

**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)	
_____)	

**APPELLANTS’ REPLY TO THE OPPOSITION OF THE DISTRICT AND PERSEUS
TO APPELLANTS’ JOINT MOTION TO ADDITIONALLY QUALIFY
PROFESSOR JAMES MCCRERY AS AN EXPERT ON THE
DISTRICT OF COLUMBIA ZONING REGULATIONS AND
COMPLIANCE WITH SAID REGULATIONS**

INTRODUCTION

The Oppositions of the District and Perseus to the qualification of Professor James McCrery, a renowned District of Columbia architect, as an expert in the DC Zoning Regulations and compliance therewith are misguided. Professor McCrery, who has not only taught courses addressing the DC Zoning Regulations for six years, as well as being an award-winning practicing architect licensed to practice and who does practice in DC, is eminently qualified to be an expert on the zoning issues in this case. Indeed, the Oppositions’ remarkable objection to qualifying a professor at a well-respected local university, who teaches a course addressing the very subject on which Appellants’ seek to qualify him, is surely unprecedented. The Oppositions’ principal “never enough” approach ignores the substantial bases for his additional

qualification as an expert in the DC Zoning Regulations and compliance therewith and are insufficient to warrant denial of the instant motion.

ARGUMENT

A. Standard to Qualify an Expert Witness.

In *Motorola Inc. v. Murray*, 147 A.3d 751 (D.C. 2016), the DC Court of Appeals adopted the standards for qualifying an expert witness in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590–95 (1993). Under this standard, judges may qualify an expert by “knowledge, skill, experience, training, or education,” *any one of which is sufficient*. Fed. R. Evid. 702. See *Exum v. Gen. Elec. Co.*, 819 F.2d 1158, 1163 (D.C. Cir. 1987) (“‘[E]xperience’ is only one among the five different ways to demonstrate an expert is qualified.”); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999) (“The Rules grant [testimonial] latitude to all experts”).

In general, Rule 702 has been interpreted to favor admissibility of expert testimony. See *Daubert*, 509 U.S. at 587; see also Fed. R. Evid. 702 advisory committee’s note (2000) (“A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.”). The adversarial system remains the “traditional and appropriate” mechanism for exposing unreliable but admissible evidence. Fed. R. Evid. 702 advisory committee’s note (2000) (quoting *Daubert*, 509 U.S. at 596).

Failure to have served in a particular role is insufficient to deny qualification as an expert. *Harris v. Koenig*, C.A. No. 02-618 (GK), 2011 WL 1838483 at 2 (D.D.C. May 16, 2011) (rejecting objection to qualification of expert on standard of care for fiduciaries under ERISA on the grounds that expert had “never served as a trustee or fiduciary of an employee benefit plan”). As the Supreme Court stated in *Daubert*, the trial court must determine whether the proposed

expert possesses “a reliable basis” for qualification as an expert. 509 U.S. at 592. “Formal education ordinarily suffices, and a person who holds a graduate degree typically qualifies as an expert in his or her field.” *Khairkhwa v. Obama*, 793 F. Supp. 2d 1, 11 (D.D.C. 2011) (citing *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 176-77 (5th Cir. 1990), and *Am. Gen. Life. Ins. Co. v. Schoenthal Family, LLC*, 555 F.3d 1331, 1338-39 (11th Cir. 2009)).

B. Professor McCrery Fully Qualifies and An Expert in the DC Zoning Regulations and Compliance Therewith.

As noted above, under the applicable Fed. R. Evid. 702 standard, judges may qualify an expert by “knowledge, skill, experience, training, or education,” any one of which is sufficient. Fed. R. Evid. 702. While the Oppositions nit-pick at Professor McCrery’s qualifications, he has clearly satisfied the standard for being recognized as an expert with respect to DC Zoning Regulations and compliance therewith.

1. Knowledge.

Professor McCrery’s declaration states that he is very “familiar with the DC Zoning Regulations and compliance therewith.” McCrery Decl. ¶ 2. This statement alone is sufficient to qualify him as an expert witness in the DC Zoning Regulations and compliance therewith. Indeed, his years of teaching zoning courses at a well-respected District of Columbia university and his employment as a practicing architect licensed in DC routinely applying the DC Zoning Regulations all provide sufficient support for qualifying him on the basis of his knowledge.

