

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001**

Appeal by Michael D. Hays
Appeal by DuPont East Civic Action Assoc.

BZA Appeal No. 20452
BZA Appeal No. 20453

D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS’S
PRE-HEARING STATEMENT

NOW COMES, D.C. Department of Consumer and Regulatory Affairs (“DCRA”) for its *Pre-Hearing Statement*, and states as follows:

I. INTRODUCTION

The Dupont East Civic Action Association (“DECAA”) and Michael D. Hays (“Mr. Hays”) (collectively the “Appellants”) challenge the Zoning Administrator’s approval of a subdivision of Lot 108 in Square 192 into two (2) lots: Lot 110 (the “Temple Lot”) on the west; and Lot 111 (the “Eastern Lot”) on the east. The Supreme Council of the Scottish Rite of Freemasonry, 33rd Degree, Southern Jurisdiction, USA’s (the “Masons” or “Property Owner”) Scottish Rite Temple is located on the Temple Lot. *See*, Subdivision Square 192, D.C Office of Surveyor, attached hereto as Exhibit A.¹

The Appellants filed nearly identical appeals citing numerous violations of the zoning regulations. In shotgun fashion, the Appellants claim that the subdivision’s Temple Lot (Lot 110) violates:

- a) 11 DCMR Subtitle A § 101.6 (lot division);²
- b) 11 DCMR Subtitle C § 302.1 (lot division);³

¹ For background on the Scottish Rite Temple, see *In Re: Matter of Scottish Rite Temple*, HPA No. 19-497, Decision and Order, dated November 6, 2020.

² BZA Appeal 20452 Exhibit 6 - Statement of Appellant Michael Hays in Support of Appeal, p. 6; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, p. 3.

³ *Id.*

- c) 11 DCMR Subtitle F §§ 605.1 and 606.1 (rear and side yard requirements);⁴
- d) 11 DCMR Subtitle C §§ 901.1, 901.4; 903.1, 905.2, 905.3 and 905.4 (loading berths, loading platforms, and service delivery spaces);⁵
- e) 11 DCMR Subtitle F § 601.1 (the purpose and intent of the Dupont Area RA Zones);⁶
- f) 11 DCMR Subtitle C§ 701.5 (parking requirements);⁷and
- g) 11 DCMR Subtitle B § 308.2 (building height measurement point (“BHMP”)).⁸

However, contrary to the Appellants’ assertions, the Zoning Administrator did not err in approving the subdivision. Appellants’ arguments are supported by a misapplication of the zoning regulations — they narrowly construe the zoning regulations, and in many respects fail to address or even acknowledge other applicable zoning regulations. As the Appellants’ arguments are without merit, the Board of Zoning Adjustment (the “Board” or “BZA”) must deny these appeals.

II. THE PROPERTY AND THE SUBDIVISION.

The property at issue is located at or near 1733 16th Street NW (Square 192, formerly Lot 108) (the “Property”). The Property is bounded by S Street NW to the north, 15th Street NW to the east, a public alley to the south, and 16th Street NW to the west. The Property is owned by the Masons. The Zoning Administrator approved a subdivision of the Property on November 19, 2020. *See*, Exhibit A. Lot 108 was divided into two lots: Lot 110 (the Temple Lot); and Lot 111 (the Eastern Lot), each with an area of approximately 46,110 square feet. *See*, Exhibit A. The

⁴ *Id.*

⁵ *Id.*

⁶ BZA Appeal 20452 Exhibit 6 – Statement of Appellant Michael Hays, pp. 6, 7, 33; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, pp. 3, 24.

⁷ BZA Appeal 20452 Exhibit 6 – Statement of Appellant Michael Hays, p. 7; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, p. 4.

⁸ BZA Appeal 20452 Exhibit 6 – Statement of Appellant Michael Hays, p. 25; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, p. 27.

Temple Lot is improved with the Scottish Rite Temple, and is in an RA-9 zone. The Eastern Lot contains a surface parking lot, lawn and a carriage house and is located in an RA-8 zone.

