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 Appeal of Dupont East Civic Action Association)	)	Case No.20453
In re Appeal of Michael D. Hays	)	Case No. 20452

JOINT MOTION OF APPELLANTS DUPONT EAST CIVIC ACTION ASSOCIATION AND MICHAEL D. HAYS TO SUPPLEMENT THEIR STATEMENT OF ISSUES TO SPECIFICALLY INCLUDE THE CLAIM THAT THE DECISION OF THE ZONING ADMINISTRATOR TO APPROVE THE SUBDIVISION OF LOT 108 VIOLATES 11-B DCMR § 324.1(a)

COME NOW Appellants Dupont East Civic Action Association ("DECAA") and Michael D. Hays (collectively "DECAA") and jointly file this Motion to Supplement Their Statement of Issues to Specifically Include the Claim that the Decision of the Zoning Administrator to Approve the Subdivision of Lot 108 Violates 11-B DCMR § 324.1(a). In support of this Motion, they state as follows:

INTRODUCTION

As more fully set forth below, this Board should address DECAA's contention that the Zoning Administrator's approval of the Subdivision of Lot 108 violates the requirements for *Structures In Required Open Spaces* contained in 11-B DCMR § 324.1(a) for multiple reasons.

First, despite repeated inquiries, multiple emails, an in-person meeting, and LeGrant's knowledge that there was considerable attention and opposition by the citizens of the District of

Columbia to the project, the Zoning Administrator in a highly unusual move chose not to issue a written determination letter explaining his basis for approving the Subdivision of Lot 108.[1]

The failure of LeGrant to issue a Zoning Determination Letter for this Subdivision, a project expected to cost between *$50 and $100 million dollars*, destroying over 46,000 sq feet of open green space in East Dupont, while issuing Zoning Determination Letters on much smaller, much less consequential projects for the public, such as, back porches, begs the question 'why'. But, this decision of LeGrant not to place into the DCRA public repository (as is his normal practice *cf.* fn 1) his reasons for approving this Subdivision clearly impeded those being adversely affected, including Appellants, from identifying the zoning issues concerning the Subdivision of Lot 108.

Thus, until the District and Perseus filed their oppositions to DECAA's Pre-Hearing Submissions in July, DECAA and Michael Hays did not know the basis upon which the Zoning Administrator approved the Subdivision. This failure of the Zoning Administrator to provide an explanation of how the subdivision allegedly met the Zoning Regulations impeded Appellants' ability to fully evaluate the deficiencies in the Zoning Administrator's approval.

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[1] DCRA has created an online public repository of LeGrant's Zoning Determination Letters containing *580* Zoning Determination Letters he has issued since the Fall of 2011: https://dcra.dc.gov/newsroom?field_date_value%5Bmin%5D%5Bdate%5D=&field_date_value%5Bmax%5D%5Bdate%5D=&keys=determination+letters&field_release_type_tid=All&sort_by=field_date_value&sort_order=DESC

In addition, DCRA has created an archive containing a public repository of LeGrant's Zoning Determination Letters issued in 2010 and the first half of 2011 with dozens of additional Zoning Determination Letters: https://dcra.dc.gov/publications-list?after[value][date]=&before[value][date]=&keys=Zoning+Determination&type=All&sort_by=field_date_value&sort_order=DESC

There are well over 600 Zoning Determination Letters in DCRA's public repository.

For this and the reasons given below this motion to supplement the issues is fully consistent with 11-Y DCMR § 302.13.

Second, the District itself and Perseus *sua sponte* raised the issue of whether the new "rear" yard violates 11-B DCMR § 324.1(a). *See* District Pre-Hearing Statement at 10; Perseus Pre-Hearing Statement at 9-10. Indeed, both the District and Perseus argued that areaway wall in the new "rear" yard meets the requirements of 11-B DCMR § 324.1(a); and, therefore the entire required "rear" yard meets the requirements § 324.1(a).

*But, there are **2 walls** in the required rear yard,* not one.

DCRA and Perseus cannot fairly make the claim that one of the walls in the required rear yard meets the requirements of 11-B DCMR § 324.1(a) and therefore the whole required rear yard meets the requirements of § 324.1(a), while trying to argue to this Board that Appellants cannot point to the other wall in the *very <u>same</u>* required rear yard and say that other wall does *not* meet the requirements of 11-B DCMR § 324.1(a); and, therefore, the whole required rear yard does *not* meet the requirements of § 324.1(a).

Thus, DCRA and Perseus expanded the issues to be litigated in this proceeding and DECAA has a right to address those issues.

Third, the Board should exercise its discretion under the circumstances here to allow the Amendment. The Supreme Court, as well as District of Columbia courts, have long recognized the constitutional due process requirements for resolving disputes on the merits, and for this reason both have adopted civil procedure Rule 15, which provides that in court cases amendments are to be "freely" allowed. Here, there is no cognizable prejudice to the District and Perseus in allowing amendment, and it should be permitted.

