

**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)	
)	
Appeal of Michael D. Hays)	Case No. 20452
)	
_____)	

**OPPOSITION OF APPELLANTS DUPONT EAST CIVIC ACTION ASSOCIATION
AND MICHAEL D. HAYS TO DCRA’S MOTION *IN LIMINE* TO EXCLUDE
THE TESTIMONY OF APPELLANT MICHAEL D. HAYS**

Appellants Dupont East Civic Action Association and Michael D. Hays (collectively “Appellants”), through counsel, hereby oppose the DCRA’s Motion to Exclude the Testimony of Appellant Michael D. Hays (“Motion”) as follows.

At the outset, the Motion is unclear (and inconsistent) as to what exactly DCRA is seeking to exclude. Therefore, Appellants reserve the right to supplement and augment this opposition.

A. DCRA's Motion, To The Extent It Seeks To Deprive Mr. Hays Of His Rights Under The Due Process Clause And The Zoning Regulations To Present Evidence, Seeks Patently Improper Board Action.

Mr. Hays is a *party*, i.e. an Appellant, in this proceeding. To the extent the Motion seeks to deprive him of his right to testify, it invites this Board to violate the Due Process clause and the Zoning Regulations, both of which are patently improper Board actions.

First, the Due Process clause embraces one of the central propositions of our democracy: that the government must accord a party “the opportunity to be heard[.]”. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). *See also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). The notion that DCRA would attempt to wholly deprive a party of the right to testify obviously violates this constitutional guarantee. *See, e.g., Harvey v. Colvin*, 2015 WL 078223 at *7 (D.D.C. July 1, 2015) (plaintiff’s allegations that the ALJ made recommendations “before giving him the opportunity to present evidence or testimony” presented colorable due process violation); *Beckham v. U.S.*, 609 A.2d 1122, 1125 (1992) (the right to due process of law “include[s] a right to be heard and to offer testimony”).

Second, the Zoning Regulations themselves provide Mr. Hays with the right to testify. In this regard, 11 DCMR Subtitle Y-203.11 specifically provides:

The applicant, *appellant*, public agency representatives, additional parties, organization representatives, and individuals *may appear as witnesses and offer evidence at a hearing*. [Emphasis added.]

Regardless of Mr. Hays’ expertise, as an Appellant, he has a due process right to present his case. While the Board has the authority to manage the hearing, that does not permit the Board, as the DCRA seems to suggest, to violate the U.S. Constitution and the Boards’ own regulations. Moreover, issues regarding the scope of testimony are best handled during the

hearing in the context of all the evidence, not by pre-testimony speculation as to what that testimony will be.

B. The Motion, To The Extent It Seeks To Restrict Testimony Regarding Future Harms, Would Exclude Pertinent Evidence And Is Contrary To The Zoning Regulations.

A wholesale prohibition of any testimony “relating to the alleged injuries as the result of the subdivision” (Motion at 2) is misguided and contrary to the Zoning Regulations. As Professor McCreary noted in his Expert Report:

In contrast, the proposed property subdivision, the proposed development, and its proposed scale, density, coverage and relationship to the historic Temple building each run contrary to the clear and worthy *intentions* for the RA-9 zone. The Zoning Regulations set forth the *intent* for the RA-9 zone:

The RA-9 zone is intended to: (*emphasis ours*)

Recognize the Dupont Circle area is a unique resource in the District of Columbia that must be preserved and enhanced;

- Provide strong protections to retain its low scale, predominantly residential character, independent small retail businesses, human scale streetscapes, and historic character;
- Enhance the residential character of the area by maintaining existing residential uses and controlling the scale and density of residential development;
- Protect the integrity of “contributing buildings”, as that term is defined by the Historic Landmark and Historic District Protection Act of 1978.
- Preserve areas planned as open gardens and backyards and protect the light, air, and privacy that they provide;
- Enhance the streetscape by maintaining the public space in front of buildings as landscaped green spaces; an
- Encourage greater use of public transportation and the free circulation of vehicles through public streets and alleys.”

The proposed property subdivision, the proposed development, and its proposed scale, density, coverage and relationship to the historic Temple building each run contrary to 4 of the 6 clearly stated and worthy *intentions* for the RA-9 zone.

Prof. McCreary Expert Report at 10. Testimony regarding the consistency of the subdivision with the purposes of the Zoning Regulations themselves is clearly relevant.

