



**BEFORE THE ZONING COMMISSION OR
BOARD OF ZONING ADJUSTMENT FOR THE DISTRICT OF COLUMBIA**



FORM 150 – MOTION FORM

**THIS FORM IS FOR PARTIES ONLY. IF YOU ARE NOT A PARTY PLEASE FILE A
FORM 153 – REQUEST TO ACCEPT AN UNTIMELY FILING OR TO REOPEN THE RECORD.**

Before completing this form, please review the instructions on the reverse side. Print or type all information unless otherwise indicated. All information must be completely filled out.

CASE NO.:

Motion of:

Applicant
 Petitioner
 Appellant
 Party
 Intervenor
 Other _____

PLEASE TAKE NOTICE, that the undersigned will bring a motion to:

Joint Motion In Limine of Appellants DECAA and Michael D. Hays to Bar DCRA
And Perseus From Presenting Any Expert Testimony at the July 28, 2021Hearing
In The Alternative Joint Motion of Appellants to Postpone and Compel Disclosure

Points and Authorities:

On a separate sheet of 8 1/2" x 11" paper, state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion, including relevant references to the Zoning Regulations or Map and where appropriate a concise statement of material facts. If you are requesting the record be reopened, the document(s) that you are requesting the record to be reopened for must be submitted separately from this form. No substantive information should be included on this form (see instructions).

Consent:

Did movant obtain consent for the motion from all affected parties?

- Yes, consent was obtained by all parties
 Consent was obtained by some, but not all parties
 No attempt was made
 Despite diligent efforts consent could not be obtained

Further Explanation: Edward Hanlon wrote to the attorneys for DCRA and Perseus on
July 15, 2021 to request the information concerning their expert witnesses
described in the Motion and received no reply.

CERTIFICATE OF SERVICE

I hereby certify that on this 25 th day of July Month, 202021

I served a copy of the foregoing Motion to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of Planning

in the above-referenced ZC or BZA case via:
 Mailed letter
 Hand delivery
 E-Mail
 Other _____

Signature: /s/ Edward V. Hanlon

Print Name: Edward V. Hanlon

Address: 1523 Swann Street NW, Washington, DC 20009

Phone No.: 301 466-4492

E-Mail: ED.Hanlon.3@gmail.com

Board of Zoning Adjustment
 District of Columbia
 CASE NO 20453
 EXHIBIT NO.04

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

**JOINT MOTION *IN LIMINE* OF APPELLANTS
DUPONT EAST CIVIC ACTION ASSOCIATION AND MICHAEL D. HAYS
TO BAR DCRA AND PERSEUS
FROM PRESENTING ANY EXPERT TESTIMONY AT THE JULY 28, 2021 HEARING
IN THE ALTERNATIVE
JOINT MOTION OF APPELLANTS TO POSTPONE AND COMPEL DISCLOSURE**

COME NOW Appellants Dupont East Civic Action Association (“DECAA”) and Michael D. Hays and jointly file this Motion *In Limine* to Bar DCRA and Perseus from Presenting Any Expert Testimony at the July 28, 2021 Hearing; or, in the Alternative Joint Motion of Appellants to Postpone and Compel Disclosure and state as follows:

ISSUE

Perseus and DCRA have failed to disclose

- a. The names of any expert(s) they wish to call at the July 28, 2021 hearing;
- b. The substance of any expert’s finding and opinions and a summary of any expert’s testimony; and,
- c. The resume of each expert.

BACKGROUND

On July 15, 2021 Edward Hanlon wrote by email to Hugh Green, Esq., and Lawrence Ferris., attorneys for DCRA and Perseus respectively, and requested *inter alia* that they

“[I]dentify any expert witness(es) to be called, provide the resume(s) for the expert witness(es), provide any reports from any experts, and provide a written summary of the testimony of all witnesses you intend to call in your cases-in-chief.” *See* attached July 15 email

At all times since, Mr. Green and Mr. Ferris have provided no response to this July 15, 2021 request nor have they provided any of the requested information.

ARGUMENT

Subtitle Y *Board of Zoning Adjustment Rules of Practice and Procedure* states

203.9 An individual offered as an expert witness shall provide written evidence to the Board of expertise including but not limited to educational attainment, licensing, accreditation, and examples of relevant or comparable work and employment.

302.17 No later than seven (7) days before the public hearing, the appellee and all persons with party status and the affected ANC shall file any responsive briefs and supporting information, whether in support of or opposition to the appeal. All filings shall be accompanied by a certificate of service.

Appellants aver that when §§203.9 and 302.17 are read together the resume(s) of any expert witness(es) which DCRA or Perseus wish to call should have been supplied at least 7 days before the July 28 hearing.

By not providing the resumes DCRA and Perseus hide the identity of their expert witness(es), seek to gain an unfair litigation advantage and obstruct Appellants’ preparation for the hearing. Appellants, not knowing the names of the expert(s), cannot adequately research the

experts' backgrounds, their prior testimony in other cases which may be relevant to this instant appeal and consult with Appellants' own identified expert witnesses as appropriate.

Further, both Perseus and DCRA completely avoided any discussion in their Pre-Hearing Statements concerning who their experts are or what expert testimony they may present. Neither Perseus' nor DCRA's Pre-Hearing Statements contain any discussion of any proffered expert testimony. The failure to disclose in their Pre-Hearing Statements what their experts may testify to at the hearing seriously prejudices Appellants and is an attempt by DCRA and Perseus to gain an unfair litigation advantage. The word "expert" nowhere appears in Pre-Hearing statements filed by either DCRA and Perseus.