FACTUAL BACKGROUND

A. The Zoning Administrator's Failure To Respond to Multiple Requests for Information.

As more filly discussed below, in an attempt to learn the Zoning Administrator's opinion regarding the proposed Subdivision, DECAA acted diligently. Prior to LeGrant's approval of the Subdivision on November 19, 2020, Hanlon, then ANC Commissioner, and neighbors met in-person with the Zoning Administrator about the Subdivision and sent the Zoning Administrator written questions concerning the Subdivision, which the Zoning Administrator promised to answer in writing, but never did. One of the questions posed both in-person and in writing to the Zoning Administrator, which LeGrant promised to answer and never did, was

"[is] zoning relief needed for the Subdivision of this lot at 1733 16th Street[.]"

See May 9, 2019 Letter from Edward Hanlon to Matthew LeGrant docketed as IZIS Exhibit 73[2]

B. The Zoning Administrator's Failure To Issue a Written Decision.

Despite (or perhaps because of) DECAA's expressed interest in the Subdivision approval process, the Zoning Administrator failed to provide any written analysis supporting his determination that the Subdivision of Lot 108 will comply with the Zoning Regulations. Among other things, DECAA submitted two Freedom of Information Act ("FOIA") requests to the District of Columbia requesting all information relating to the Zoning Administrator's approval of the Subdivision. *See* IZIS Exhibits 54 and 55 The District's response revealed that the *only* document addressing the Temple's compliance with the Zoning Regulations was the one page amateurishly

[2] Unless specifically stated otherwise, all IZIS docket numbers refer to the IZIS docket for Dupont East Civic Action Association, BZA Case No. 20453

drawn "stick" plat dated November 19, 2020[3] and the one sentence approval itself (*see* IZIS Exhibit 59), which merely states as follows: "I certify that this Subdivision complies with all applicable provisions of DCMR 11, Zoning Regulation of the District of Columbia."

The Zoning Administrator's letter analyzing the alleged compliance of the Subdivision with the Zoning Regulations (IZIS Exhibit 12) purports to be a "comprehensive determination for your client's project at 1733 16th Street, NW (Square 192, Lot 108)[.]" However, it cleverly defines the "Project" as only the new Luxury Project to be constructed on what is now Lot 111. It does not address the compliance of Lot 110, the small lot the Temple will sit on after the Subdivision. Thus, the only written determination that the Zoning Administrator made regarding the Temple's compliance with the Zoning Regulations was the one sentence filed with the "stick" plat.

C. The Merits of the Proposed New Issue.

As Perseus notes in its July 2, 2021 Pre-Hearing Statement (at 9), the Zoning Regulations provide that a required rear yard "shall be unoccupied, except as specifically provided in this title." *See* 11-B DCMR § 100.2 (definition of "yard, rear"). 11-B DCMR § 324.1(a), in turn, exempts from this requirement "any structure less than four (4) feet in height, [which] is permitted to be located within a required side or rear "yard." *See* Perseus' Pre-Hearing Statement at 9.

Here, the wall identified in the next photo occupies a portion of the re-designated required rear yard in violation of 11-B DCMR § 324.1(a). The wall, which is not a retaining wall, is shown in the photo below and is at least 11'6" tall. The tree in the photo helps give perspective.

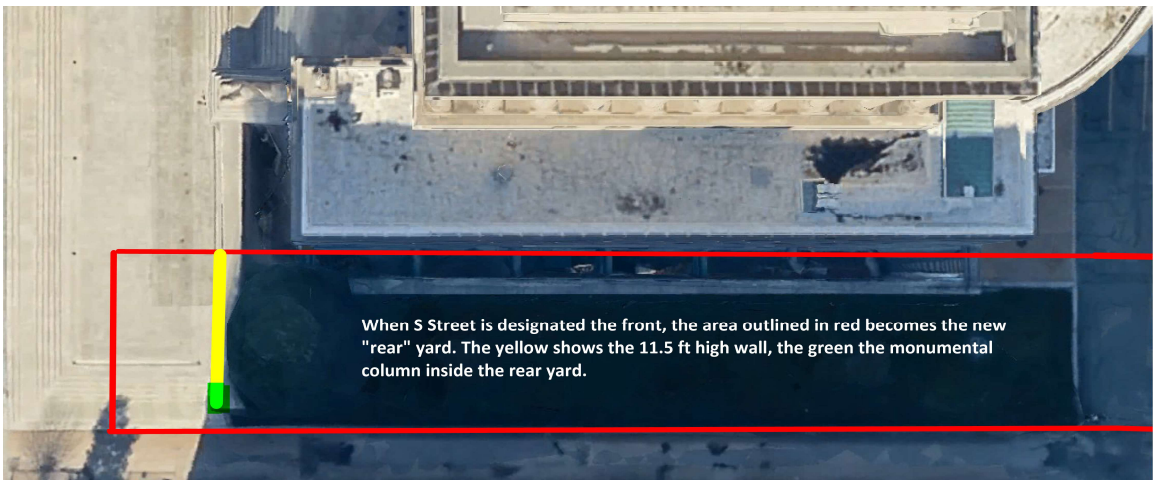
[3] IZIS Exhibit 59

In addition to the above wall which is more than 11.5 feet above adjacent grade in violation of 11-B DCMR § 324.1(a) (which states there can be no structure more than 4 feet in height in this new required "rear" yard) a huge stone column more than 11.5 feet above grade will *also* occupy a portion of the above required "rear" yard as shown in the next photo below.

