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May 20, 2008

District of Columbia Office of Zoning
Board of Zoning Adjustment
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: BZA Appeal No. 17769, Authorization for Representation

To the Board:

AppleTree Institute for Education Innovation, Inc. hereby authorizes Mark A. Perry and Jason J. Mendro with the law firm of Gibson, Dunn & Crutcher LLP to represent it in the proceedings before the Board in Appeal No. 17769, in which AppleTree is the appellee. This authorization includes the power to bind AppleTree in its case before the Board.

Sincerely,


Jack McCarthy,
Managing Director

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17769

EXHIBIT NO. 12-A

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**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

ADVISORY NEIGHBORHOOD COMMISSION 6A,
Appellant,

v.

BZA APPEAL NO. 17769

APPLETREE INSTITUTE
FOR EDUCATION INNOVATION, INC.,
Applicant and Appellee.

BRIEF FOR APPLETREE INSTITUTE FOR EDUCATION INNOVATION, INC.

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DATED: May 20, 2008.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17769

EXHIBIT NO. 12-B

*Counsel for AppleTree Institute
For Education Innovation, Inc.*

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I. INTRODUCTION

AppleTree Institute for Education Innovation, Inc. is a Washington, D.C.-based not-for-profit corporation that has created and supported several successful education programs, including public charter schools, in the District of Columbia since 1996. AppleTree Institute focuses on pre-literacy education for three- and four-year-old children. In so doing, it helps fill a critical need: The District of Columbia ranks *last* in reading achievement among urban school districts. Nine out of every ten fourth graders cannot read at grade level; seven out of ten cannot read at even a basic level. AppleTree Institute is committed to providing and supporting high-quality, research-based preschool programs that are likely to improve the reading abilities of D.C. students. *See generally* www.appletreeinstitute.org.

In 2005, AppleTree Institute purchased a commercial property at 138 12th Street, N.E. (the Property), with plans of creating a three-classroom public charter school that would provide a quality, free education for preschool-age children. A small group of community activists, who object to the use of the Property as a charter preschool, have made repeated efforts to block this project, which has become one of the most contested zoning issues in D.C. history. The objectors have filed a lawsuit against the District, and have twice attempted to change the Zoning Regulations to stop this single project. Those efforts, however, have proven unsuccessful.

This Board has already ruled that AppleTree Institute is entitled to a building permit for the Property. In compliance with the Board's previous ruling, and after completing all necessary reviews, the Department of Consumer and Regulatory Affairs (DCRA) issued that permit—Building Permit No. 89587 (the Permit)—in late 2007, and confirmed the validity of the Permit in April 2008. This appeal, which challenges the validity of that Permit, is a last-ditch effort by

disgruntled neighbors who wish to stop this lawful project. It should be rejected so that AppleTree Institute can get on with its mission of teaching young children how to read.

The appellant in this matter is Advisory Neighborhood Commission 6A, which has participated in these proceedings (publicly and behind the scenes) since AppleTree Institute first acquired the Property. Its previous attempts to stop the project have been rebuffed by the courts, DCRA, and this Board. ANC-6A's final two arguments should be similarly rejected.

First, ANC-6A argues that the Permit is invalid because it does not comply with amendments to the Zoning Regulations that became effective *after* this Board promulgated an order authorizing the Permit. The Zoning Regulations themselves demolish this argument by providing that building permits authorized by this Board may be processed according to the regulations in effect at the time of the Board's order. 11 DCMR § 3202.6. DCRA properly relied on this provision in issuing the Permit. ANC-6A's appeal simply cannot be reconciled with the law.

Second, ANC-6A contends that this Board should "[r]evoke the . . . Environmental Discipline[]" and the Permit because AppleTree Institute did not complete an Environmental Impact Screening Form (EISF). This contention fails because this Board lacks jurisdiction over environmental regulations and because ANC-6A waived this argument long ago. If this Board were to reach the merits of this contention, it fails because AppleTree Institute was not required to file an EISF.