III. ARGUMENT

A. The Appeals Must be Denied as the Subdivision Satisfies the Loading Berth, Loading Platform, and Parking Space Requirements, pursuant to 11 DCMR Subtitle B § 308. 8; Subtitle C § 201.2, and Subtitle C §§ 705.3 and 901.7.

The Appellants argue that, as a result of the subdivision, the Scottish Rite Temple itself is in violation of the current zoning regulations with respect to loading berth and parking requirements under Subtitle C §§ 705.1, 901.1, 901.4, 903.1, 905.2, 905.3, and 905.4.⁹ However, the Appellants selectively cite to the regulations to support their positions. Under the zoning regulations, a non-conforming structure that existed prior to the adoption of the zoning regulations

⁹ BZA Appeal 20452 Exhibit 6 – Statement of Appellant Michael Hays, p. 6; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, pp. 3, 15-21.

Subtitle C § 705.1: 701.5 Except as provided for in Subtitle C § 702, parking requirements for all use categories are as follows (all references to “sq. ft.” refers to square feet of gross floor area as calculated in Subtitle C § 709):

Subtitle C § 901.1, states, in part: All buildings or structures shall be provided with loading berths and service/delivery spaces as follows, except for structures erected on Kingman and Heritage Islands for which the construction of service delivery loading spaces shall be prohibited. . .

Subtitle C § 901.4. Each loading berth shall be accompanied by one (1) adjacent loading platform.

Subtitle C § 903.1. Except as provided in this section, all loading berths and service/delivery spaces shall be located as follows: (a) Within the building or structure the berths or spaces are designed to serve; b) Within the rear yard of the building they are intended to serve; or (c) Within a court or side yard of the building they are intended to serve, provided that on a lot that is within or adjacent to an R, RF, RA, or NC zone, the loading berths and service/delivery loading spaces shall be at least six feet (6 ft.) from any side lot line.

Subtitle C § 905.2. All loading berths shall be a minimum of twelve feet (12 ft.) wide, have a minimum depth of thirty feet (30 ft.) and have a minimum vertical clearance of fourteen feet (14 ft.).

Subtitle C § 905.4. All loading berths shall be accompanied by one (1) adjacent loading platform that meets the following requirements: a) A loading berth that is less than fifty-five feet (55 ft.) deep shall have a platform that is at least one hundred square feet (100 sq. ft.) and at least eight feet (8 ft.) wide; (b) A loading berth that is fifty-five feet (55 ft.) deep or greater shall have a platform that is at least two hundred square feet (200 sq. ft.) and at least twelve feet (12 ft.) wide; (c) Loading platforms shall have a minimum vertical clearance of ten feet (10ft.); and (d) A loading platform floor shall consist of one (1) horizontal level.

(and amendments) may continue to exist, provided that the non-conformity is neither added to nor expanded. *See*, Subtitle B. § 308.8; Subtitle C § 201.2.¹⁰

In this instance, the Scottish Rite Temple has existed for over a century, well before the zoning regulations were enacted in the District. Although the lot subdivision may render certain aspects of the Temple lot as non-conforming under ZR16, the regulations explicitly allow it, provided that the non-conformity is neither expanded nor increased. *See*, Subtitle B. § 308.8; Subtitle C § 201.2 Despite these clear provisions in the regulations, the Appellants fail to acknowledge them.

Moreover, as an historical landmark, such as the Scottish Rite Temple, absent an expansion and/or increase in gross floor area (“G.F.A.”), ***no additional parking, loading berths, loading platforms, etc. are required***, as follows:

Subtitle C § 705.3

A historic resource shall not be required to provide additional parking spaces for a change in use without expansion.

Subtitle C § 901.7

An addition to a historic resource shall be required to provide additional loading berths, loading platforms, and service/delivery spaces only for the addition’s gross floor area and only when the addition results in at least a fifty percent (50%) increase in gross floor area beyond the gross floor area existing on the effective date of this title.