DECAA President Nick DelleDonne (who is approximately 5'6" tall) is shown in the photo below standing next to the column entirely inside the new required "rear" yard, approximately 25 feet from the property line to the west and several feet from the alleyway lot line on the south side of Lot 110. Note the photo below shows a separate bronze hand railing for the stairs which is not attached to either the 11.5 foot wall or to the stone column.

Part of the Front Steps are now in the Rear Yard: *The roof is not the roof. The front is not the front. And, it is now clear that a further absurd result of the Subdivision the Zoning Administrator approved would also put part of the front steps in the rear yard.*

The steps, the 11.5 foot wall, and the monumental column shown in the photo above, along with Mr. DelleDonne are all in the new "rear" yard if S Street is designated the front of this historic landmark. The below mark up from Google Earth shows the "rear" yard in red, the 11.5 ft high wall in yellow, Mr. DelleDonne and the monumental column in green.



In the below photo, the woman in blue is sitting on what she may think is the front of this national historic landmark; but, if S Street is the new "front", then the woman below is really sitting in the rear yard – almost certainly a huge surprise to her and other members of the public.

As shown above, designating S Street as the front for rear yard requirements puts a s*ignificant part of the monumental front entrance into the new "rear yard",* an absurd outcome.

ARGUMENT

A. The Zoning Administrator Impeded Appellants' Ability To Identify the Zoning Issues, Including 11-B DCMR § 324.1(a).

11-Y DCMR § 302.13 provides that an appeal may be amended to include issues not identified in the initial statement of the issues on appeal if "the appellee impeded the appellant's ability to identify the new issues identified." As to the applicable legal standard, the word "impede" is not a defined term in the Zoning Regulations and is not listed in the Definitions contained Subtitle B § 100.2 of ZR-16. When a word is not a defined term, Subtitle B § 100.1(g)

states: "Words not defined in this section shall have the meanings given in *Webster's* Unabridged Dictionary."

Webster's defines "impede" as follows:

"***to interfere with or slow the progress of"***

"Impede implies making forward progress difficult…"

Webster's: "Examples of *impede* in a Sentence: 'He claims that economic growth is being *impeded* by government regulations.'" Thus, impede does not mean completely block; it simply means to "slow the progress of." The act of impeding can be unintentional as *Webster's* economic example shows. 11-Y DCMR § 302.13 does not require the actions that impede to have been actions which were deliberately intended to impede.[4]

The standard found in 11-Y DCMR § 302.13 is met for multiple reasons in this case as set forth below.

1. The Zoning Administrator Refused To Respond to Questions Regarding the Subdivision.

First, the Zoning Administrator failed to respond to multiple questions posed regarding the the Subdivision, including those posed by then ANC Commissioner Edward Hanlon. For example, on May 1, 2019 Edward Hanlon and two neighbors met with the Zoning Administrator, Matthew LeGrant, in Mr. LeGrant's Office at DCRA. Mr. Hanlon was ANC Commissioner at the time for

[4] Other examples cited by *Webster's* of the use of impede in a sentence, showing intent is not required, are:

> "Astronomers have objected, fearing that the night sky could be filled with artificial light, which would *impede* important observations of the solar system and the tracking of asteroids headed toward Earth."
>
> "Too much wind, dust or water vapor can *impede* a telescope's accuracy."

one of the ANC districts bordering the Masonic Temple. The purpose of the meeting was to discuss the Intervenor's project and the proposed Subdivision of Lot 108.

The meeting was long and LeGrant took 3 pages of notes. IZIS Exhibit 74 Hanlon asked LeGrant several specific questions. LeGrant carefully wrote down the questions and promised Commissioner Hanlon an answer in writing by May 9, 2019. This May 1, 2019 meeting was memorialized in the attached May 9, 2019 letter from Hanlon to LeGrant listing the zoning questions LeGrant had promised to answer in writing. *See* IZIS Exhibit 73 In the May 9, 2019 letter to LeGrant, Hanlon hypothesized that Perseus might want to redesignate the "front" of the Temple as S Street, and stated in part:

> Matthew Le Grant
> Zoning Administrator
>
> Re: *Masonic Temple*
> *1733 16th Street*
>
> Good afternoon Mr. Le Grant:
>
> I want to thank you for taking more than one and half hours of your time last week to meet with me, Dr. Sarao and Mr. Kervin.
>
> At last week's meeting I had asked several specific questions and you agreed to get back to me in writing by today, ***May 9***, with the answers to my questions. My questions were:
>
> •••
>
> 5. Is zoning relief needed for the subdivision of this lot at 1733 16th Street, given that the owner is choosing S street as its front? You noted that any subdivision cannot create or enlarge any nonconformity without zoning relief.