II. BACKGROUND

Although the law governing this appeal is straightforward, ANC-6A has made the history of AppleTree Institute's Permit complex. That history is summarized in this section, and ANC-6A's last two objections are addressed in the next section.

The Property is 36 feet wide and contains 4230 square feet. Exh. 28 at 2. The Property is situated between rowhouses on a primarily residential street, but has been used for non-residential purposes at least since the enactment of the Zoning Regulations. *Id.* The Property is improved with a building “constructed sometime in the 19-teens, first appearing in city directories in 1916 when it . . . functioned as an office facility.” Exh. 6 at 1. On May 12, 1958, the effective date of the modern Zoning Regulations, the Property was used as an office facility for a heating oil company. Exh. 28 at 2. In the mid to late-1960s, the Property was used as an office facility for a hospice, and the Knights of St. John and the Women’s Auxiliary operated a private club there from 1969 to 2005. *Id.*

AppleTree Institute purchased the Property on July 2, 2005, after DCRA officials provided oral (but not written) advice establishing that the Property would be suitable for matter-of-right use as a public Charter School after being renovated. Representatives of AppleTree Institute also met with neighboring property owners and ANC-6A to discuss the proposed project. In response to concerns raised at that time, AppleTree Institute revised the construction plans to ensure that the building would be no deeper than the shallowest of its two neighbors, and its third story would not be visible from the street. On December 15, 2005, the Historic Preservation Review Board voted 9-1 to approve AppleTree Institute’s plans with minor modifications. Exh. 5.

In the meantime, however, ANC-6A started a campaign to prevent AppleTree Institute from obtaining zoning approval for the project. ANC-6A first took the position that the proposed use of the Property as a public charter school was not an “of right” use under the Zoning Regulations. *See* Exhs. 1 & 3. That position was contrary to all applicable authorities, as AppleTree Institute explained to the Zoning Administrator. *See* Exhs. 2 & 4.

Since it was clear that AppleTree Institute was entitled to a building permit under the existing Zoning Regulations, opponents of the project set out to change the regulations. On December 16, 2005—the day after the Historic Preservation Review Board approved the project—the Office of Planning stated that it “inten[ded] to do a set of zoning regulations which will define charter schools as public schools for zoning purposes, but will also revise the regs that apply to all public schools in terms of separation from residential units, rear and side yards, lot occupancy, parking, etc.” Exh. 7 at 1. A contemporaneous e-mail confirms that “[t]he specific case the Commission is considering involves 138 12th St., N.E.”—the Property at issue here. *Id.*

On February 2, 2006, a group of property owners calling itself Northeast Neighbors for Responsible Growth (NNRG) filed a lawsuit against the District of Columbia. Exh. 9. The relief sought was an injunction preventing the issuance of any building permits to AppleTree Institute for the subject Property. The complaint was later amended to add AppleTree Institute as a defendant. Exhs. 13 & 14. The court dismissed the lawsuit on the ground, among others, that “it is undisputed that both the DCRA and the Zoning Commission are actively considering this matter and [NNRG’s] complaint to the proposed school. *Whether such a school is in compliance with existing and newly enacted ordinances is precisely the type of issue that has been placed within the special competence of the BZA.*” Exh. 18 at 7 (emphasis added).

On February 3, 2006, the Office of Planning issued a setdown report on the proposed amendments to the Zoning Regulations. Exh. 10. These “emergency” amendments were eventually adopted by the Zoning Commission in its Order No. 06-06, which became effective on December 1, 2006. *See* Exh. 20. This Order provided that, although charter schools were to be treated as public schools, charter schools alone would be subject to additional zoning requirements, including enhanced lot-area, lot-width, and parking requirements. *Id.*

In the meantime, on February 9, 2006, AppleTree Institute filed its building permit application. Exh. 34. After the amendments to the Zoning Regulations were set down, NNRG contacted the Zoning Administrator to ask, “How will this impact your consideration of the pending building permit?” Exh. 12. The Zoning Administrator responded, “From my reading of the regs, it will have to comply with the emergency text amendment. With just a preliminary review, there are two areas where it doesn’t comply with the previous regs—lot frontage and parking.” *Id.* Although AppleTree Institute was unaware of this *ex parte* communication (at a time when NNRG had a lawsuit pending in which the Zoning Administrator was named as a defendant), AppleTree Institute submitted a letter explaining in considerable detail how the project complied with both the existing regulations and the amendments. Exh. 15.