¹⁰Subtitle B. § 308.8. A conforming structure in existence on June 14, 2013, that would have been rendered nonconforming as a result of the adoption of amendments to this section made in Z.C. Order No. 12-11, shall be deemed conforming; provided that the height of the structure may neither be increased or extended.

Subtitle C § 201.2. Any nonconforming use of a structure or of land, or any nonconforming structure lawfully existing on the effective date of this title that remains nonconforming, and any use or structure lawfully existing that became nonconforming on the effective date of this title, may be continued, operated, occupied, or maintained, subject to the provisions of this chapter.

Turning to this matter, if the Scottish Rite Temple itself were significantly altered, or there was an increase in gross floor area, ZR16’s provisions for parking, loading, etc. would apply. However, the zoning regulations expressly *exclude* the Temple Lot from these regulations, as the subdivision did not alter any of the features which would trigger their application. *See*, Subtitle C §§ 705.3, 901.7. Under the Appellants’ narrow reading of the regulations, *any* lot division would require all existing structures (non-conforming, historic, or otherwise) to strictly comply, which is contrary to the zoning regulations. The Appellants’ strained interpretation reveals their flawed arguments. On this basis alone, the Board must deny these appeals.

B. The Appeals Must be Denied as The Zoning Administrator Correctly Determined that the Temple Lot Conforms to the Rear Yard Requirements.

The Appellants maintain that the Temple Lot violates minimum rear yard requirements because: a) the selection of S Street NW as the building front is improper; b) the Temple areaway width must be excluded from the rear yard measurements; and c) the BHMP for determining the rear yard was miscalculated.¹¹ However, all of Appellants’ arguments are meritless, and the Temple Lot satisfies the regulations with respect to rear yard requirements.

1. Under the Zoning Regulations, S Street NW May Be Designated as the Front for Rear Yard Purposes.

The Appellants claim -- absent any evidence -- that the Temple Lot violates the rear yard provisions because the front of the Temple has been “redesignated.”¹² However, the Appellants offer no substantive evidence, and fail to point to any regulation that the lot is redesignated. The parties are left to speculate as to the relevance of this argument. Nevertheless, under Subtitle B

¹¹ BZA Appeal 20452 Exhibit 6 – Statement of Appellant Michael Hays, pp. 22-24; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, pp. 3, 15-21.

¹² BZA Appeal 20452 Exhibit 6 – Statement of Appellant Michael Hays, p. 25; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, p. 10, DECCA does not use the term “redesignated” but it take issue with the S Street NW as the “theoretical front.”

§100.2 “When a lot abuts more than one (1) street, the owner shall have the option of selecting which is to be the front for purposes of determining street frontage.” Moreover, under Subtitle B §308.7, “if a building fronts on more than one (1) street, any front may be used to determine street frontage; but the basis for measuring the height of the building shall be established by the street selected as the front of the building.”

Turning to this matter, the Temple fronts on more than one street, and *any* front may be used to determine street frontage. The Property Owner selected S Street NW as the front of the building. The Appellants’ object to S Street NW as the Temple’s front because the Temple’s the main entrance is not on S Street NW.¹³ On the contrary, the zoning regulations do not require that a building’s entrance be the basis for determining the rear yard for a lot. *See, BZA Appeal No. 19080 of Adams Morgan Neighbors for Action.* In *19080 Adams Morgan*, the BZA found that the Zoning Administrator did not err in concluding that Columbia Road could be designated as a hotel’s front for rear yard purposes, despite the fact that the hotel’s main entrance was on Euclid Street. In finding for the Zoning Administrator, the BZA stated:

. . . the Owner’s selection of street frontage is not tied to the location of the building entrance or the address of the property. (citation omitted) Nor, stated the ZA, is the selection of street frontage tied in any way to the measurement of building height; i.e. the ZA testified that ‘measuring the building height can occur on another street frontage besides the choice of the frontage for the frontage of the lot.’ (citation omitted) The Board believes this is a reasonable interpretation. The Board agrees with the position advanced by DCRA’s counsel, that there is a distinction built into the Zoning Regulations between the determination of ‘street frontage’ and the ‘front’ of a building. Street frontage is used, among other things, to determine the rear lot line designation; whereas, building frontage is used to measure building height. (citation omitted). As such, the fact that Euclid Street is the building front -- used to measure building height – has no bearing on the selection of street frontage. . .