Though LeGrant promised an answer in writing to the above Subdivision question by May 9, LeGrant did not respond and answer the question. LeGrant also did not confirm that in fact Perseus was going to designate the front of the building as S Street.

On May 31, 2019, a full month after the meeting with LeGrant, Hanlon followed up and wrote again to LeGrant and asked again for answers to the 5 questions posed to LeGrant on May

1, including whether "zoning relief is needed for the Subdivision[.]" *See* IZIS Exhibit 74 This May 31 letter to Mr. LeGrant further stated in part:

> May 31, 2019
>
> Matthew LeGrant
> Zoning Administrator
>
> RE: The Masonic Temple Project
> 1733 16th Street NW
>
> Dear Mr. LeGrant:
>
> I met with you in your office on May 1, 2019 for more than an hour and raised serious zoning questions with you concerning the Masonic Temple project at 1733 16th Street NW. You were very courteous and took 3 pages of notes as we spoke. You looked straight at me and the others present and promised a written response by May 9 to the zoning questions I had raised in our May 1 meeting. Those zoning questions are reiterated in my attached May 9 letter to you.

Finally, almost a month later on June 27, 2019 the Zoning Administrator responded in an email with Subject Line: "*Response to ANC Commissioner Hanlon's Zoning Questions concerning the Masons Temple Project at 1733 16th Street NW*." *See* IZIS Exhibit 75 (June 27, 2019 email from LeGrant to Hanlon). However, LeGrant's June 27, 2019 email did *not* answer a single zoning question posed to him, and specifically LeGrant did *not* answer whether zoning relief was necessary to subdivide Lot 108 if S Street were chosen as the front of the building.

Instead, in response to Commissioner Hanlon's question LeGrant simply attached three documents (see IZIS Exhibits 75) one of which was his October 30, 2018 Zoning Determination Letter for 1733 16th Street.

2. The Zoning Administrator Allows Perseus' Lawyers To Write Their Own Zoning Determination Letter – the Effect of Which Was To Impede Appellants from Discovering That The Subdivision Cannot Be Done As a Matter of Right.

Second, the Zoning Administrator allowed Lawrence Ferris, Esq., the attorney for Perseus to write his own Zoning Determination Letter for this project, which likewise impeded Appellants'

analysis of the zoning issues, including the issue of whether the rear yard complied with the requirements of 11-B DCMR § 324.1(a).

As set forth in DECAA's previous submissions, the developer, Perseus, exercised improper and undue influence over the Zoning Administrator, thereby impeding Appellants.

We know of this improper and undue influence to obscure the facts, because the records released under the Freedom of Information Act show that Lawrence Ferris, Esq.[5], the attorney for the Perseus, wrote the entire October 30, 2018 letter and emailed it to the Zoning Administrator in September 2018. *See* IZIS Exhibits 10, 11 and 12 The Zoning Administrator signed the letter on October 30, 2018 which Mr. Ferris had written for him. *See* IZIS Exhibit 12 The Zoning Administrator did this on DCRA letterhead as an official act of the agency. The Zoning Administrator did not even change a punctuation mark in the multipage single spaced letter Ferris had written for him to sign. *Compare* IZIS Exhibits 10 and 12

Indeed, it is extraordinary for the Zoning Administrator of the District of Columbia to have farmed out his official duties and responsibilities for a project costing $50 million to $100 million dollars to the attorney for the developer.

The attorney for the developer had no interest whatsoever in discussing or disclosing the zoning issues for Lot 110 which would arise upon Subdivision. *Indeed, Ferris had every reason (financial and otherwise) to hide the zoning violations in order to impede any zoning appeal of this Subdivision*.

The fox was in the henhouse. The Zoning Administrator had opened the door wide and then turned the other way.

Ferris carefully and selectively crafted the October 30, 2018 letter to make it appear the Zoning

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[5] Appellants may seek to call Mr. Ferris as a witness at the hearing in November, either in the case-in-chief, or in rebuttal.

Administrator was opining that upon Subdivision both Lot 110 and 111 would be conforming, when in fact the October 30, 2018 letter studiously only addresses the zoning compliance of Lot 111. In this regard, the Zoning Administrator's letter (written by Ferris) analyzing the alleged compliance of the Subdivision with the Zoning Regulations *falsely* purports to be a "comprehensive determination for your client's project at 1733 16th Street, NW (Square 192, Lot 108)[.]" *See* IZIS Exhibit 12 However, the letter cleverly defines the "Project" as only the new Luxury Project to be constructed on what is now Lot 111, thus disguising the zoning non-conformance of the Temple on the new Western Lot (Lot 110) after the Subdivision.

