BEFORE THE BOARD OF ZONING ADJUSTMENT
APPEAL OF A DECISION OF THE ZONING ADMINISTRATOR, DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

In re	)	
	)	
Appeal of the	)	Case No. 20453
Dupont East Civic Action Association	)	
	)	

EMERGENCY MOTION TO STAY CONSTRUCTION
AND
REQUEST FOR EXPEDITED HEARING DATE

COMES NOW Appellant Dupont East Civic Action Association (DECAA), by and thru its attorney, Edward V. Hanlon, Esq., and files this Emergency Motion to Stay Construction and Request for Expedited Hearing Date. DECAA hereby requests that the Board of Zoning Adjustment stay the construction work being undertaken pursuant to Building Permit No. B1907507 ("Building Permit") until such time as the Board issues a decision in this appeal.

As set forth in more detail below, the Building Permit was issued for a project which is the subject of two meritorious zoning appeals of the Zoning Administrator's improper approval of the subdivision of Lot 108 (the "Subdivision") containing the Masonic Temple, one of the most iconic historic landmarks in the District of Columbia. That approval was in clear violation of the Zoning Regulations.

The rear yard created by the Subdivision is without any doubt a *non-conforming rear yard* because it contains a ***massive 11 ½ foot tall stone wall and column*** in violation of 11-B DCMR § 324.1(a); and *second*, the new rear yard has a grossly insufficient height to rear yard ratio in violation of 11-F DCMR § § 605.1. Despite these obvious flaws, the developer, Perseus, is *rapidly* proceeding with construction in an obvious attempt to build as much of the apartment building as fast as possible before the February 23, 2022 hearing in order to present this Board with a fait accompli. A stay of construction is necessary to preserve the status quo and this Board's ability to award meaningful

relief.

AUTHORITY TO ISSUE A STAY

This Board has in several cases affirmed its authority to stay construction under a challenged building permit pursuant to D.C. Code § 6-641.07(g) (1) and (4).

The seminal case on this Board's authority to issue a stay of construction pending a hearing on the building permit was brought more than 30 years ago by Phil Mendelson, now Chair of the DC Council, in *Appeal No. 15136 of Phil Mendelson on behalf of ANC 3C ("In re Phil Mendelson").* Indeed, DECAA's appeal is remarkably similar to *In re Phil Mendelson* and its companion case *Appeal No. 15129 of Richard B. Nettler ("In re Richard B. Nettle")* filed on behalf of a neighborhood association in that both sets of cases involve the contention that the underlying subdivision of a lot which the Zoning Administrator approved violated the Zoning Regulations and, therefore, was invalid; and hence, subsequently issued building permits, approved by the Zoning Administrator pursuant to that subdivision, allowing new construction, were also invalid.

The facts of *In re Phil Mendelson* can briefly be stated as follows:

June 14, 1988: the Zoning Administrator approved the request of Woodland Limited Partnership to subdivide one large wooded lot on Rock Creek Drive NW into 7 smaller lots in order to build 7 homes.

August 3, 1988: the Zoning Administrator approved a revised subdivision application.

August 11, 1988: DCRA issued 7 building permits for the construction of 7 houses, one each on the 7 newly subdivided lots.

The Court of Appeals chronology continues:

> "[O]n August 11, 1988, Woodland obtained building permits … Despite the fact that five of the seven lots abutted or fronted Rock Creek Park, the permit

> applications were not referred to the Commission of Fine Arts ("Commission") for review as required by the *Shipstead-Luce Act*, D.C. Code § 5-410 (1988 Repl.). Two weeks following the Zoning Administrator's issuance of the building permits, Woodland began construction on lots 37 and 38..." *Mendelson v. Board of Zoning Adjustment,* 645 A.2d 1091-92 (1994)
>
> "On May 26, 1989, the [Woodland] Association [*In re Richard B. Nettler]* appealed that action to the BZA, alleging that the development did not comply with the zoning regulations as to rear yard, side yard, use, and height requirements." *Mendelson, supra,* at 1092
>
> "On June 5, 1989, Phil Mendelson, et al. [*In re Phil Mendelson]* also appealed to the BZA maintaining that the [underlying] subdivision plan generally did not comply with the zoning regulations." *Id.*

Thereafter, Phil Mendelson and Nettler filed a Joint Motion for an Emergency Stay of further construction on these lots pending a decision by this Board on the validity of the underlying subdivision which the Zoning Administrator had approved.

The Board ***granted*** Phil Mendelson's Emergency Motion to Stay construction, holding:

> "ORDER GRANTING STAY This matter is before the Board on the Joint Motion of Appellants for an Emergency Stay. Having considered the joint motion and the response thereto and having heard advice from the Executive Director of the Zoning Secretariat about the legal criteria that apply to consideration of a stay, the Board concludes that, pursuant to D.C. Code Sec. 5-524 (g) (4) (1988), the Board has authority to stay construction, just as the Zoning Administrator has authority to stop work pursuant to a permit, and that a brief stay until the date on which the Board is scheduled to decide this matter, that is, December 6, 1989, is in the public interest and will not cause any irreparable injury to intervenor. Accordingly, the Board hereby ORDERS that further construction on Lot 46, Square 2140, be STAYED until close of business (4:45 p.m.) on December 6, 1989.
>
> This ORDER shall be final and effective immediately upon execution by the Executive Director of the Zoning Secretariat on behalf of the Board." (Emphasis added). See attached BZA Order in Case Nos. 15129 and 15136 granting Motion for Emergency Stay.

D.C. Code § 6-641.07(g)(4) contains the same language previously found previously in D.C. Code Sec. 5-524 (g) (4) (1988) referred to in the above Order granting the Stay in *In re Phil Mendelson*, *supra.*

§ 6-641.07(g)(4) states:

> (g) Upon appeals the Board of Adjustment shall have the following powers …
>
> (4) In exercising the above-mentioned powers, the Board of Adjustment may, in conformity with the provisions of this subchapter, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from or may make such order as may be necessary to carry out its decision or authorization, and to that end shall have ***all*** the powers of the officer or body from whom the appeal is taken. (All emphasis added).

