

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

Appeals of Dupont East Civic  
Action Association

BZA Appeal Nos. 20453 & 20656  
ANC 2B04

**Perseus TDC, LLC’s Opposition to Motion to Stay Construction and Expedite Hearing**

Perseus TDC, LLC (“**Perseus**”) hereby respectfully requests that the Board of Zoning Adjustment (“**Board**”) deny the motion filed by Dupont East Civic Action Association (“**DECAA**”) in the above-referenced appeals requesting that the Board of Zoning Adjustment (“**Board**”) grant a stay of construction and requesting an expedited hearing date (the “**Motion**”). The Motion requests that the Board issue an order enjoining construction of a multifamily residential building (the “**Project**”) located at 1732 15<sup>th</sup> Street NW (Square 192, Lot 111) (the “**Property**”). The building permit for the Project, Permit No. B1907507 (“**Permit**”) is the subject of DECAA’s appeal in BZA Case No. 20656 (“**Permit Appeal**”).

Throughout development of the Project, DECAA and its members have sought to obstruct and delay the entitlement processes for the Project, including requesting multiple stays for historic preservation approvals. Each of these requests have been correctly denied by the relevant administrative authority or court, which refused to reward DECAA for its dilatory tactics. The Board should do the same and deny the request for a stay. With respect to the hearing date, Perseus has no objection if the Board sees fit to reschedule the hearing for the Permit Appeal to February 23, 2022, the same day as the hearing for the appeals challenging the subdivision approved for the Project (“**Subdivision**”), BZA Case Nos. 20452 (filed by Michael Hays, a member of DECAA) and 20453 (filed by DECAA directly) (together, the “**Subdivision Appeals**”). However, DECAA has not demonstrated justification for further expediting the hearing for the Permit Appeal, which has no independent basis other than the violations DECAA

has alleged with respect to the Subdivision. This is especially so given that it is DECAA that requested the most recent — and third — postponement of the hearing for the Subdivision Appeals and thus prevented the issues in those appeals from reaching resolution and given that DECAA waited no less than 42 days after issuance of the Permit to file its “emergency” Motion.

The Board should deny the Motion and should schedule the hearing date as it deems most efficient for its calendar.

## **I. Background**

On November 19, 2020, the Subdivision was approved to subdivide then-Lot 108 in Square 192, which is owned by the Supreme Council of the Scottish Rite of Freemasonry, 33rd Degree, Southern Jurisdiction, USA (the “**Masons**”) and consists of land improved with the Scottish Rite Temple (“**Temple**”), a historic landmark having an address of 1733 16<sup>th</sup> Street NW on west portion of the lot, and vacant land on the east portion of the lot. The Subdivision divided former Lot 108 into two lots: Lot 110 on the west, which will continue to be occupied by the Temple; and Lot 111 on the east, on which Perseus is developing the Project — a multifamily residential building with 158 units — pursuant to a ground lease with the Masons.

DECAA and one of its members, Michael Hays, separately filed the Subdivision Appeals on January 18 and 19, 2021, continuing their broader ongoing efforts to stop the Project, which include court challenges to the approvals granted by the Historic Preservation Review Board and Mayor’s Agent for Historic Preservation (“**Mayor’s Agent**”) for the Subdivision and Project. The Subdivision Appeals were originally scheduled for hearing on May 12, 2021. That hearing was rescheduled to July 28, 2021, and again rescheduled to November 10, 2021. Most recently, at DECAA’s request, the hearing was again postponed until February 23, 2022.

Meanwhile, Perseus had continued to move forward with the Project and submitted a building permit application in April 2021, pending approval of the Subdivision. The Permit was issued on October 27, 2021 and was posted on the Property on November 1, 2021. The Applicant sent additional notice of the Permit issuance to DECAA and Mr. Hays via email on November 10, 2021.