Importantly, the so-called "comprehensive determination" letter fails to advise that Perseus had selected S Street to be the new "front" of the Temple, disguising that the new rear yard was to be south side of the Temple, thus avoiding the issue of whether the new rear yard complied with 11-B DCMR § 324.1(a).

By allowing the developer to write its own zoning determination letter and include only favorable facts, hide unfavorable facts (e.g., that there was a new required rear yard that did not comply with 11-B DCMR § 324.1(a) and that the basis for the zoning approval was that the 332 ton roof was not a roof at all but was an "embellishment" like a Christmas tree ornament) and effectively allow the developer to issue this document as an official DCRA government document, on DCRA letterhead, on DCRA's official website, impeded the public in general and the Appellants in particular, from fully understanding this project and identifying all the zoning violations, including that the rear yard did not comply with 11-B DCMR § 324.1(a).

3. The Zoning Administrator Deletes the October 30, 2018 Zoning Determination Letter from DCRA's Official Public Repository of Determination Letters Contained on DCRA's Website.

Third, as noted above, Lawrence Ferris, attorney for Perseus, wrote his own zoning

determination letter (IZIS Exhibit 10) and emailed it to the Zoning Administrator on September 18, 2018 for LeGrant's signature. (IZIS Exhibit 11) Mr. Ferris in the salutation even ***addressed the letter to himself*** and ended the letter ***by writing to himself***: "Please let me know if you have any further questions." This was a farce. But, it was effective in impeding the Appellants and other members of the public from identifying all of the zoning non-compliance issues with Lot 110, including non-compliance with 11-B DCMR § 324.1(a).

Then, in late 2019 or early 2020 DCRA deleted from its website, without explanation, LeGrant's October 30, 2018 Zoning Determination Letter and issued no new Zoning Determination Letter in its place for 1733 16th Street NW. There are over 600 Zoning Determination Letters on the DCRA website going back to 2010.[6] Appellants know of no other instance in which DCRA has deleted a Zoning Determination Letter from the public repository on its official website.[7]

DCRA's deleting of the October 30, 2018 Zoning Determination Letter concerning 1733 16th Street from its public repository violates several provisions of Freedom of Information Act. DC Code § 2-536 *Information which must be made public,* states certain records described below must be posted on DCRA's website and made available to the public without the need to make a

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6 https://dcra.dc.gov/newsroom?field_date_value%5Bmin%5D%5Bdate%5D=&field_date_value%5Bmax%5D%5Bdate%5D=&keys=determination+letters&field_release_type_tid=All&sort_by=field_date_value&sort_order=DESC and https://dcra.dc.gov/publications-list?after[value][date]=&before[value][date]=&keys=Zoning+Determination&type=All&sort_by=field_date_value&sort_order=DESC

7 DCRA has created a public repository on its website for the Zoning Determination Letters issued by DCRA – the only public repository of such determinations. In some instances, the date of publication of the Zoning Determination letter on the DCRA website is legally important and may trigger the 60 day deadline found in 11 DCMR § 3112.2(c). This public repository is required under the provisions of DC Code § 2-536

FOIA request. DC Code § 2-536 states:

> Without limiting the meaning of other sections of this subchapter, the following categories of information are specifically made public information, and do not require a written request for information:
>
> …
>
> (a) 5. Correspondence and materials referred to therein, by and with a public body, relating to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby the public body determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party;
>
> …
>
> (b) For records created on or after November 1, 2001, each public body shall make records available on the Internet or, if a website has not been established by the public body, by other electronic means. This subsection is intended to apply only to information that must be made public pursuant to this subsection.
> (Emphasis added)

The Board of Government Ethics and Accountability (BEGA), Office of Open Government (OOG), was severely critical of DCRA in a January 2016 *Advisory Opinion, OOG-002_1.29.16 (DCRA)* and advised DCRA in 2016 that it must make available on its website the records described in DC Code § 2-536. The October 30, 2018 Zoning Determination Letter squarely falls within the category of correspondence which "states an opinion upon, or is asked to determine or state an opinion upon, the rights of … any private party [Perseus]" and must be published on the DCRA website.

DCRA acted illegally when it deleted the October 30, 2018 Zoning Determination from its website, in violation of both DC Code § 2-536 and *Advisory Opinion, OOG-002_1.29.16*.

The situation is likely *unique* and *the effect of DCRA's deliberately deleting its own official agency record from public view (and replacing this official agency determination with nothing new) was to further obscure on what basis the Zoning Administrator was acting when he approved*

this Subdivision, and to hide the fact that Perseus had selected a new rear yard which violated multiple zoning regulations including the requirements of 11-B DCMR § 324.1(a).