The Zoning Administrator clearly has the power to issue a Stop Work Order with respect to the Building Permit in this case; and, therefore, this Board also has that same power pursuant to § 6-641.07(g)(4).

I. Motion for Stay of Construction Under the Building Permit

In order to prevail on a motion for stay, the party seeking the stay must demonstrate that it is likely to prevail on the merits, that irreparable injury will result if the stay is denied, that the opposing parties will not be harmed (or will be less harmed) by a stay, and that the public interest favors the granting of a stay. *See Kufiom v. District* of *Columbia Bureau of Motor Vehicle Services,* 543 A.2d 340, 344 (D.C. 1988) (administrative agency required to consider the four specified factors in considering a motion for stay). Where the last three factors strongly favor temporary relief, only a substantial showing of likelihood of success, not a "mathematical probability," is necessary for the grant of a stay. *See Barry v. Washington Post Co.,* 529 A.2d 319, 321 (D.C. 1987).

But "[W]here one factor has been shown to a certainty, it is appropriate to apply a lower threshold on other prongs, such as irreparable injury, in the balance of the four factors. *See, e.g.,* CFGC, 454 F.3d at 297." *Davis v. Pension Benefit Guar. Corp*., 571 F.3d 1288, 1295, 387 U.S. App. D.C. 205 (D.C. Cir. 2009)

A. Likely to Prevail on the Merits[1]

The Appeals filed in *Appeal of Michael D. Hays*, Case No. 20452 and *Appeal of Dupont East Civic Action Association*, Case No. 20453, scheduled for hearing on February 23, 2022, involve several issues, but principally concern the *simple question*, succinctly put, of whether or not the Subdivision the Zoning Administrator approved on November 19, 2020 creates a *non-conforming rear yard* along the alleyway to the south of the Temple in violation of Subtitle A § 101.6 of ZR-16 and Subtitle C § 302.1 of ZR-16 ("Where a lot is divided, the division *shall* be effected in a manner that will not violate the provisions of this title for yards…" (All emphasis added))

11-B DCMR § 324.1(a) states:

> Every part of a yard required under this title shall be open and unobstructed to the sky from the ground up except as follows:
>
> (a) A structure, not including a building no part of which is more than four feet (4 ft.) above the grade at any point …
>
> (b) A fence or retaining wall …
>
> (c) Stairs leading to the ground … (Emphasis added)

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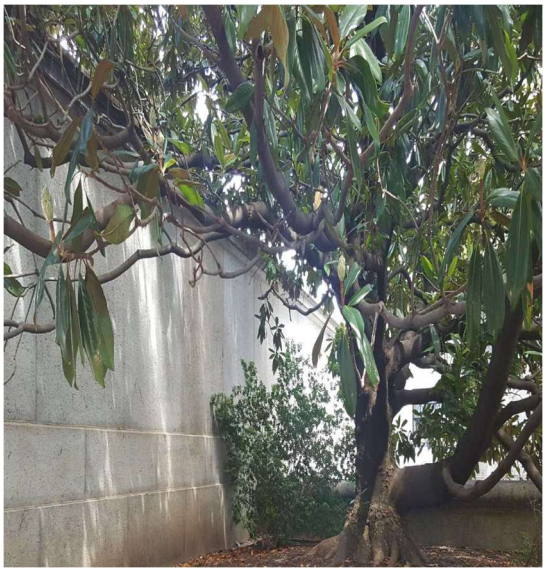
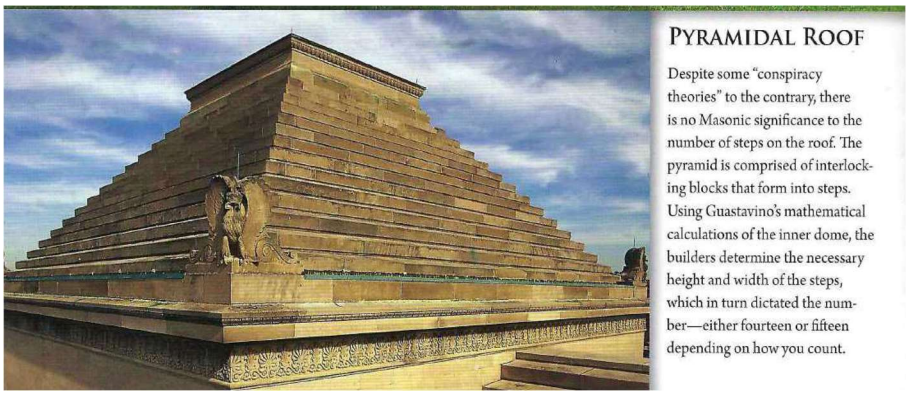
[1] On November 10, 2021 the Board informed the parties that it was very familiar with the facts in the consolidated appeals of *Michael D. Hays*, *Case No. 20452* and *Dupont East Civic Action Association, Case No. 20453* and urged the parties to avoid further repetitive filings. Accordingly, DECAA has provided only a brief summary of the basis for those appeals below.