2. Skill.

Even without his extensive knowledge, Professor McCrery’s skill as a very prominent architect renders him capable of qualifying as an expert on the DC Zoning Regulations and compliance therewith. He has a graduate degree in architecture, he is a licensed DC architect, he is the winner of multiple awards for his architectural work, and he has been a practicing architect

for decades. Also, zoning is an integral part of architectural design, and zoning codes across the country address similar issues such as height restrictions and rear yard setbacks. He obviously has the skill to render expert opinions on the DC Zoning Regulations and compliance therewith.

3. Experience.

As Professor McCrery stated in his declaration, he “has advised numerous clients with respect to DC Zoning Regulations and compliance therewith. These projects include urban design commissions in the District of Columbia and unique commissions for the federal government work in the District of Columbia.” These facts are wholly sufficient to warrant qualifying him as an expert based on his experience. The Oppositions state no authority for their proposition that Appellants must provide every single project Professor McCrery has worked on over the course of his lengthy career.

4. Training and Education.

Professor McCrery has “taught courses that address the DC Zoning Regulations for over 6 years[.]” McCrery Decl. ¶ 5. The training and education required for him to teach these courses is alone an ample basis for qualifying him as an expert in the DC Zoning Regulations and compliance therewith.

C. The Oppositions Objections Are Misguided.

With this background, it is readily apparent that the District’s and Perseus’ objections are meritless. Professor McCrery has provided ample information from which this Board can conclude he has the relevant expertise to qualify him as an expert in the DC Zoning Regulations and compliance therewith.

First, while the District complains (Dist. Opp. at 1) that Professor McCrery did not give the names of courses he has taught, the District cites no such requirement and there is none. His

declaration establishes that he has “taught courses that address the DC Zoning Regulations” for over six years. McCrery Decl. ¶ 5. The District’s far-fetched attempt to impose a further requirement that the course be “dedicated” to the DC Zoning Regulations is meritless. The course need not be “dedicated” to provide an ample basis for Professor McCrery’s knowledge of these Regulations. Perseus’ objection that his work as a Professor teaching a course addressing the DC Zoning Regulations “does not clearly indicate the specific extent of professional experience from which that proficiency was gained” (Perseus Opp. at 2) is incomprehensible. Universities select professors to teach courses based on their knowledge and experience. Perseus’ fanciful and unsupported suggestion (at 2) that these courses are somehow teaching superseded DC Zoning Regulations is likewise meritless.

Second, the District, apparently unaware of the bases for qualifying expert witnesses, complains that Mr. McCrery has not appeared as an expert “before either the BZA or the Zoning Commission.” Dist. Opp. at 2. There is no such requirement, as Fed. R. Evid. 702 and the above cited cases make clear. *See Exum*, 819 F.2d at 1163 (“[E]xperience’ is only one among the five different ways to demonstrate an expert is qualified.”); *Harris*, 2011 WL 1838483 at 2 (rejecting objection to qualification of expert on standard of care for fiduciaries under ERISA on the grounds that expert had “never served as a trustee or fiduciary of an employee benefit plan”).

Third, the District and Perseus suggest that the examples of Professor McCrery’s experience are insufficient to qualify him. Putting aside the fact that “experience” is only one of the five ways in which an expert may be qualified, as a practicing architect licensed in D.C. he routinely analyzes the DC Zoning Regulations, as his declaration makes clear. *See* McCrery Decl. ¶ 7 (“I have analyzed and advised numerous clients with respect to DC Zoning Regulations and compliance therewith.”) As noted above, there is no requirement that Appellants’ must

provide every single project he has worked on over the course of his lengthy career. Moreover, in addition to ignoring the Randall Fields Development (800,000 sq. feet of proposed mixed development) and multiple residential projects recited in his Declaration, the Oppositions' suggestion that every client analysis and consultation must result in a constructed project or it does constitute relevant experience is, of course, false.

Fourth, Perseus' denigration of Professor McCrery's outstanding resume, reciting among other things ten architectural achievement awards and Presidential appointment as a Commissioner, United States Commission on Fine Arts, as failing to demonstrate "any notable experience in reviewing or advising on zoning matters" ignores Fed. R. Evid. 702's admonition that "skill" suffices to qualify as an expert. The Oppositions also ignore, among other things, the fact that the Commission on Fine Arts' review of projects includes issues covered by the Building Height Act (an Act at issue in these appeals) under the Shipstead-Luce and Old Georgetown Acts. McCrery Decl. ¶ 6. Clearly, an architect of Professor McCrery's stature should be of assistance to the Board in addressing the zoning issues in this case.

CONCLUSION

Accordingly, Appellants respectfully request that this Board additionally recognize Professor McCrery as an expert in the DC Zoning Regulations and compliance therewith.

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

Dated: February 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2022, a copy of the foregoing Reply was filed with

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