BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeals of Michael Hays and Dupont East Civic Action Association — BZA Appeal Nos. 20452 & 20453, ANC 2B04

Perseus TDC, LLC and Property Owner's Joint Opposition to Appellants' Joint Motion for Summary Reversal

Perseus TDC, LLC ("**Perseus**") and the Supreme Council of the Scottish Rite of Freemasonry, 33rd Degree, Southern Jurisdiction, USA, the owner of the property at issue in this appeal ("**Property Owner**"), hereby submit this joint opposition to the motion ("**Motion**") of appellants Dupont East Civic Action Association ("**DECAA**") and Michael Hays (collectively, the "**Appellants**") asking that the Board of Zoning Adjustment ("**Board**") issue a summary reversal of the Zoning Administrator's approval of the subject subdivision.

As a threshold matter, the Appellants cite to no provision of the Zoning Regulations or any other authority that would provide a basis for the Board to grant an appeal and reverse a prior decision of the Zoning Administrator via a summary disposition without holding a hearing. Indeed, the Board's rules are quite clear that a hearing is required before an appeal can be granted, stating unequivocally that, "[u]nless the Board has dismissed an appeal before a hearing, a public hearing ***shall*** be held on each appeal . . . ." 11-Y DCMR § 500.5 (emphasis added).[1]

Moreover, not only does the Motion fail to identify any procedural basis in the Board's rules for issuing a summary reversal here — the Motion makes no reference to the Zoning Regulations whatsoever. Rather, the Motion continues the Appellants' campaign to turn the

[1] Note that, whereas the Board's rules specifically permit dismissal of an appeal without a hearing, the rules require a hearing prior to granting an appeal. As granting an appeal results in a previously secured approval being invalidated, the hearing requirement is consistent with, and indeed mandated by, Constitutional due process, which requires a hearing prior to any action that would affect a property owner's vested rights, such as a properly approved subdivision. *See e.g. Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70 and n.7 ("When protected interests are implicated, the right to some kind of prior hearing is paramount.").

Board of Zoning Adjustment
District of Columbia
CASE NO.20452
EXHIBIT NO.60

zoning appeal procedure into a forum for any and all manner of other issues and claims far afield of the Zoning Regulations. Regardless, the Appellants' claim that the Zoning Administrator did not review any information supporting the subdivision prior to approval is false. Indeed, the Appellants' own filings in this Appeal directly refute this claim. In their last joint motion, the Appellants included a 2019 email the Zoning Administrator sent to them in response to their inquiries regarding zoning assumptions for the Temple (Exhibit 52 in Case No. 20452; Exhibit 75 in Case No. 20453). One of the attachments to the email was a set of plans dated September 25, 2018 that was incorporated as an exhibit to the Zoning Administrator's Determination Letter for the project, as highlighted in the relevant excerpt of the email shown below as Figure 1.

From:	LeGrant, Matt (DCRA) <matthew.legrant@dc.gov>
Sent:	Thursday, June 27, 2019 10:50 AM
To:	Edward Hanlon
Subject:	Response to ANC Commissioner Hanlon's Zoning Questions Concerning the Masonic Temple Project at 1733 16th Street NW
Attachments:	Det Let re 1733 16th St NW to Ferris 10-30-18.pdf; Determination Letter 4-18-18.pdf; Plan set dated 9-25-18 .PDF

Figure 1: Excerpt from Exhibit to Appellants' Joint Motion to Supplement the Appeal to Add a New Claim (Ex. 52 in Case No. 20452; Ex. 75 in Case No. 20453)

The plans, which the Zoning Administrator reviewed in 2018 and shared with the Appellants via the above-referenced email in 2019, are attached as Exhibit A. Notably, the first page of the plans (Page A-1) is a site plan showing various zoning metrics for both the project and the Temple lot, including the Temple's rear yard, side yard, and height. Further, aside from minor adjustments that were made to the residential project with no impact on the Temple lot, the site plan the Zoning Administrator reviewed and sent to the Appellants is identical to the one included in the plans dated February 8, 2019, which the Appellants included in their initial filings for this Appeal. *See* Page A-9 of Exhibit 8A1 in Case No. 20453. In short, despite their attempt to cast a contrary narrative, there is no question that the Appellants have in fact long

been aware of the relevant zoning metrics underlying approval of the subdivision, including what the Zoning Administrator provided to them directly.