DCRA's deleting this official agency record from its public file of Zoning Determination Letters left Appellants guessing as to the basis for the Zoning Administrator's decision to approve this Subdivision. This highly unusual, if not unique, action by DCRA further impeded Appellants' ability to understand the basis for the Subdivision approval and identify the zoning issues involved, including the violation of 11-B DCMR § 324.1(a).

The DCRA website states the following about Zoning Determination Letters:

Determination Letters, Zoning Maps and Plans

Tuesday, March 6, 2018

Determination Letters, Zoning Maps and Plans

> "The Zoning Administrator issues determination letters resulting from requests by property owners, developers, architects, and land use attorneys inquiring about the ***applicable zoning regulations applicable to specific development proposals***. **These letters offer guidance** to requesting parties **as to whether a proposed project**, such as a new building, an addition to an existing building, or a use change, **conform to the District's Zoning regulations** as set forth in DCMR Title."

See https://dcra.dc.gov/release/determination-letterszoning-maps-and-plans (emphasis added).

DCRA deleted the October 30, 2018 Zoning Determination Letter, an official agency record, from its official website without explanation.[8] Was the October 30, 2018 Zoning Determination Letter materially false? Was it deficient, incomplete, misleading, or inaccurate? Had the project changed in some important way? *Appellants were unfairly left guessing* as to the parameters of the project and the Subdivision until DCRA and Perseus filed their Pre-Hearing

[8] Not only was DCRA legally required under DC Code § 2-536 to keep the October 30, 2018 Zoning Determination Letter on its website; but, DCRA was also required to post on its website all of the "materials referred to" in this Zoning Determination Letter, which DCRA has not done. Again, these illegal actions by DCRA impeded Appellants' ability to review the Subdivision and identify zoning violations that resulted from this Subdivision, including 11-B DCMR § 324.1(a)

Statements on July 2, 2021.

This deletion and effective destruction of a record in DCRA's public repository, the one page response to a properly submitted FOIA request (described below) combined with the other actions described herein seriously impeded Appellants' ability to identify all of the zoning non-compliance issues including the non-compliance of the Subdivision with 11-B DCMR § 324.1(a).

4. The Zoning Administrator Failed To Issue a Written Determination Regarding the Compliance of the Temple Lot with the Zoning Regulations After Subdivision.

The Zoning Administrator's efforts to impede an analysis of the zoning deficiencies of the Subdivision did not end with his initial attempt to hide the actual basis for his purported determination that the Temple Lot, after Subdivision, would comply with the Zoning Regulations – that initial attempt being based on the obviously untrue assertion that the October 30, 2018 zoning determination letter was a "*comprehensive* determination for your client's project at 1733 16th Street, NW (*Square 192, Lot 108*)[.]" The Zoning Administrator also failed to provide any written analysis of the *now* alleged basis for that determination, i.e., the contention that Perseus had designated the front of the building as S Street and that the 332 ton roof was not a roof but an embellishment, and that there was no structure in the new required rear yard in violation of 11-B DCMR § 324.1(a).

This failure by the Zoning Administrator to issue a Zoning Determination Letter regarding whether after Subdivision Lot 110 complied with the Zoning Regulations, or not, is all the more significant in that the Zoning Administrator *knew* that:

- he had merely copied Mr. Ferris' Zoning Determination Letter for the proposed Eastern Lot, in and of itself improper;
- the proposed Subdivision addressed a significant historical landmark;

- DECAA and the surrounding community opposed the proposed Subdivision and resulting project and that he was likely to face significant opposition to any favorable determination.

5. DCRA Falsifies Response to Freedom of Information Request.

It appears that DCRA either falsified a response to the below described FOIA request, or there was literally no basis for the Zoning Administrator's approval of the Subdivision. If the latter is the case, then Appellants are entitled to summary reversal. In either case, DCRA's actions impeded Appellants' ability to analyze the applicable zoning issues, including the compliance of the Subdivision with 11-B DCMR § 324.1(a).

In December 2020, Edward Hanlon submitted two FOIA requests to DCRA (*see* IZIS Exhibits 54 and 55). In FOIA request 2021-FOIA-01919 (filed on the docket as IZIS Exhibit 55) Hanlon requested

> "All correspondence including but not limited to all email correspondence between the Office ofthe Zoning Administrator or Matthew Legrant or Kathleen Beeton on one hand and any person or entity concerning the Subdivision of Sq 192 Lot 108 (Date Range for Record Search: From 01/01/2020 To 12/30/2020) with respect to the Subdivision of Sq. 192 Lot 108 into lots 110 & 111" IZIS Exhibit 55 (Emphasis added)

DCRA responded to this FOIA request writing:

> "Your request is granted. DCRA conducted a search and was *unable to locate correspondence pertaining to the subdivision* identified in your FOIA request." (Emphasis added) IZIS Exhibit 58

DCRA claimed that it *could not locate any correspondence whatsoever* between the Office of the Zoning Administrator and "and any person or entity concerning the Subdivision of Sq192 Lot 108", *not even one email. See* IZIS Exhibit 58 This is a truly stunning statement especially since the overall project is costing somewhere between $50 million and $100 million dollars.