In order to ease the burden on the Board and to avoid placing voluminous documents from *Michael D. Hays*, *Case No. 20452* and *Dupont East Civic Action Association, Case No. 20453* into this case docket, DECAA is filing this Emergency Motion in both this appeal and in its companion case, *Dupont East Civic Action Association, Case No. 20453,* (as it appears was done in *In re Phil Mendelson* and *In re Richard B. Nettler,* supra) so that the Board in deciding this motion may draw on any documents heretofore filed in Case No. 20452 and Case No. 20453 without the necessity of all those records being re-filed in this instant appeal in order for the Board to rule on DECAA's Emergency Motion. It is well-established that an adjudicatory body may take judicial notice of filings in a related case. *See Booth v. Fletcher,* 101 F.2d 676, 679 n.2 (D.C. Cir. 1938) ("court may take judicial notice of, and give effect to, its own records in another but interrelated proceeding"); *Karcher v. Islamic Republic of Iran,* Civ. No. 16-232 (CKK), 2018 WL 10742324 (Nov. 28, 2018) at *2 (same)*; Fletcher v. Pickwick, Inc.*, 140 A.2d 924 (D.C. 1958) (same).

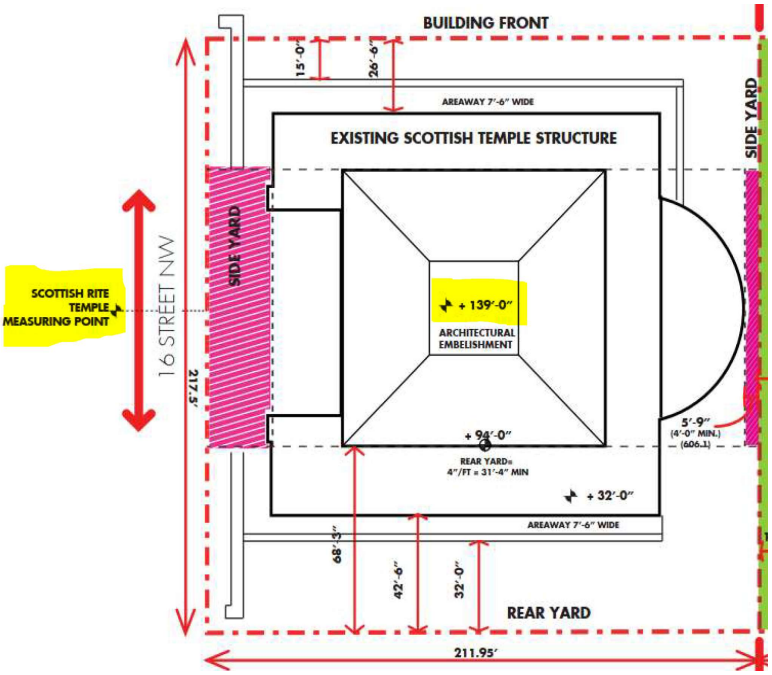
The issue is very *simple.* If the below 11.5 ft tall solid granite wall and column weighing many tons is not a "fence", not a "retaining wall", not "stairs" and is more than 4 feet above grade, then the Subdivision approved by the Zoning Administrator on November 19, 2020 clearly violates the Zoning Regulations. The rear yard created by the Subdivision is a *non-conforming rear yard that* violates 11-B DCMR § 324.1(a). *Below is a photo of the 11 ½ ft wall and column well within the confines of the newly designated rear yard:*

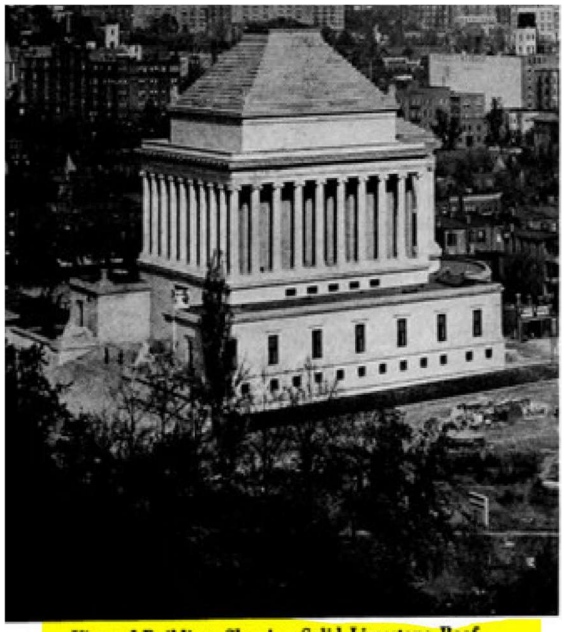


Similarly, the issue regarding the height to rear yard ratio is very *simple.* If the below is a roof, then the Subdivision approved by the Zoning Administrator violates the Zoning Regulations. If the below is a roof, then the rear yard created by the Subdivision is a *non-conforming rear yard v*iolating 11-F DCMR § § 605.1. The below is a photo of the roof the Masons themselves took and labeled as their roof in "A Guidebook to the House of the Temple" published by the Masons in 2015:



We know from the diagrams prepared by Perseus' architect (below left) that the distance from the BHMP on 16th Street to the top of the roof is at least 139 feet high.[2]





View of Building, Showing Solid Limestone Roof

11-F DCMR § § 605.1 requires all lots in an RA-9 Zone to have 1 foot of rear yard for every 3 feet of building height. If the height of a building is 139 feet, then 139ft/3 = **46.33** feet is the required depth of the required rear yard.

No matter how one measures the depth of the rear yard, Perseus' diagram (above left) shows the depth of the rear yard created by the Subdivision is less than the 46.33 feet required.

If the Subdivision the Zoning Administrator approved on November 19, 2020 violates the Zoning Regulations by *creating a non-conforming rear yard for **any** one of the above reasons*, then Building Permit B1907507 is not valid.

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[2] The photo of the Temple roof shown on the right was published in a1916 article in *Architectural Review* entitled "*Roof Construction of the Temple*" written by the contractor who built the pyramidal roof: "[I]n the roof of the Temple the lime stone alone, composing the steps in the roof as seen in the photograph weighs 332 tons!..." *Architectural Review* January 1916, Volume IV, No. 1

B. Irreparable Injury Will Result

> "The moving party must show "[t]he injury complained of is of such *imminence* that there is a `clear and present' need for equitable relief to prevent irreparable harm." (Italics in the original) *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C.Cir.2006)

On October 27, 2021 DCRA issued the construction permit, B1907507, to allow Perseus TDC to begin construction of a massive 5 story apartment building on the 46,000 sq feet of open land behind the Masonic Temple, Construction of this massive building is imminent. The below December 1, 2021 photo shows large amounts of building supplies being piled up behind the Masonic Temple for the commencement of construction.