On November 23, 2021, DECAA filed the Permit Appeal. On December 7, 2021 — 42 days after the Permit was issued — DECAA filed this “emergency” Motion in both the Permit Appeal and BZA Case No. 20453 requesting that the Board stay construction of the Project and expedite the hearing.

## **II. DECAA Fails to Demonstrate Satisfaction of the Requirements for Grant of a Stay.**

Neither the D.C. Administrative Procedure Act, D.C. Code § 2-510, nor the Zoning Regulations specify the standard applicable to a request for stay in a zoning appeal. However, the D.C. Court of Appeals has outlined the requirements for granting a stay, which the Board as previously adopted. “To prevail on a motion for stay, a movant must show that he or she is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay.” *Akassy v. William Penn Apartments Ltd. Partnership*, 891 A.2d 291, 309 (D.C. 2006) (quoting *Barry v. Washington Post Co.*, 529 A.2d 319, 320–21 (D.C. 1987)). The moving party bears the burden to show that the standard for a stay has been met. *See Don’t Tear It Down, Inc. v. District of Columbia*, 395 A.2d 388, 390 (D.C. 1978) (moving party bears “the dual burdens of proof and persuasion”).

Here, DECAA has failed to demonstrate that it can meet any of the four requirements for granting a stay, much less all four requirements.

**A. DECAA's Appeals Are Not Likely to Succeed on the Merits.**

The Permit Appeal is not likely to succeed. DECAA's one and only objection to the Permit is that the Subdivision creating Lot 111 on which the Project is located was issued erroneously. Furthermore, in its Statement of Appeal and Motion DECAA advances only one alleged error in the Zoning Administrator's approval of the Subdivision, implicitly conceding that all of the other claims in its grab bag of prior allegations are of no merit. *See* Statement of Appeal at 5–10; Motion at 5–7. In short, DECAA claims that the Subdivision creates a nonconforming rear yard for the Temple property. The alleged rear yard violations are: (i) a structure extends into the required rear yard; and (ii) the Temple dome must be included in the building's height for purposes of calculating the required depth of the rear yard.

Both of these issues have been fully briefed and re-briefed in the Subdivision Appeals, and Perseus incorporates by reference all of its written submittals in those cases. In short, the Zoning Regulations expressly permit certain structures to be located within a required yard, including a fence or retaining wall under Subtitle B § 324.1(b) and stairs leading to the ground from a principal entrance under Subtitle B § 324.1(c). The wall at issue qualifies under either exception. Moreover, even if the wall must be factored into the rear yard calculation, per Subtitle B § 318.2 the rear yard is measured as the mean horizontal distance between the building line and the rear lot line (i.e., the average measurement across the entire lot). Here, the subject wall is only three (3) feet, four (4) inches wide and thus would have only a *de minimus* impact on the rear yard calculation across the entirety of the 212-foot wide Temple lot and would not result in a nonconforming rear yard.

With respect to the Temple's pyramidal dome, as discussed in detail in briefing for the Subdivision Appeals, from the time the Temple was built the dome has been considered an

architectural embellishment that is not counted in measuring the Temple’s building height for purposes of compliance with the Height of Buildings Act of 1910 (“**Height Act**”) and the Zoning Regulations, both of which specifically exclude certain top-of-building elements such as “domes” from building height. Just as the dome was excluded from the Temple’s height under the Height Act when the permit was issued for its construction in 1911, so is the dome excluded from height under the Zoning Regulations’ corollary provision, Subtitle B § 306.5.<sup>1</sup> Further, the dome is fully consistent with the requirement under that section that an embellishment not create the appearance of a raised building height for more than 30% of the wall on which it is located. The dome is set back and does not visually extend the building façade or appear to extend building height at all, instead standing out distinctly as a separate aesthetic element that does not exist to increase — or appear to increase — the building height. Thus, under Subtitle B § 306.5, it is excluded from building height and does not create a nonconforming rear yard for the Temple.

