

alternative photos or any alternative measurements.

5. DCRA's Opposition contains no statement from the Zoning Administrator opining that this 11 ½ foot structure is not a wall.

6. DCRA's Opposition does not *proffer* any expected testimony from the Zoning Administrator that this 11 ½ foot high structure is not a wall.

7. *A careful reading of DCRA's Opposition shows DCRA never contends that this structure is not a wall. DCRA never asserts this structure is a fence, stairs or a retaining wall.*

8. DCRA's Opposition should be accepted for what it is – an **admission** by omission that the 11 ½ foot structure shown in the photos contained in DECAA's Motion is in fact an 11½ foot wall in the middle of a required rear yard in violation of 11-B DCMR § 100.2 and 11-B DCMR § 324.1.

9. Perseus states in its Opposition without any explanation that 11 ½ foot high granite wall is *both* a “fence or retaining wall” *and* “stairs”.

“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.” (Emphasis added) Perseus Opposition at 4

Perseus' argument is bipolar and literally makes no sense. Something cannot be both a “fence” and “stairs” at the same time.

10. Perseus' Opposition contains no explanation for why this 11 ½ foot structure is not a wall. Thus, Perseus' Opposition contains no reasoning from which this Board could conclude this structure is not a wall.

11. Perseus' Opposition also attached no report from its expert witness, a licensed architect, opining that this 11½ foot structure is not a wall and why.

12. Perseus' Opposition does not *proffer* any expected testimony from its architect that

this 11½ foot structure is not a wall and why.

13. Perseus's Opposition, with its lack of any proffer of any opinion from its expert, should be accepted for what it is – an **admission** by omission that the 11 ½ foot structure shown in the photos contained in DECAA's Motion is in fact, in the opinion of its own expert, an 11½ foot wall in the middle of a required rear yard in violation of 11-B DCMR § 100.2 and 11-B DCMR § 324.1.

14. Perseus claims the harms that DECAA, its members and the neighbors of the Temple will suffer if construction goes forward pursuant to a fatally defective construction permit:

“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.” (All emphasis added) Perseus' Opposition at 6

Perseus does not believe that. This is about constructing a 5 story, \$50 million, building. If Perseus is allowed to begin construction of this building, Perseus will fight tooth and nail never to tear it down. Litigation could go on for years over a half finished building sitting in the middle of a residential neighborhood. This is not in the public's interests. And, the harm of a half finished building, sitting potentially for years, causes irreparable aesthetic, environmental and organizational harm to DECAA and its members, *injuries which are irreparable because they are injuries not compensable in money damages. Cf. Fund for Animals v. Espy*, 814 F. Supp. 142 (D.D.C. 1993)

15. Perseus's Opposition is notable also for ***the failure to attach any affidavit*** to support the statements Perseus makes that it will “Suffer Substantial Harm If Construction Is Further Delayed”.

16. There is no evidence in the record from Perseus about the costs to it or the Masons of the Board's granting DECAA's Motion. Perseus has submitted no accounting, no itemization, no invoices, no contracts, no projections etc. All this information is solely and exclusively in the

control of Perseus and Perseus has chosen not to provide it to the Board. The statements by Perseus' attorney in its Opposition are not evidence in this matter.

17. **Self-inflicted harm:** Perseus' claims that it will suffer substantial harm if the Stay is granted are all self-inflicted. Perseus has had at all times complete control over the scheduling and pacing of this project. Perseus could have waited until this Board decided the merits of this appeal but is choosing not to wait, creating a major problem for DECAA, this Board and the public at large.

18. **Mr. May's questions go unanswered:** On November 10, 2021 Commissioner Peter May, a member of this Board, made clear on the record that he had questions for the Zoning Administrator about this wall and wanted to know the Zoning Administrator's reasoning in approving this Subdivision. Mr. May said that he wanted DCRA to come to next hearing prepared to discuss the "substance" of the issue. DCRA had an opportunity to address Mr. May's concerns in its Opposition and has chosen not to. This Board should draw the appropriate inferences.

19. Finally, DCRA's Opposition refers to, and Perseus' Opposition attaches, the November 6, 2020 decision of the Mayor's Agent historic preservation case now on appeal to the DC Court of Appeals. But, this decision is totally irrelevant to the zoning issues in this case as the decision itself states:

"However, zoning issues are not within the Mayor's Agent's jurisdiction, raise distinct and separate considerations from historic preservation review, and thus have no bearing on this case." See Perseus Exhibit A at 4

CONCLUSION

For all the reasons given above and in its Motion, Appellant DECAA respectfully requests that the Board grant DECAA's Emergency Motion to Stay Construction And Request for Expedited Hearing Date.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that DECAA's foregoing *Reply to the Opposition of DCRA and Perseus to DECAA's Emergency Motion to Stay Construction And Request for Expedited Hearing Date* and all associated documents have been served, this 17th day of December 2021, upon the following by email:

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

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Respectfully submitted,



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Date: December 17, 2021