com
*Counsel for The Scottish Rite Temple*

Christine Roddy
Goulston & Storrs, PC
1999 K St NW Ste 500,
Washington, DC 20006
CRoddy@goulstonstorrs.com

The Supreme Council of the Scottish Rite Temple
1733 16th Street, NW
Washington DC 20009
council@scottishrite.org
*Property Owner*

/s/Michael Hays
Michael Hays