DCRA and Perseus may contend that the *Board of Zoning Adjustment Rules of Practice and Procedure* ("BZA Rules") do not require them to disclose prior to the hearing:

- a. The names of any expert(s) they wish to call at the July 28, 2021 hearing;
- b. The substance of any expert's finding and opinions and a summary of any expert's testimony; and,
- c. The resume of each expert.

Appellants aver that BZA's Rules are so one sided and so unequal as to the disclosure requirements put on Appellants compared to DCRA and Perseus as to rise to a violation of Appellants' due process rights. Subtitle Y *Board of Zoning Adjustment Rules of Practice and Procedure* states with respect to Appellants' required disclosures:

302.12

- (g) A statement of the issues on appeal, identifying the relevant subsection(s) for each issue of the Zoning Regulations;
- (h) All statements, information, briefs, reports (including reports and statements of experts and other witnesses), plans, photographs, or other exhibits that the appellant may wish to offer in evidence at the public

hearing;

- (i) A copy of the resume of any expert witness who will be testifying in the case;
- (j) A written summary of the testimony of all witnesses; and

302.13 An appeal may not be amended to add 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.

(Emphasis added)

The *Administrative Procedures Act*, D.C. Code 2-509(b), Contested cases, guarantees Appellants the right “to conduct such cross-examination as may be required for a full and true disclosure of the facts.”

This is a complicated case. Appellants cannot conduct a complete and an adequate cross-examination of the expert witnesses DCRA and Perseus intend to call in order to elicit “a full and true disclosure of the facts” without knowing sufficiently before the hearing the names of the experts, the substance of their findings and opinions (“written summary of the testimony”) and a copy of their resumes along with adequate time to use the information, consult with Appellants’ experts and prepare for a hearing. Appellants cannot conduct their research nor consult with their experts in the middle of the hearing. On the other hand, in obvious prejudicial imbalance DCRA and Perseus have known who Appellants’ experts are and the substance of their opinions for months, allowing DCRA and Perseus months to prepare, research and consult with their own experts.

The hearing on each Appellant’s appeal is a “contested case”.

“[A] contested case is one in which a trial-type hearing is implicitly required, either by the organic act or constitutional right.” *Lamont v. Rogers*, 479 A.2d 1274, 1278 (D.C.1984).

The DC Court of Appeals in *Glenbrook Road v. Bd. of Zoning Adj.*, 605 A. 2d 22, 26 (D.C. 1992):

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287 (1970). In *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959), the Supreme Court stated that "the requirements of confrontation and cross-examination ... have ancient roots.... This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases... but also in all types of cases where administrative and regulatory actions were under scrutiny." [Citations and footnotes omitted]. *Id.* at 496-97, 79 S. Ct. at 1413-14." *Glenbrook Road v. Bd. of Zoning Adj* at 38-39

The right to cross-examine means the right to effectively cross-examine in accordance with basic notions of due process and equal treatment of all litigants.

CONCLUSION

Accordingly, Appellants request that DCRA and Perseus be barred from calling any expert witness or offering any expert testimony at the July 28, 2021 hearing. Alternatively, Appellants request that the Board postpone the July 28 hearing for 30 days and order DCRA and Perseus to supply to Appellants by August 4, 2021:

1. The names of each expert(s) DCRA or Perseus intends to call in this case;
2. The substance of each expert's finding and opinions and a detailed summary of each expert's testimony; and,
3. All briefs, reports and statements of each expert witness either DCRA or Perseus intends to call, including the Zoning Administrator, concerning the issues raised in this appeal.

Respectfully submitted,

For Dupont East Civic Action Association

/s/ Edward V. Hanlon
Edward V., Hanlon

For Michael D. Hays

/s/ Michael D. Hays
Michael D. Hays

CERTIFICATE OF SERVICE

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

Hugh J. Green, Assistant General Counsel,
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I certify that on this date I served a copy of the foregoing Motion via first class mail postage prepaid to::

The Supreme Council of the Scottish Rite Temple
1733 16th Street, NW
Washington DC 20009
Property Owner



Edward V. Hanlon
1523 Swann Street NW
Washington, DC 20009

Date: July 25, 2021

ed.hanlon.3@gmail.com

From: ed.hanlon.3@gmail.com
Sent: Thursday, July 15, 2021 5:07 PM
To: hugh.green@dc.gov; LFerris@GOULSTONSTORRS.com
Cc: 'Michael Hays'
Subject: List of Witnesses, Identification of Experts, Expert Reports, Supporting Information

Good afternoon Mr. Green and Mr. Ferris,

Neither one of you have provided any list of witnesses, identified any expert witness(es), provided any resume(s) for expert witness(es), provided any reports from any experts, nor provided a written summary of the testimony of any of your witnesses.

Also, DCRA has provided documents labeled Exhibits A thru F which appear incomplete and some of which appear to have altered or annotated in a manner that makes them different from the originals.

I request that you provide by cob tomorrow, Friday, July 16, 2021:

1. The complete set of "Construction Documents" from which DCRA Exhibits D, E and F were drawn from along with the Legend which identifies the meaning of circled numbers 1 thru 16 which appear on DCRA Exhibits D, E and F;
2. The complete set of documents submitted to the Zoning Administrator from which Exhibits A and B were drawn; and,
3. The list of witnesses you intend to call in your cases-in-chief, identify any expert witness(es) to be called, provide the resume(s) for the expert witness(es), provide any reports from any experts, and provide a written summary of the testimony of all witnesses you intend to call in your cases-in-chief.

If you have any questions, please contact me.

Sincerely,

/s/
Edward Hanlon
301 466-4492 cell