On April 28, 2006, the Zoning Administrator denied AppleTree Institute’s application, asserting that AppleTree Institute’s proposed project failed to meet three new requirements set forth in Order No. 06-06 related to minimum lot area, lot width, and parking spaces. Exh. 16. AppleTree Institute filed a timely appeal with this Board challenging the Zoning Administrator’s denial of its permit application. Exh. 19. ANC-6A moved to intervene in AppleTree Institute’s appeal, and this Board granted ANC-6A party status. Exh. 21 at 244-45.

On November 21, 2006, this Board held a public hearing on AppleTree Institute’s appeal from the Zoning Administrator’s denial of the building permit. Exh. 21. The Board accepted supplemental submissions from AppleTree Institute, ANC-6A, and NNRG. *See* Exh. 22 at 34-36. On January 9, 2007, the Board voted 4-1-0 to reverse the Zoning Administrator’s denial of AppleTree Institute’s permit application. *Id.* at 71. On July 25, 2007, this Board published its order, holding that the Zoning Administrator had erred in each of his three conclusions and that AppleTree Institute’s permit application was in compliance with all applicable Zoning Regula-

tions, including the amendments. Exh. 28. The Board specifically noted in its order that it “has carefully considered the issues and concerns stated in the written report of the ANC and . . . finds them unpersuasive.” *Id.* at 10. The order became effective on August 6, 2007. *See* 11 DCMR § 3125.9.

ANC-6A moved for reconsideration of this Board’s decision, arguing that the Board had incorrectly construed the amendments adopted by Order No. 06-06. Exh. 29. This Board held another public hearing on August 17, 2007, and after lengthy discussion it denied ANC-6A’s motion for reconsideration. Exh. 33. Several Members of the Board made a point of explaining the care with which they had considered the arguments advanced by ANC-6A. *See, e.g., id.* at 97-99. Chairperson Miller summarized the issue in this fashion:

I would like to say that I recognize the hard work that the ANC has done and their great concern with this issue and their obvious frustration with the process. What I want to clarify is that we don’t make decisions on the basis of what we would like the outcome to be. We, as a Board, are obliged to apply the law as we understand it and in the long run, I think it is adherence to the law is what is in the public interest. [¶] I will just say that . . . for the ANC’s benefit, because I want them to realize that that’s what we’re doing. We’re interpreting the regulations the way we truly believe we are required to do under the legal standards.

Id. at 102-03. The Board voted 3-0-2 to again reject all the arguments that ANC-6A saw fit to make in opposition to the project. *Id.* at 103.

In the meantime, the Zoning Commission considered yet further amendments to the Zoning Regulations. The Commission Chair acknowledged that “[t]he origin of [these amendments] was the AppleTree appeal of their building permit.” Ex. 23 at 140. The Zoning Commission proceeded to adopt the amendments in Order No. 07-03. These amendments became effective on September 14, 2007. Exhs. 27 & 46.

DCRA, which had suspended its review of AppleTree Institute’s application pending the outcome of the BZA proceeding, reinitiated its review after AppleTree Institute prevailed. An

experienced zoning technician in the Office of the Zoning Administrator approved AppleTree Institute's application for zoning compliance on August 7, 2007. On August 9, 2007, ANC-6A wrote this objection to the Zoning Administrator:

This site has been the focus of two Zoning Commission Regulations (06-06 and 07-03) *issued specifically to stop this construction*. The BZA Order is the focus of a reconsideration request from ANC-6A, which is still pending. . . .

I ask that you recall this permit until the question of reconsideration has been settled. *It would be better to delay* its consideration until the publication of ZC # 07-03 in the DC Register.