In FOIA request 2021-FOIA-01918 (filed on the docket as IZIS Exhibit 54) Hanlon

requested all of the following and got only <u>one piece of paper</u> in reply (IZIS 59):

Records Requested in FOIA-01918:

1. The application for Subdivision of Sq. 192 Lot 108 into lots 110 & 111;

2. Any survey provided to the Office of the Zoning Administrator with the application or otherwise relied upon by DCRA in reviewing and approving the requested Subdivision application;

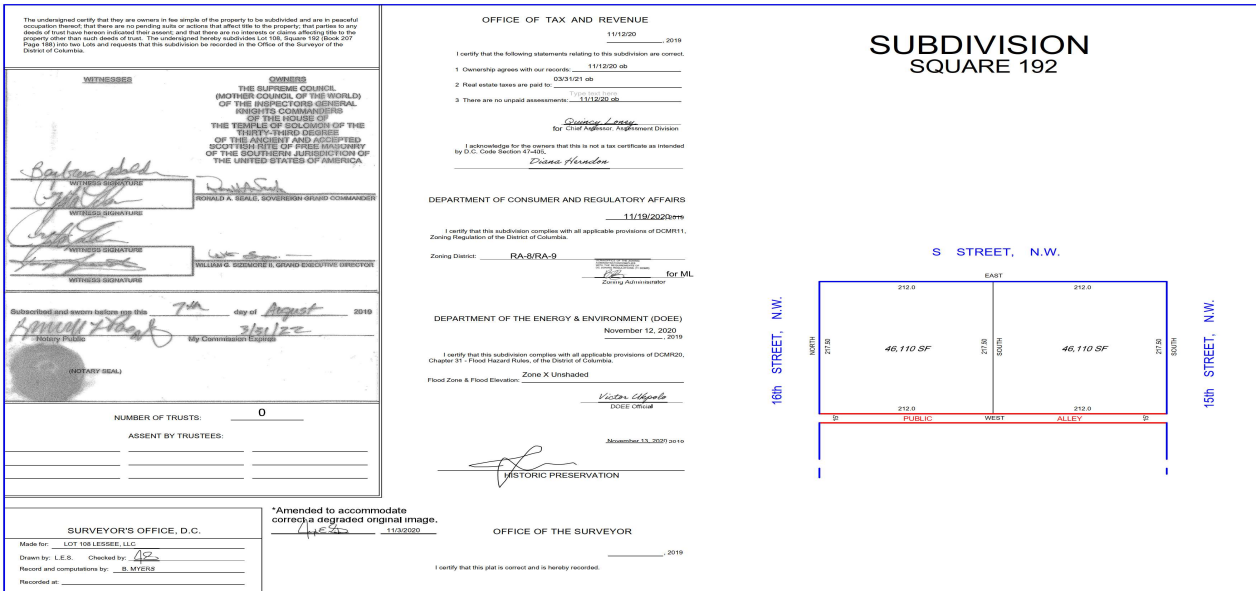
3, Any drawings or data submitted to the Office of the Zoning Administrator by the Applicant wishing to subdivide Lot 108 or which were otherwise reviewed by your office during the Subdivision application process which address zoning issues including building height, yards, set back and/or lot coverage issue;

4. Any drawings or plans of the existing Scottish Rights Masonic Temple which were reviewed by the Office of the Zoning Administrator during the Subdivision application process;

5. Any and all elevation or setback information provided by the Applicant to the Office of the Zoning Administrator during the Subdivision application process; and,

6. All other pertinent data upon which the Office of the Zoning Administrator relied when making its decision to approve the Subdivision of this lot 108. (Date Range for Record Search: From 09/01/2020 To 12/30/2020)

DCRA's one page reply (IZIS Exhibit 59) to the above extensive request for its records concerning the Subdivision is below:



Thus, DCRA claims that the Zoning Administrator reviewed no documents, plats, plans or drawings except the amateurish "stick" plat (IZIS Exhibit 59), corresponded with no one about this Subdivision, sent or received no emails about this Subdivision, and relied on nothing to make his decision to approve Subdivision other than the stick plat in IZIS Exhibit 59.

DCRA's response to the above two FOIA requests is part of a pattern by the Zoning Administrator of trying to obscure the truth and impede others, including Appellants, from identifying the zoning deficiencies with this Subdivision – letting Perseus' lawyer write the Zoning Determination Letter, deleting/destroying an official record in DCRA's public repository, refusing to answer the basic questions posed to him in-person and in writing in May 2019 concerning whether a Subdivision of this lot would require zoning relief.