In this case, the fact that the S Street NW was designated as the front is allowed under the

¹³ BZA Appeal 20452 Exhibit 6 –Statement of Appellant Michael Hays, p. 25; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, p. 6.

regulations.

2. The Zoning Administrator Properly Determined the BHMP of the Scottish Rite Temple.

a. The Property Owner May Select 16th Street NW for Determining BHMP.

In a RA-9 zone, the zoning regulations require a rear yard of “15’ ft.; or a distance equal to 4 in. per 1 ft. of principal building height.” *See*, 11 DCMR Subtitle F § 605.1 (Table F). The Property Owner selected 16th Street NW for calculating BHMP. From 16th Street NW, the height of the Temple from S Street, NW is 85.25’ (feet) (approx.). *See*, West Elevation, attached hereto as Exhibit B. The minimum rear yard requirement for the Temple Lot is 28.41’ (feet) ($85.25 \times 4 \div 12 = 28.41$ ’ (feet)). The rear yard that is provided is 42’ (ft) 6” (in.), thus satisfying Subtitle F § 605.1. *See*, Subdivision Site Plan, attached hereto as Exhibit C.

In determining the BHMP, Appellants argue that the Temple dome must be included in the in determining the BHMP for calculating the rear yard.¹⁴ However, domes are expressly excluded from BHMP calculations under Subtitle C §1501.3:

Architectural embellishments consisting of spires, tower, domes, minarets, and pinnacles may be erected to a greater height than any limit prescribed by these regulations or the Height Act, provided the architectural embellishment does not result in the appearance of a raised building height for more than thirty percent (30%) of the wall on which the architectural embellishment is located.

See, Subtitle C §1501.3 (emphasis added).

In this case, the Temple dome is excluded under C §1501.3. Further, it is not located on a wall on which it is located, but is set back. *See*, Exhibit B. Moreover, the Zoning Administrator’s analysis is in harmony with the prior determination(s) in other projects regarding similar

¹⁴ BZA Appeal 20452 Exhibit 6 –Statement of Appellant Michael Hays, p. 28; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, p. 23.

embellishments in the District. *See*, Letter from Matthew LeGrant, December 17, 2013 and selected associated slides, attached hereto as Group Exhibit D. As the Zoning Administrator did not err, these appeals must be denied.

b. Assuming *Arguendo* that S Street NW is Used for Determining BHMP, the Temple Lot Still satisfies the Rear Yard Requirements.

The Appellants insist that if S Street NW is used for BHMP, the subdivision violates the rear yard provisions for the zone. As has previously been stated, the Owner may select the street from which to measure BHMP, and another for determining lot front. *See, 19080 of Adams, supra.* Assuming *arguendo* that S Street NW is used, the Temple lot still complies for rear yard in the zone. *See, S Street NW BHMP, attached hereto as Exhibits E and F.*

As an initial point, the Appellants erroneously argue that the depth of the areaway along the front of the Property should also be included in the BHMP calculations. However, an “areaway” is an exception to grade in determining BHMP.¹⁵ Subtitle B § 308.2 carves out exceptions to grade in determining BHMP. *See, Subtitle B § 308.2.* The zoning regulations define “Exceptions to Grade” as follows:

The following are exceptions to “Finished Grade” and “Natural Grade” as those terms are defined below:

- (a) A window well that projects no more than four feet (4 ft.) from the building face; and
- (b) An areaway that provides direct access to an entrance and, excluding associated stairs or ramps, projects no more than five feet (5 ft.) from the building face.