Further, as to Mr. Hays' statements in his submission regarding harm, the Zoning Regulations provide with respect to those seeking to intervene that they shall submit a statement that sets forth:

The environmental, economic, social, or other impacts likely to affect the person and/or the person's property if the appeal is affirmed or reversed.

11 DCMR Subtitle Y-501(i)(4). While not applicable to Mr. Hays at this point since he is an appellant, statements with respect to his alleged harm ensure his standing.

Finally, the Motion's attempt to restrict testimony that it speculates may be offered regarding future harms is premature. The Board should evaluate the testimony at the time it is offered to determine whether to permit it, and if so, what weight it should be given.

C. Mr. Hays Has Substantial Expertise In The Regulatory Interpretation Issues Involved In This Case.

The Zoning Regulations do not address, let alone require, that an Appellant have any particular expertise in order to present his or her case. However, Mr. Hays does have substantial relevant experience as a lawyer, including over 45 years of experience in the interpretation and application of regulatory and statutory provisions. His background and prior experience includes the following:

EDUCATION

- College: B.A. *cum laude*, Princeton University
Princeton School of Public and International Affairs
- Law School: Georgetown University
Editor, Georgetown Law Journal

PROFESSIONAL HONORS, ACTIVITIES, AND MEMBERSHIPS:

- Recognized by Super Lawyers in Business Litigation (2007-2010, 2013-2016)
- Recognized as a Washington D.C. Legal Leader by ALM Media and Martindale-Hubbell
- Assistant U.S. Attorney – District of Columbia
- Recipient – U.S. Department of Justice Special Achievement Award
- Faculty Member – National Institute of Trial Advocacy
- Faculty Member – Appellate Advocacy
- Member – Board of Directors, Council for Court Excellence
- Federal District Court Clerkship (Southern District of New York) (Honorable Lloyd MacMahon)
- Partner and Litigation Practice Group Leader (Dow Lohnes)

Mr. Hays has had substantial experience in complex administrative litigation, and in regulatory and statutory interpretation issues, which are central to this case. These include, among many others, the following cases:

- *At Home Corp. v. Cox Commc'ns, Inc., et al.*, 340 F. Supp. 2d 404 (S.D.N.Y. 2004), *aff'd*, 446 F.3d 403 (2d Cir. 2006) (obtained dismissal of largest federal securities short swing profits claim ever filed seeking over \$600 million in connection with complex hybrid derivatives regulations)
- *De Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011), *aff'd in part and rev'd in part*, 714 F.3d 591 (D.C. Cir. 2013) (currently on remand) (represented plaintiffs in action seeking return of art works seized from Hungarian Jews during World War II that included complex issues regarding interpretation of the Foreign Sovereign Immunities Act)
- *Association of Proprietary Colleges v. Department of Education, et al.*, Case No. 14-cv-8838-LAK, 2015 WL 1649146 (S.D.N.Y. 2015) (represented association in constitutional, statutory, and administrative law challenges to regulations promulgated by the Department of Education)

- *Roussin v. AARP, et al.*, 664 F. Supp. 2d 412 (S.D.N.Y. 2009), *aff'd*, 379 Fed. Appx. 30 (2d Cir. 2010) (successfully defended AARP and Board Members in class action seeking hundreds of millions of dollars involving insurance regulatory issues)
- *Harbinger Capital Partners LLC, et al., v. Deere & Co., et al.*, 13 Civ. 8157, 2014 WL 345270 (S.D.N.Y. Jan. 31, 2014), appeal dismissed, Case No. 15-408 (2d Cir.) (successfully represented GPS manufacturer Garmin in defense against securities fraud and associated tort claims seeking \$1.9 billion in damages involving FCC regulations)

In addition to the above, Mr. Hays is very familiar with the Zoning Regulations at issue in this case, as evidence by his Statement previously submitted.

CONCLUSION

For all the above reasons, Appellants respectfully request that the Board deny the Motion.

Respectfully submitted,

For Dupont East Civic Action Association

/s/Edward Hanlon

Edward Hanlon

For Michael D. Hays

/s/Michael D. Hays

Michael D. Hays

Certificate of Service

I hereby certify that, pursuant to 11-Y DCMR §§ 205.3(e) and 302.15, a copy of the foregoing Opposition of Appellants Dupont East Civic Action Association and Michael D. Hays To DCRA's Motion *In Limine* To Exclude The Testimony of Michael D. Hays has been served, this 9th day of July, 2021, upon the following by email:

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