For these reasons, and for all the reasons set forth in Perseus’ briefs submitted in the Subdivision Appeals, the Subdivision was properly issued and DECAA’s challenge of the Building Permit based entirely on the Subdivision is not likely to succeed.

**B. DECAA Has Not Demonstrated Any Irreparable Injury That Would Result If the Motion Is Denied.**

DECAA alleges that denial of a stay will result in irreparable harm from construction impacts, increased activity in the area when the multifamily building is occupied, harms to DECAA’s aesthetic interests, and impairment of its organizational purposes. However, to the

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<sup>1</sup> The Zoning Regulations provision governing architectural embellishments was previously codified as Subtitle C § 1501.3 and was recently relocated to Subtitle B as part of the comprehensive amendments to the penthouse regulations approved by the Zoning Commission in Z.C. Case No. 14-13E, for which the Notice of Final Rulemaking has been issued and which will become effective as of December 24, 2021.

extent these alleged harms are within the Board’s purview, they are not irreparable for the simple fact that the Property is always capable of being returned to its former state as an empty lot with grass and gravel cover in the case of an adverse result.

In support of its claim of construction-related harms, DECAA sites several federal cases, all of which involved alleged environmental violations. However, claims of irreparable harm in the environmental context, where the risk of pollution and the spoliation of natural resources is often at issue, bear little relevance to a zoning case. The type of general impacts of construction raised by DECAA, such as noise from trucks entering and exiting the worksite, are not permanent and certainly are not irreparable. Moreover, such temporary impacts are within the purview of the Construction Codes and not governed by the Zoning Regulations, which is why the Board has long affirmed that construction impacts are outside its jurisdiction. *See e.g. BZA Case No. 19249 of Jennifer Wisdom* (2016) (confirming that “construction impacts are outside the Board’s jurisdiction”); *see also BZA Order No. 20444 of Nicole Dillard* (2021) (stating same). DECAA cannot use the procedural mechanism of a request for stay as a wedge to introduce matters otherwise not within the Board’s purview in consideration of a zoning appeal.<sup>2</sup>

DECAA’s claimed harms resulting from the occupancy of the Project also fall flat for the simple reason that such harms are not irreparable. As noted above, if the Project cannot ultimately be developed due to an adverse ruling, the Property can simply be returned to its prior fallow state, as previously affirmed by the Board. *See BZA Order No. 17532-B of AppleTree Institute for Education Innovation, Inc.* (2008) (denying motion to stay Board order clearing path

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<sup>2</sup> DECAA also makes contradictory allegations that Perseus has both sped up and slowed down development of the Project so as to somehow “game the system” to evade the Board’s review on appeal — at once arguing both that Perseus is racing to develop the Project “as fast as possible” (Motion at 9, 18) and that Perseus delayed filing the building permit application (*id.* at 18). DECAA’s claims are logically incoherent and take as an assumption the fantastic assertion that Perseus could control when DCRA would complete its review and issue the Permit. These disjointed claims are entirely baseless and are irrelevant in any event because the Project has not avoided appeal.

for issuance of a building permit and commencement of construction because, e.g., construction pursuant to a permit under appeal is at-risk). Claims of harm to aesthetic interests and organizational purposes are likewise unavailing for the same reason — any such harms are not irreparable given the ability to return the Property to its prior state. This is in stark contrast to the “organizational purpose” case on which DECAA relies, *League of Women Voters of United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016). In that case, the D.C. Circuit concluded that the claimed organizational harm — obstruction of voter registration due to enforcement of state voting laws — was irreparable because “after the registration deadlines for the November election pass, there can be no do over and no redress.” 838 F.3d at 9 (internal quotation omitted). But here, redress is readily available because the Project, once constructed, will be no more indelible than the rowhouses that existed on the Property when the Temple was originally constructed. Views and open space can always be restored and so inherently cannot be deemed irreparable.