*See, Subtitle B § 100.1.*¹⁶

¹⁵ BZA Appeal 20356 Exhibit 2 – Appellant’s Pre-Hearing Statement, p. 1.

¹⁶ Subtitle B § 100.1:

Grade, Finished: The elevation of the ground directly abutting the perimeter of a building or structure or directly abutting an exception to finished grade. Exceptions to Finished Grade are set forth in the definition of “Grade, Exceptions to.”

Grade, Natural: The undisturbed elevation of the ground of a lot prior to human intervention; or where there are existing improvements on a lot, the established elevation of the ground, exclusive of the improvements or adjustments to the grade made in the five (5) years prior to applying for a building permit. Exceptions to Natural Grade are set forth in the definition of “Grade, Exceptions to.”

Moreover, an “areaway” is defined as: “A subsurface space adjacent to a building that is open at the top or protected at the top by a grating or guard and that provides passageways accessing a basement/cellar door.” *See*, Subtitle B § 100.1.

Turning to this matter, the Temple’s areaway is an existing non-conforming feature. In looking at the plans and diagrams, the feature is adjacent to the building, and provides a passageway accessing a basement. *See*, North Elevation, Exhibit C. Furthermore, although the dimensions of the existing areaway are slightly different than those proscribed by the current regulations, it is nevertheless a non-conforming feature. *See*, Subtitle C §201.2. Thus the Temple areaway is excluded from the calculations.

Nevertheless, even if S Street NW was used as a basis for determining the BHMP (either including or excluding the depth of the areaway), the rear yard is compliant, as follows:

S Street SW BHMP= 87.5’(feet) - the minimum rear yard requirement for the Temple Lot is 28.41’ (feet) ($87.5 \times 4 \div 12 = 29.16$ (feet)) Exhibit E;

S Street SW BHMP (including the depth of the areaway) = 102.72’ (feet) - the minimum rear yard requirement for the Temple Lot is 34.24’ (feet) ($102.72 \times 4 \div 12 = 34.24$ (feet)). *See*, Exhibit F.

Here, the Temple’s areaway has been existing and functioning for almost a century. The areaway in question is part of the original structure. The subdivision does not increase or alter its nonconforming nature. *See*, Exhibit A. As an areaway, it is an “exception to grade,” under Subtitle B § 100.1, and it may be excluded from determining BHMP. Moreover, even if S Street NW were used in determining BHMP, the Temple lot is still compliant. Thus, from either 16th Street NW or S Street NW (as the Appellants erroneously claim), the minimum rear yard requirement is satisfied. *See*, Exhibit C.

3. The Zoning Administrator Did Not Err in Including the Width of the Temple Areaway in determining the Rear Yard Calculations.

The Appellants also argue that the areaway along the Temple’s southern wall must be excluded from the rear yard calculations. The areaway is below grade, and its above ground wall is approximately 2’ (feet). *See*, Exhibit F. Contrary to the Appellants, the width of the areaway is included in the rear yard measurements. *See*, Subtitle § B 101.1¹⁷ An illustrative case is *BZA Appeal No. 18888 of Adams Morgan for Reasonable Development*. In *18888 Adams Morgan*, an issue was whether a ramp leading down to a below-grade garage and the subsurface garage itself, violated the rear yard requirements. The Board found:

The definition of a rear yard requires that it be open to the sky “from the ground up.” The garage ramp and the garage do not violate this requirement. There is no dispute that the garage ramp is located at grade and that the garage is located below grade. Neither the ramp nor the garage “occupy” the rear yard as that term is defined in the Zoning Regulations; thus, each may be located along the property line. Further, it cannot be said that both occupy more than 50% of the rear yard since they do not occupy the rear yard at all. The walls that surround the garage ramp are less than four feet above grade, and are therefore permissible with the required rear yard

Turning to this matter, *18888 Adams Morgan* is applicable. The areaway, as with the garage and ramp, does not “occupy the rear yard” of the Temple, nor does it occupy more than 50% of the rear yard. The areaway width is properly included in the rear yard calculations and is supported by the Board’s finding in *18888 Adams Morgan*. Here the Temple’s rear yard is 42.6’ (ft.), and therefore satisfies the minimum required in an RA-9 zone. *See*, Subtitle F § 605.1 (Table F); Exhibit C; Sec. A. III. 2(a)-(b), *supra*.