The construction material shown to the left in this December 3, 2021 photo (and much more) is being delivered to Lot 111 to begin imminent construction of the apartment building pursuant to Building Permit No. B1907507. This is being done even though this Board has not yet determined whether the Subdivision approved by the Zoning Administrator violates the Zoning Regulations; and, even though the appeal of Building Permit No. B1907507 pends before this Board.

Thus, it appears from activity on Lots 110 and 111 in Square 192 that Perseus is about to begin construction pursuant to Building Permit No. B1907507.

If a stay is not granted, it is likely that substantial construction, pursuant Building Permit No. B1907507, will take place before the scheduled February 23, 2022 hearing in *Appeal of Michael D. Hays*, Case No. 20452 and *Appeal of Dupont East Civic Action Association*, Case No. 20453. Appellant believes it unlikely that the Masons and Perseus TDC will ever remove the apartment building, once construction has proceeded under Building Permit No. B1907507, even if this Board grants DECAA's Appeal.

1. Attempt to Deprive this Board of Effective Jurisdiction

Moving with great speed to begin construction, *in the face of pending appeals before this Board*, is an attempt to create such facts on the ground which would effectively deprive this Board of its ability to carry out its responsibilities and exercise its powers under § 6-641.07(g)(4).

Perseus and DCRA are attempting to render this Board's ability to provide effective relief to DECAA nugatory *even if* this Board finds DECAA's appeals to be *wholly meritorious*. Perseus is obviously attempting to build as much of the apartment building as fast as possible before the February 23, 2022 hearing in order to present this Board with a fait accompli.

Given Perseus' activities, a stay is necessary and appropriate to protect the status quo long enough for this Board to be able to make an effective decision on the merits.

2. The Nature of the Irreparable Harm

Irreparable harm is:

> harm which "cannot adequately be redressed by final relief on the merits," and for which "money damages cannot provide adequate compensation." *New York Pathological & X-Ray Labs, Inc. v. INS,* 523 F.2d 79, 81 (2d Cir. 1975); *see also Virginia Petroleum Jobbers Ass'n,* 259 F.2d at 925*." NAACP Legal Defense And Educational Fund v. Horner*, 636 F. Supp. 762, 766 (D.D.C. 1986).

3. Irreparable Harm From Construction Activities

It is well-established that construction activities can result in irreparable harm to adjoining property owners and neighborhood residents.[3] DECAA's members will begin to suffer significant

[3] *See, e.g., Nat'l Parks Conservation Assoc. v. United States Forest Serv.,* Civ. No. 15-cv-01582(APM), 2016 WL 420470, at *8 (D.D.C. Jan 22, 2016) ("the sound, visual, and other impacts" of construction "is not at all speculative."); *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1143 (D.C. Cal. 1999) (finding irreparable harm from construction project because of likelihood of pollution); *San Luis Valley Ecosystem Council v. Fish & Wildlife Serv.,* 657 F.Supp.2d 1233, 1240 (D. Colo. 2009) (preliminarily enjoining a drilling project); *New York v. Shinnecock Indian Nation,* 280 F. Supp. 2d 1, 4–5 (E.D.N.Y. 2003) (finding irreparable harm from "traffic congestion" and "heighten[ed] air pollution" construction likely to cause).

harm when the developer begins erecting this massive 5 story apartment building. The construction process for the massive project will involve large industrial equipment, numerous huge delivery trucks. So numerous will these construction vehicles be and so frequent their deliveries that DDOT has granted Perseus special staging space along the entire south side of the 1500 block of S Street. This staging space is significantly disrupting S Street, causing traffic congestion and eliminating dozens of parking spaces needed by neighborhood residents,

Noisy idling trucks, engines running, will fill the 1500 block of S Street and chock the narrow 15 ft wide alleyway along the Chastleton. This construction site, the alleyway along the south lot line of the Temple, the Chastleton and all of the 1500 block of S Street (all shown below) are wholly within the boundaries of DECAA, contain DECAA members and contain the neighborhood residents DECAA represents.

Traffic congestion, loud construction noise, increased vehicle pollution represent serious harms to residents and DECAA members, the kind of harm for which money damages cannot provide adequate compensation. *See* fn. 3. The photo below left was taken by Wendy Schumaker from her window. Her residence is directly above the alley entrance to this construction site.

The new temporary parking lot built between the Chastleton and the Temple to accommodate vehicles during the construction. It is built almost under the bedroom windows of the residents of the Chastleton (shown on the left)