Ultimately, in order to prevail in this case, the Appellants must meet their burden to demonstrate an actual error on the part of the Zoning Administrator in interpreting and applying of the Zoning Regulations. At base, the instant Motion is a mere distraction from the fact that the Appellants cannot meet this burden. With little to show on the merits of the Appeal, the Appellants instead ask the Board to adjudicate wholly separate claims under the D.C. Freedom of Information Act and the D.C. Administrative Procedure Act. As discussed in prior submissions, all such claims not based in the requirements of the Zoning Regulations are outside the scope of the Board's review in a zoning appeal and are thus irrelevant.[2]

The Appellants have not demonstrated any grounds for summary reversal, nor even established that such an action is procedurally sound. Put simply, the Appellants' motion is frivolous, and their attempts to shoehorn an array of non-zoning claims and accusations into this

[2] Further, although the Appellants attempt to cherry-pick quotations from prior Board decisions and conveniently reframe them in support of their arguments, the Appellants cannot make these cases say what they want them to say — that the Board should reverse a decision of the Zoning Administrator when there has not been any error in the interpretation or application of the Zoning Regulations. In *Case No. 13715 of Dennis Sobin* (1982), the Zoning Administrator denied an application for a Certificate of Occupancy for a publisher of sexually oriented materials but testified at the hearing that if he had reviewed all of the evidence presented at the hearing he would have instead approved the application. Rather than reverse the Zoning Administrator's decision, the Board dismissed the appeal as premature to allow the appellant to re-apply for the Certificate of Occupancy based on the additional evidence. The language the Appellants cite was part of the Board's explanation that dismissal was administratively efficient in that case because the evidence supported approval, even if the Zoning Administrator did not have the benefit of that information during his initial review. Here, by contrast, it would be very inefficient for the Board to grant this appeal and require a second review of the subdivision when the Appellants have not demonstrated any aspect in which the subdivision violates the Zoning Regulations. Likewise, in *Case No. 17439 of ANC 6A* (2007), an ANC argued that an eating/drinking use approved as a restaurant was actually operating as a fast food establishment. The Board dismissed the appeal, concluding that nothing in the subject Certificate of Occupancy application contradicted the Zoning Administrator's determination that the establishment was in fact a restaurant and that the Board lacked the authority to revoke a Certificate of Occupancy based on operations, which would instead be under DCRA's purview subject to review by the Superior Court. As with the *Sobin* decision, the language the Appellants quote is taken completely out of the relevant context, in which the Board was discussing whether it had jurisdiction to consider a use's operations, as opposed to documentary evidence reviewed during the Certificate of Occupancy application process. Nothing in either of the above decisions supports what the Appellants urge — that the Board cannot consider direct evidence that the Temple complies with the zoning requirements that Appellants allege were violated by the subdivision.

case is an abuse of the appeal process. For all the reasons discussed above, Perseus and the Property Owner hereby respectfully request that the Board deny the Appellants' Motion.

Respectfully Submitted,

Counsel for Perseus TDC, LLC

/s/
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/s/
Lawrence Ferris

Counsel for Supreme Council of the Scottish Rite of Freemansory, 33rd Degree, Southern Jurisdiction, USA

/s/
Andrew Zimmitti

Certificate of Service

The undersigned hereby certifies that copies of the foregoing documents were delivered by electronic mail to the following addresses on October 13, 2021.

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/s/
Lawrence Ferris