C. The Appeals Must Be Denied as the Temple Lot Conforms to the Side Yard Requirements under 11 DCMR Subtitle F §606.1.

¹⁷ Subtitle § B 101.1 defines Yard: An exterior space, other than a court, on the same lot with a building or other structure. A yard required by the provisions of this title shall be open to the sky from the ground up, and shall not be occupied by any building or structure, except as specifically provided in this title. No building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title

The Appellants equivocally claim that the Temple Lot violates the side yard requirements; however, they fail to make a concrete determination or provide support for this proposition. Nevertheless, in an RA-9 Zone, a minimum side yard of four (4) feet is required. *See*, Subtitle F §606.1 The east side yard is 5’(ft.) 9” (in.) (approx.) and therefore in conformity with the regulations. *See*, Exhibit C. No side yard is required on the western side of the Temple Lot as it abuts a street on a corner lot. *See*, Subtitle F § 606.4. Thus, it is clear that the Temple Lot conforms to the side yard requirements under the zoning regulations.

D. The Board must deny the Appeals as the Purpose and Intent of the Zoning Regulations for the Dupont Circle Area Zones is Not an Appealable Issue.

Appellant DECAA conclusory states that the subdivision is contrary to the purpose and intent of Dupont Circle RA Zones.¹⁸ However, as the Board has previously held the purpose and intent of the zoning regulations are not, by themselves, an appealable issue. *See*, e.g., *BZA Appeal No. 19027 of Rima Calderon and William Sawicki*; (BZA found that purposes of DuPont Circle Overlay not an appealable issue); *BZA Appeal No. 18851 of James Hill, et. al.* (granting DCRA’s dismissal of an appeal of a building permit for alleged violations of the applicable D.C. Overlay). In this case, the purpose and intent of the Dupont Area Zones are not zoning requirements, but rather explain the reasons for the requirements imposed by the Zoning Commission. As this Board has previously held, such an issue is not the proper subject of an appeal.

¹⁸ BZA Appeal 20452 Exhibit6 –Statement of Appellant Michael Hays, pp. 21; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, pp. 24.

E. The Board Lacks Jurisdiction under Subtitle Y § 1100.3 to hear Appellants’ Claims Regarding the Zoning Administrator’s Duties.

Under Subtitle Y § 1100.3, the Board “has no jurisdiction to hear and decide any appeal or portion of any appeal where the order, requirement, decision, determination, or refusal was not based in whole or in part upon any zoning regulation or map.” *See*, Subtitle Y § 1100.3 The Board’s jurisdiction is limited to an appeal of an administrative decision “based in whole or in part upon any zoning regulation or map adopted under this subchapter.” *See also*, D.C. Code § 6-641.07(f); *see also*, *BZA Appeal No. 20292 of ANC 8A* (dismissing appeal for lack of jurisdiction regarding construction codes). Turning to this matter, the Appellants make spurious claims that the Zoning Administrator failed to “discharge his duties.”¹⁹ However, the Appellants fail to cite to a single substantive zoning regulation. Accordingly, this Board lacks jurisdiction over such claims.

IV. CONCLUSION.

For the foregoing reasons, DCRA prays that the Board deny these appeals.

Respectfully submitted,

/s/ Esther Yong McGraw

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¹⁹ BZA Appeal 20452 Exhibit6 –Statement of Appellant Michael Hays, pp. 21; BZA Appeal 20453 Exhibit 2 - DECAA’s Statement in Support of Appeal, pp. 29-31.

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