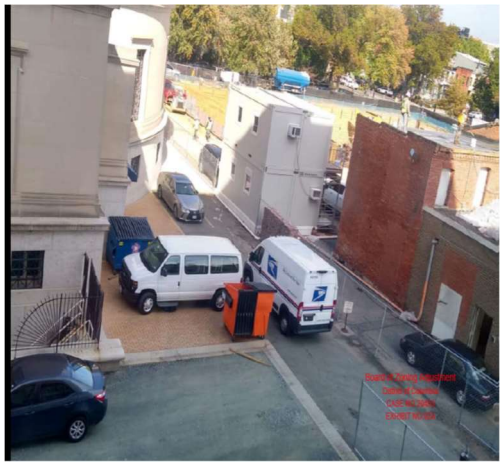
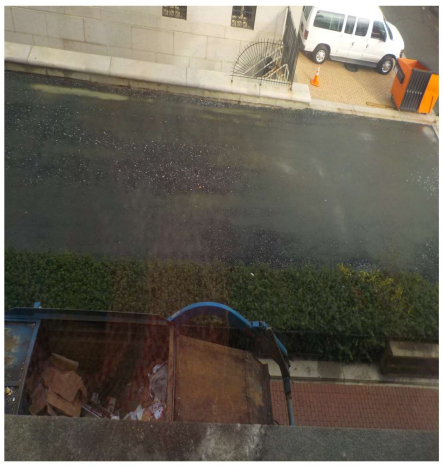
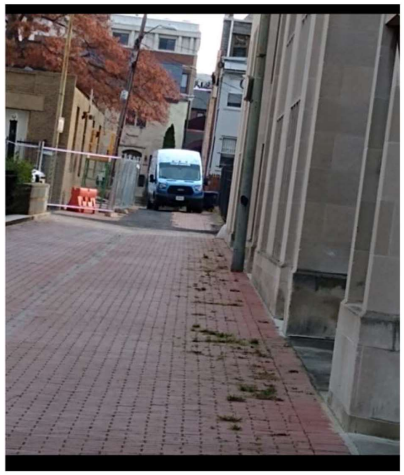


Photo taken by Wendy Schumacher showing the construction site, delivery area and new temporary parking area directly below her windows.



*Trash trucks have to **back** down the alley all the way from 16th St under the bedroom windows of the Chastleton. The construction fence (shown in photo far right) makes the 15th St alley entrance too narrow for large trucks. All trash and delivery trucks for the Temple have been re-routed to the alley. Previously, the S Street entrance was normally used.*

*1st floor bedroom and living room windows of Chastleton residents are only a few feet above the level of the alley. After construction this alley will become a very busy one-way only travel lane and **every** delivery truck, **every** trash truck and **every** vehicle leaving the new 108 space parking garage will be required to travel down this narrow one way alley next to these bedroom windows.*

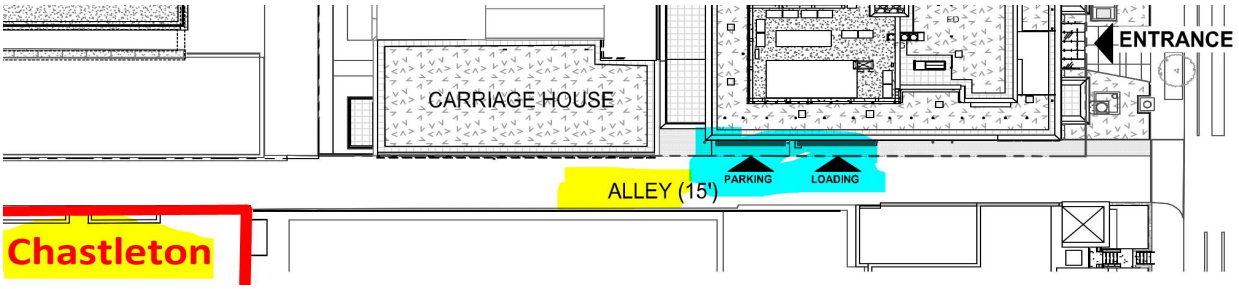


During the construction Perseus has placed a construction fence along the eastern part of the alley, narrowing the alley to just 10 feet and making it very difficult to navigate which is why trash trucks have to back down this alley from 16th St to service the Chastleton and the Temple.

4. Irreparable Harm from the Noise, Traffic Congestion and Loss of Privacy

Before construction only a few vehicles a day used this very quiet alley next to the Chastleton which had more dog walkers than vehicles using it. After construction this two way alley will be converted to a one way only alley because of the large volume of traffic down this alley which this new 158 unit building will cause.

The entrance to the underground parking garage and the entrance to the loading dock for this 5 story apartment building are going to be constructed ***on*** the alley so that ***every*** vehicle using the underground garage each day must drive down the entire length of the alley. The loading dock for this massive apartment building will also be on this alley so *every* delivery vehicle delivering to this new 5 story apartment building will have to drive down this alley destroying the alley's previous quiet contemplative atmosphere. From the diagrams prepared by Perseus' architect:



Traffic congestion on the 1500 block of S Street, an entirely residential block, during construction is horrendous.

The construction site entrance is at the mid-point of the 1500 block. All construction vehicles, heavy equipment vehicles, and deliveries of construction materials have to be delivered from the S Street side of the construction site, causing traffic jams, noise and significant vehicle emissions affecting the residents of the 1500 block of S Street. S Street, though two way, has been effectively narrowed to one lane during the day and requires flag men to stop traffic at the chock points. The below photos taken on the 1500 block of S Street on December 6, 2021 show the traffic congestion, heavy trucks and what can fairly be called an assault on the peace, quiet, safety, aesthetic views and natural beauty of the open area behind the Masonic Temple that DECAA members and neighborhood residents have enjoyed for decades. This is the type of harm for which there is no monetary compensation available. This harm is legally irreparable.

As the photo above shows, parking has been removed from the south side of the block so contractor vehicles and heavy trucks can queue to enter the construction site. As the erection of the building under Permit No. B1907507, begins and huge number of delivery trucks and workers arrive, the traffic congestion and construction noise is expected to be worse.

S Street has become so narrow and dangerous that, even though S Street is two-way, a flag man has to be stationed on this block during construction hours because of how difficult it has become for two-way traffic. These harms are not speculative. *See, e.g., Nat'l Parks Conservation Assoc. v. United States Forest Serv.,* Civ. No. 15-cv-01582(APM), 2016 WL 420470, at *8 (D.D.C. Jan 22, 2016) ("the sound, visual, and other impacts" of construction "is not at all speculative."). The noise, traffic congestion and air pollution being caused on the 1500 block of S Street constitute irreparable harm to DECAA's members and the residents who live within DECAA's boundaries. *See, e.g., New York v. Shinnecock Indian Nation,* 280 F. Supp. 2d 1, 4–5 (E.D.N.Y. 2003) (finding irreparable harm from "traffic congestion" and "heighten[ed] air pollution" construction likely to cause).