Exh. 31 (emphasis added). On August 23, 2007, following additional review, the Zoning Administrator personally approved AppleTree Institute's application again. Exhs. 38 & 59.

Several neighbors had petitioned the D.C. Court of Appeals to review this Board's order, and ANC-6A was copied on all court filings. After Order No. 07-03 became effective, the neighbors moved to dismiss their appeal, claiming that the amendments mooted this Board's decision. Exh. 53. AppleTree Institute filed a response explaining that:

Because the amendments . . . did not take effect until September 14, 2007, they do not apply to AppleTree's application. "All applications for building permits authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date those orders are promulgated." 11 DCMR § 3202.6. The BZA's order authorizing the issuance of a building permit to AppleTree Institute was promulgated on July 25, 2007 and became final and effective on August 6, 2007. *See* 11 DCMR § 3125.9. Thus, any subsequent amendments to the Zoning Regulations—including the amendments effective September 14, 2007—do not apply to the application at issue.

Exh. 54 at 2. AppleTree Institute further pointed out that "[i]f the Court . . . dismisses the appeal, [the neighbors] will have forfeited any opportunity to obtain judicial review of the BZA's order authorizing issuance of the permit." *Id.* On November 8, 2007, the Court of Appeals dismissed the petition for review. Exh. 55.

Less than two weeks after this Board denied ANC-6A's motion for reconsideration, on August 30, 2007, ANC-6A submitted two letters to DCRA raising *new* objections to the issuance

of a building permit to AppleTree Institute. *See* Exhs. 36 & 37. Among other things, ANC-6A argued for the first time that the application should be denied because of environmental concerns, including “the threat of possible underground storage tanks,” that ANC-6A had not raised during the two years that AppleTree Institute had owned the Property. Exh. 36 at 1. In response, AppleTree Institute submitted a Phase I Environmental Assessment of the Property, which Hillis-Carnes, a reputable environmental firm that assisted in the construction of Nationals Stadium, had already conducted. Exh. 43. Hillis-Carnes’s assessment “revealed no Recognized Environmental Conditions.” *Id.* at attachment, 34.

By August 31, 2007, all required disciplines had approved AppleTree Institute’s application, authorizing the Permit to be granted. DCRA’s designated representative testified that he could identify no reason why AppleTree Institute’s Permit was not granted at that time. Exh. 60 at 108-109. The Permit actually issued on October 26, 2007. Exh. 52. ANC-6A filed this appeal on December 24, 2007. Exh. 58.

On November 15, 2007, DCRA issued a notice stating that it intended to revoke AppleTree Institute’s Permit due to an error in the issuance process. Exh. 56. In particular, DCRA stated that it had issued the Permit before it completed zoning and environmental reviews, the latter in response to ANC-6A’s belated concerns about possible underground storage tanks. *Id.* AppleTree Institute contested the notice of revocation in the Office of Administrative Hearings (“OAH”). Exh. 57. ANC-6A was granted leave to intervene in the OAH proceedings. Exh. 63. While those proceedings were pending, AppleTree Institute addressed each of the issues raised by DCRA in its notice of revocation.

With respect to the zoning review, AppleTree Institute responded to DCRA’s suggestion that the September 14, 2007 amendments should be applied to AppleTree Institute’s application:

The law is otherwise. As you know, the Board of Zoning Adjustment has already considered AppleTree’s permit application. On July 25, 2007, the BZA issued a formal order determining that AppleTree’s application satisfied all zoning regulations effective on that date. This order—which conclusively authorized the issuance of AppleTree’s permit for all purposes within the scope of BZA’s regulatory authority—became effective on August 6, 2007. DC law is clear that amendments to the zoning regulations after this date are inapplicable to AppleTree’s application: “All applications for building permits authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date those orders are promulgated.” 11 DCMR § 3202.6.

Exh. 62 at 1-2. AppleTree Institute concluded: “Thus, the September 14 amendments to the Zoning Regulations are irrelevant to AppleTree’s application and provide no legal basis for divesting AppleTree of its settled rights.” *Id.* at 2. AppleTree Institute asked that this analysis be brought to the attention of the Zoning Administrator, who subsequently “concluded [his] final review of the application and issued zoning approval of the building permit application for the Property.” Exh. 66 at 2.