It should be further noted that in IZIS Exhibit 59 the Zoning Administrator stated an opinion "*I certify that this Subdivision complies with all applicable provisions of DCMR 11, Zoning Regulation of the District of Columbia*." Pursuant to DC Code § 2-536 any "Correspondence and materials referred to therein" … whereby the public body determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party" must be made available on the DCRA website without the need for an FOIA request. No materials or correspondence appear on the DCRA website regarding this one sentence opinion by the Zoning Administrator.

1. DCRA's Own FOIA Officer Has Accused DCRA Officials of Not Complying in Good Faith with FOIA Requests.

In a 2018 law suit, 2018 CA 005787 *Genet v. District Of Columbia Government et. al*, DCRA's own FOIA Officer, Genet Amare, accused DCRA of not providing honest and complete responses to FOIA requests. In that lawsuit, the FOIA officer stated: "DCRA employees were

issued a directive that they were not to aid in the production of FOIA documents." *See* Genet Complaint ¶ 11. The Complaint further states:

> "DCRA Director Bolling] issued a directive to DCRA division managers, who then disseminated the information to their staff that they were not to aid Plaintiff Amare and Ms. Roberts in the production of FOIA documents…
>
> [DCRA] Director Bolling instructed the FOIA officers to attest to methods followed in responding to FOIA requests, *which were false*." (Emphasis added)

See Genet Complaint ¶ 6. As an investigation by the City Paper disclosed in a May 2019 article:

> "While at the helm of DCRA, [DCRA Director] Bolling made clear that she was not concerned about violating Freedom of Information Act deadlines and allegedly *instructed staff to prepare false sworn statements* about how public records were gathered for FOIA requests, according to a whistleblower lawsuit filed last August." (Emphasis added).
> https://washingtoncitypaper.com/article/180483/a-second-whistleblower-lawsuit-accuses-former-dcra-director-bolling-of-retaliation-and-bullying/

Either Zoning Administrator LeGrant reviewed nothing and corresponded with no one and based his decision to approve the Subdivision on nothing but a one page "stick" plat; or, LeGrant helped provide a knowingly false reply to a valid FOIA request seeking records on this Subdivision. In either case, this conduct impeded Appellants.

B. The District and Perseus Opened The Door To The 11-B DCMR § 324.1(a) Issue.

In their Pre-Hearing Statements filed on July 2, 2021, both DCRA and Perseus *sua sponte* raised the issue of whether the new "rear" yard violates 11-B DCMR § 324.1(a). Both the District and Perseus argued that the new "rear" yard meets the requirements of 11-B DCMR § 324.1(a). Both, in their Pre-Hearing Statements, cited approvingly the following language from *BZA Appeal No. 18888 of Adams Morgan for Reasonable Development*:

> "The walls that surround the garage ramp are *less than four feet above grade*, and are therefore permissible with the required rear yard…

District Pre-Hearing Statement at 10; Perseus Pre-Hearing Submission at 9 (emphasis added). Thus, the District and Perseus clearly opened the door to whether or not the new required "rear yard" meets the height restrictions of §324.1(a).

C. The 11-B DCMR § 324.1(a) Issue Is Proper Rebuttal.

For much the same reasons as the above, the 11-B DCMR § 324.1(a) issue is permissible under 11-Y DCMR 300.16 as "rebuttal" evidence to counter that the new "rear" yard meets the requirements of 11-B DCMR § 324.1(a).

D. The Board Should Permit Addition of the 11-B DCMR § 324.1(a) Issue To Conform To Fundamental Due Process.

The Board should exercise its discretion under the circumstances here to allow the amendment. The Supreme Court, as well as District of Columbia courts, have long recognized the constitutional due process requirements for resolving disputes on the merits, and for this reason both have adopted civil procedure Rule 15, which provides that in court cases amendments are to be "freely" given. *See, e.g., Krupski v. Costa Crociere S.p.A.,* 560 U.S. 538, 550 (2010) (addressing "the requirements of due process, as codified in Rule 12 and 15 of the Federal Rules of Procedure").

Under well-established principles, even in a court proceeding at trial, a "party opposing amendment under Rule 15(b) must show actual prejudice in maintaining his claim or defense as a result of the admission of the evidence." *Emerine v. Yancey,* 680 A.2d 1380, 1385 (D.C. 1996). Here, there is no cognizable prejudice to the District or Perseus in allowing amendment, and it should be permitted. DECAA asserted this issue in its Reply Statements filed July 19, 2021, and almost two months remain until the hearing set for November 10, 2021.

CONCLUSION

Accordingly, Appellants request that this motion be granted, and that the issue of whether the Subdivision complies with 11-B DCMR § 100.2 (definition of "yard, rear") and 11-B DCMR § 324.1(a) be added to these proceedings.

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

Certificate of Service

I certify that on this date I served a copy the foregoing Motion via email to:

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I further certify that on this date I served a copy of the foregoing Motion via first class mail postage prepaid to::

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Date: September 18, 2021