The privacy interests of those living along the alley are being irreparably damaged. The windows of the first floor units of the Chastleton are only a few feet above the alley surface, making it easy to look into the windows of these apartments by the hundreds of people who are expected to use this alley everyday once the 5 story apartment building is constructed.

5. Irreparable Harm to the Aesthetic Interests of DECAA and Its Members

Aesthetic interests can serve as an appropriate basis for defining and analyzing irreparable harm. Two cases decided by the U.S. District Court for the District of Columbia, *Fund for Animals v. Espy,* 814 F. Supp. 142 (D.D.C. 1993) and *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14

(D.D.C. 1998) are illustrative of this approach. In both cases, the plaintiffs sought preliminary injunctions to prevent the proposed killing of bison before their claims for violations of National Environmental Policy Act (NEPA) could be considered on the merits.

In arguing for injunctive relief, plaintiffs in *Espy* and *Clark, supra*, claimed that their aesthetic interests in viewing the bison would be irreparably harmed by the proposed actions, both in being forced to witness the slaughter of the bison *and in losing the opportunity to view the bison to which they had become attached*. In both cases, the district court upheld these arguments, finding that the plaintiffs had met their burden of showing irreparable harm and ultimately granting the preliminary injunctions. In *Espy*, the court held:

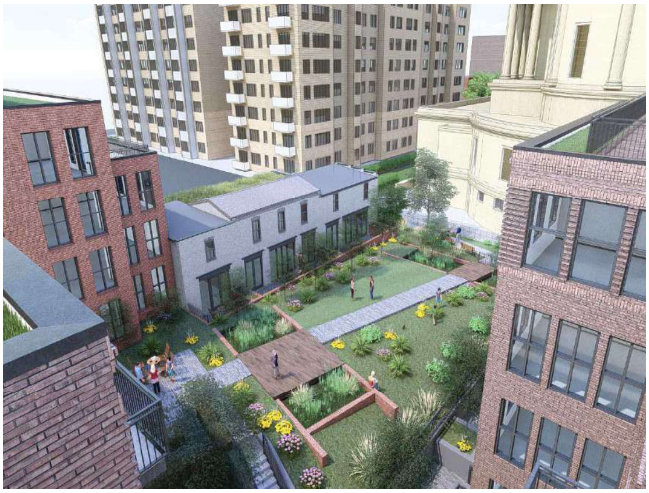
> "The individual plaintiffs live near Yellowstone National Park and frequent it… Each of them enjoys the neighboring Yellowstone bison in much the same way as a pet owner enjoys a pet, so that the sight, or even the contemplation, of treatment in the manner contemplated of the wild bison, which they enjoy and have seen and are likely to see captured for the program, *would inflict* ***aesthetic injury*** *upon the individual plaintiffs …*
>
> *Such injury is not compensable in money damages because, while the injury threatened to these plaintiffs' aesthetic interests would be palpable and concrete, they are not ownership interests in property susceptible to monetary valuation*.
>
> In addition, most states (if not all) deny damage awards for pain and suffering not accompanied by physical injury… *Thus, the injury experienced and threatened would be irreparable*." (Emphasis added) *Fund for Animals v. Espy* at 151

DECCA members enjoyed using this area and its beautiful views behind the Temple for aesthetic purposes and the construction of a 5 story apartment building within 6 feet of the apse of the Temple would destroy those uses. DECAA members, some of whom live immediately across the street from the project, have long enjoyed the unobstructed view of the Temple apse, which the construction of this 5 story building would permanently obscure and impair.

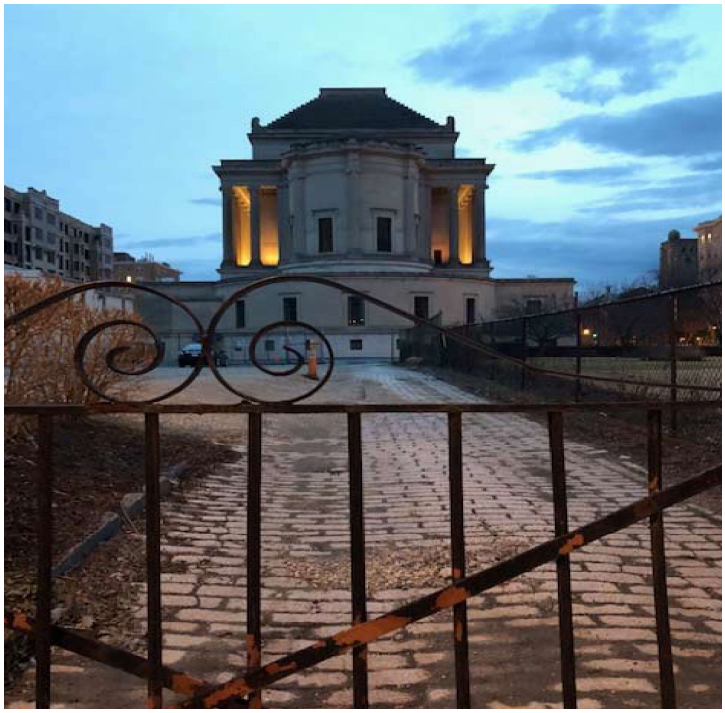
The intrusion of this mammoth luxury complex will forever after alter the space, the peace, and the reflection of this historic place by DECAA members. Their aesthetic interests will forever be

diminished and permanently destroyed by construction of this apartment building.

BEFORE: The aesthetic beauty and quietude DECAA members and neighborhood residents so enjoyed



AFTER: The cluttered ugly apartment building with its rooftop clubhouse, pool, commercial kitchen which would destroy forever the aesthetic enjoyment and quietude DECAA members and neighborhood residents enjoyed.