On this issue, the D.C. Court of Appeals’ decision regarding the requested stay of the Mayor’s Agent approval for the Project is directly on point. In concluding that a stay of that decision was not justified pending appeal, the Court stated: “Even if the commencement of work on the [Project] that the Mayor’s Agent’s decision facilitates constitutes a harm to petitioners, we are not persuaded it is an irreparable harm. The record shows that the [Project] would be situated on land that is vacant but for a garden and a parking lot, such that it could be readily restored to that state if necessary.” *See* Court of Appeals Order Per Curiam dated March 23, 2021 in 2019 CAB 4130 (included in Exhibit A).

**C. Perseus Will Suffer Substantial Harm If Construction Is Further Delayed.**

In stark contrast to the lack of harm to DECAA if the requested stay is denied, Perseus will assuredly suffer real and immediate harm by the resulting delay in the construction of the Project. Halting construction will inflict significant ongoing costs, which are likely to increase further due to the current inflationary economic environment and could ultimately risk the Project's viability. Stopping construction now would also result in current construction agreements being voided and would impose substantial additional cost to the Project. In addition, there would be significant expenses related to either removing the crane that is currently erected on the Property or leaving it on-site without use indefinitely. This is also true of other construction equipment and work crews that have been deployed to the site as development has progressed, both of which will have been reassigned under new contracts for other sites by the time construction would resume at the Property, further imposing delay and additional cost on the Project.

It is worth reiterating that DECAA and its members have attempted to thwart the Project throughout the entitlement process, including challenging the Project's approvals from both the Historic Preservation Review Board and the Mayor's Agent in separate court cases. At every turn, DECAA and its members have endeavored to delay proceedings and prolong the approval process in an effort to postpone the Project into oblivion. Other authorities evaluating the Project have recognized these actions for what they are — blatant dilatory tactics — and have denied prior requests for stay.<sup>3</sup> The Motion at hand is no different and is also a baseless attempt to

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<sup>3</sup> DECAA member Michael Hays requested that the Mayor's Agent stay proceedings in that matter in 2019 for various reasons, which the Mayor's Agent denied. Thereafter, when the Mayor's Agent issued the final order approving the Subdivision in 2020, Hays asked both the Mayor's Agent and the Court of Appeals to stay effectiveness of the decision, and both the Mayor's Agent and the Court denied those requests. The Mayor's Agent and Court orders denying the requests for stay are attached as Exhibit A.



obstruct development of the Project. Given that no irreparable harm is posed to DECAA if construction proceeds, whereas Perseus will be seriously harmed if construction is further delayed, the balance of the interests weighs strongly in favor of denying a stay and preventing DECAA from reaping benefit from its delay tactics.

**D. Public Interest Strongly Favors Denying a Stay.**

The public interest weighs heavily in favor of denying DECAA's request for a stay. First and foremost, granting a stay would represent a major setback in the delivery of 158 residential units, including 13 affordable units, to directly address the city's immediate significant shortfall in housing, thereby resulting in harm to the city as a whole. Moreover, as was discussed at length in historic preservation proceedings, the Project and underlying ground lease to Perseus for development constitute a vital resource of revenue for the Temple itself, which requires an estimated \$80 million worth of crucial repairs and maintenance work. Stopping construction and halting progress in the development of the Project when DECAA has not made a colorable showing that the Subdivision or Building Permit run afoul of the Zoning Regulations would directly undercut the city's important objectives to meet the need for additional housing and would compromise the preservation and protection of a historic landmark. Further, doing so while the Project is still in the excavation stage, leaving a very large hole in the ground for an undetermined period of time, would come with its own risks. Sheeting and shoring systems installed during this phase of construction are, by design, temporary measures and are not meant to be in place with a large open pit for indefinite extended periods, which further counsels against putting construction efforts on hold at this juncture. In sum, public interest strongly favors denying a stay.



## Certificate of Service

The undersigned hereby certifies that copies of the foregoing documents were delivered by electronic mail to the following addresses on December 14, 2021.

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