BEFORE: The Masonic Temple at sunset from 15th St. The Temple almost looks alive in its historic classical beauty – once voted the 5th most beautiful building in the world by the American Institute of Architects. It is a view so treasured by DECAA and its members.

AFTER: The beautiful sunset views that DECAA members so love, forever destroyed by erection of this ugly apartment building. Perseus seeks to build as much of this building as fast as it can to deprive this Board of any opportunity to render meaningful relief to DECAA if this Board determines the appeals of DECAA and Michael Hays are meritorious.

6. Irreparable Harm to DECAA's Organizational Purposes

An organization suffers irreparable injury if the opposing party's actions "perceptibly impair" the organization's programs. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016). A two-part test applies to determine organizational injury. *First*, has the opposing party's conduct "made the organization's activities more difficult" *Id.* (citation omitted). *Second,* if so, do the opposing party's actions "directly conflict with the organization's mission" *Id.* Here, the answer to both questions is clearly yes.

As the Declaration of Nicholas DelleDonne (DECAA's President) ("DelleDonne Decl.") establishes, DECAA was founded to protect and promote "the preservation of open spaces, and the historic, architectural, and aesthetic value of property, landmarks, and sites in the greater Dupont Circle area of Washington, D.C." It works to protect significant historic sites and to advocate for historic preservation as a fundamental value. DECAA members have contributed substantial time and resources to furthering these goals. DelleDonne Decl. ¶¶ 1, 10.

Construction of the project directly conflicts with the organizational purposes explained above, and it will render DECAA's activities more difficult. Since one of DECAA's founding purposes has been to preserve the Temple Gardens, construction will undermine its efforts to attract new members. *See* DelleDonne Decl. ¶¶ 1, 11. DECAA, as an organization, is irreparably harmed by Perseus' race to erect this building before this Board can decide whether the Subdivision, which the Zoning Administrator approved, is too large and violates creates a non-conforming rear yard.

C. Opposing Parties Will Not Be Harmed

There is no conceivable harm to DCRA of a stay until such time as the Board issues a decision in this appeal. This is not city-owned property. DCRA has no legal or financial interest

in Lots 110 or 111 and no financial interest in the outcome of this Appeal. Thus, there appears to be no cognizable harm to DCRA in granting this motion.

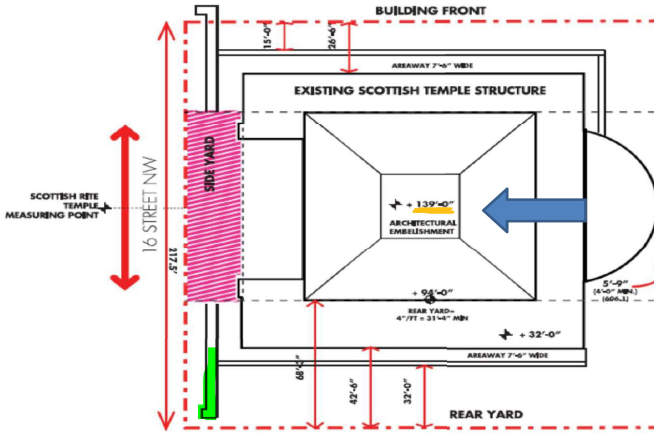
With respect to Perseus the hearing on whether the Zoning Administrator's decision approving the Subdivision violated the Zoning Regulations is set for February 23, 2022.

Perseus is choosing to go ahead with construction ***now*** knowing

1. The ***Subdivision approval is being contested*** and a hearing before BZA is scheduled for February 23, 2022 in BZA Case Nos 20452 and 20453.

2. The ***construction permit itself is being contested*** in this appeal.

3. The ***DC Court of Appeals*** on November 19, 2021 consolidated DECAA's two law suits challenging this project on historic preservation grounds and has decided it ***will hear oral arguments in both cases as "expeditiously, as the calendar permits***."[4]



Perseus' probable misconduct: The diagram at left, which this Board is familiar with, was drawn by the architect for Perseus. The architect drew on the diagram i*nside the newly designated rear yard* the 11 ½ ft wall (highlighted in green).

Perseus' architect showed the lot lines with a dashed red line. Thus:

- *Perseus knew the wall existed, because it is drawn in on its own diagrams*,
- Perseus knew that choosing S St as its "front" automatically put the 11 ½ ft wall inside the newly designated required rear yard.
- Perseus knew that the wall was more than **4 ft** high.

[4] *Dupont East Civic Action Association et al., v. Mayor's Agent For Historic Preservation and Perseus TDC*, Appeal No. 20-AA-0693 consolidated with *Dupont East Civic Action Association, et al., v. Bowser*, Appeal No. 20-CV-315.

Accordingly, at all times Perseus knew designating the yard on the south side of Temple the 'rear yard' violated 11-B DCMR § 324.1(a). Perseus has consistently misrepresented the truth of this situation to this Board. Now, Perseus is racing to build this building, knowing the putative Subdivision is no good. Perseus is racing to build before this Board can rule.

Any injury Perseus may suffer is entirely ***self-inflicted***. Perseus knew the Subdivision created a non-conforming rear yard and has repeatedly *misrepresented* this fact. Attorneys for Perseus wrote their own Zoning Determination letter and thereby deliberately sought to avoid any determination that the rear yard was non-conforming.

Perseus could have applied much sooner for the building permit but chose not to. Perseus gamed the system and the timing of when the permit was issued in order to avoid the possibility of an adverse BZA ruling before it was ready to commence erection of the building.

Notice of Intent to Appeal: DECAA had informed Perseus in July that it would appeal the building permit when it was issued.[5] Perseus has chosen to proceed any way. A party who

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[5] On July 31, 2021 Edward Hanlon on behalf of DECAA wrote a **Notice of Intent** letter to Hugh J. Green, Esq., Counsel for DCRA, Andrew Zimmitti, Esq., Counsel for The Scottish Rite Temple and Christine Roddy, Esq., Counsel for Lessee Perseus TDC as follows:

> *"I am writing on behalf of the Dupont East Civic Action Association (DECAA) to put all parties on notice that DECAA will appeal the issuance of any permit for the construction of an apartment building on Lot 108, subdivided on November 19, 2020 into Lots 110 and 111. This November 19, 2020 subdivision is being challenged in two appeals, BZA Case Nos. 20452 and 20453. These appeals are meritorious and will succeed...*
>
> *Building Permit B1907507 is pending. If it is issued, DECAA will be appeal the permit.*
>
> *If Perseus TDC and the Scottish Rite Temple proceed and begin construction, they will do so at their own financial and legal risk.*
>
> *A party who proceeds with construction while a zoning approval is being contested is doing so at its own risk. See e.g., Godfrey v. Zoning Board of Adjustment, 344 S.E.2d 272,*
>
> ***There is no legally vested interest in such a putative building permit."***

proceeds with construction while a zoning approval is being contested is doing so at its own risk. *See, e.g*., *Godfrey v. Zoning Board of Adjustment*, 344 S.E.2d 272, 280 n. 2 (N.C. 1986). *See also Bosse v. City of Portsmouth*, 226 A.2d 99 (Supreme Court N.H. 1967). **There is no legally vested interest in such a putative building permit.**

Perseus has at all times controlled the timing of this project, including when to apply for a building permit.

> "Here, Defendants held most of the power — including the power to control the timing of the project and the review process…
>
> While the court is sympathetic to the problems Defendants face, the fact that they are now pressed for time . . . after having invested a great deal of effort and money is a *problem of their own making and does not weigh in their favor*."

See Quechan Tribe of the Ft. Yuma Reservation v. Dep't of the Interior, 755 F. Supp. 2d 1104, 1121 (S.D. Cal. 2010)

If there is any harm to Perseus from a short stay, it is entirely self-inflicted and should not be weighed favorably by the Board in its analysis. *See e.g.*, *Epic Games, Inc., v. Apple Inc.,* 493 F.Supp.3d 817 (N.D. Cal. 2020)

D. Public Interest

The public interest clearly favors the granting of a stay in this situation until the validity of the Subdivision can be decided on the merits. There are substantial, indeed, overwhelming, reasons to believe, as discussed above, that the Subdivision approved by the Zoning Administrator on November 19, 2020 creates a ***non-conforming rear yard*** in violation of multiple Zoning Regulations. The ***only*** alternative rear yard designation as a *matter of right* would run more than 46 feet behind the rounded Temple apse resulting in a still significant but smaller building constructed on a smaller lot. It is not in the public interest to allow Perseus to disrupt an entire

neighborhood, inflict irreparable harm on DECAA, DECAA members and residents of the neighborhood, undermine the authority of this Board, in its ***race against the clock*** to erect as much of this building as possible before the Board can rule in February on an obviously bad lot Subdivision.

The clear public interest is for this Board, in an orderly manner, to put the horse ***before*** the cart and decide ***first*** whether the Subdivision violates the Zoning Regulations before allowing Perseus to proceed with construction under a putative building permit which in all likelihood is a bad permit.

II. Request for an Expedited Hearing Date

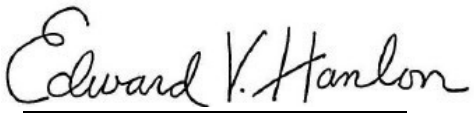
An expedited hearing date may possibly resolve many of the issues noted above, and could limit the time of any stay granted per the above request. An expedited hearing date would be of great benefit to all parties.

Consent to DECAA's *Emergency Motion to Stay Construction And Request for Expedited Hearing Date* was sought from Hugh J. Green, Esq., Assistant General Counsel, OGC Department of Consumer and Regulatory Affairs; Andrew Zimmitti, Esq., Manatt, Phelps & Phillips, LLP who is Counsel for The Scottish Rite Temple; and, Christine Roddy, Esq., Goulston & Storrs, PC who is counsel for Perseus TDC. All respectfully declined to consent.

CONCLUSION

For the reasons stated above, Appellant DECAA respectfully requests that the Board grant this Motion.

Respectfully submitted,



Edward V. Hanlon, Esq.
1523 Swann Street NW
Washington, DC 20009
ED.Hanlon.3@gmail.com
Counsel for the Dupont East Civic Action Association

CERTIFICATE OF SERVICE

I hereby certify that DECAA's *Emergency Motion to Stay Construction And Request for Expedited Hearing Date* and all associated documents have been served, this 7th day of December 2021, upon the following by email:

Matthew LeGrant
Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., Room 3100
Washington, DC 20024
dcra@dc.gov

Hugh J. Green, Assistant General Counsel,
OGC Department of Consumer and Regulatory Affairs
1100 4th St SW, 5th Floor
Washington, DC 20024
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Matthew Hudson, Chairperson ANC 2B
2146 Florida Ave, NW
Washington, DC 20008
2B@anc.dc.gov

Moshe Pasternak Commissioner ANC SMD 2B04
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John Fanning Chairperson ANC 2F

1307 12th Street, NW #505
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Counsel for Lessee Perseus TDC

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Washington, D.C. 20036
azimmitti@manatt.com
Counsel for The Scottish Rite Temple

Christine Roddy
Goulston & Storrs, PC
1999 K St NW Ste 500
Washington, DC 20036
CRoddy@goulstonstorrs.com

I certify that December 7, 2021 I served a copy of forgoing via first class mail postage prepaid to:

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

Respectfully submitted,

Date: December 7, 2021

Edward V. Hanlon, Esq.
1523 Swann Street NW
Washington, DC 20009
ED.Hanlon.3@gmail.com
Counsel for the Dupont East Civic Action Association