With respect to the additional environmental review—although AppleTree Institute had already received all necessary environmental approvals and had taken the additional, voluntary measure of retaining Hillis-Carnes to conduct Phase I Environmental—AppleTree Institute retained ECS Mid-Atlantic, LLC, to conduct a geophysical survey of the Property. ECS “determined that there did not appear to be any buried fuel tanks” within the area in question. Exh. 64. DDOE subsequently advised DCRA that it “did not have any environmental objection to allowing construction of [AppleTree Institute’s] project to move forward.” Exh. 66 at 2.

Once these issues had been addressed, DCRA withdrew the notice of revocation, and “confirm[ed] the validity of the Permit *nunc pro tunc*.” *Id.*; *see also* Exh. 65 at 1 (“DCRA expressly acknowledges that the Permit is valid”).

III. DISCUSSION

In this appeal, which marks ANC-6A's *third* appearance before the Board on the same project, ANC-6A raises two objections to the Permit issued by DCRA to AppleTree Institute. First, ANC-6A contends that the Permit is invalid because it does not comply with amendments to the Zoning Regulations that became effective September 14, 2007; but the Regulations themselves authorize the Zoning Administrator to process AppleTree Institute's application according to the law in effect on July 25, 2007, when this Board promulgated its previous order. Second, ANC-6A maintains that AppleTree Institute failed to comply with the Environmental Policy Act; but this Board has no jurisdiction to review that challenge, which, in any event, is both procedurally barred and substantively incorrect. Accordingly, the appeal should be denied.

A. **AppleTree Institute's Application Satisfied All Zoning Regulations In Effect When This Board Authorized The Permit**

ANC-6A contends that the Permit does not comply with the amendments to the Zoning Regulations made by Order No. 07-03, which became effective on September 14, 2007. It is important to note what is implicit in ANC-6A's contention: The Permit *does* comply with the Zoning Regulations in effect before that date.¹ Thus, if the September 14 amendments are inapplicable, ANC-6A has no zoning challenge to the Permit. And those amendments *are* inapplicable, because the Regulations contain a "Grandfather Clause" that specifically authorizes the Zoning Administrator to apply the law in effect on July 25, 2007—*before* the effective date of the amendments. 11 DCMR § 3202.6.

¹ AppleTree Institute received all required approvals by August 31, 2007, before the amendments became effective.

“‘Grandfathering,’ by its very nature, operates to vest a right as of a time certain, by operation of law.” *Page Assocs. v. D.C. Bd. of Zoning Adjustment*, 463 A.2d 649, 656 (D.C. 1983). Recognizing that the administrative process requires finality, the Zoning Regulations provide that permit applications are entitled to be reviewed and processed according to the law in effect on either of two dates. First, when a permit issues, regardless of whether this Board has reviewed the application for zoning compliance, the “construction authorized by [the] permit may be carried to completion pursuant to the [Zoning Regulations] in effect *on the date that the permit is issued.*” 11 DCMR § 3202.4 (emphasis added). Second, regardless of whether a permit issues, when permit applications come before this Board for review, those “applications for building permits authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations *in effect on the date those orders are promulgated.*” *Id.* at § 3202.6 (emphasis added).

This Grandfather Clause, which is the operative law in this case, contains only two pre-conditions to its application: (1) this Board must have promulgated an order authorizing a building permit and (2) the application for that permit must be accompanied by plans, drawings, and an official plat that are sufficiently complete to permit processing without substantial change or deviation. *Id.* AppleTree Institute’s Permit application satisfied both pre-conditions on July 25, 2007. Therefore, any amendments to the Zoning Regulations after July 25, 2007 do not apply to the Permit at issue in this appeal.

1. This Board’s July 25, 2007 Order Authorized AppleTree’s Permit

ANC-6A asserts that this Board’s order “does not authorize the *issuance* of building permits as of the date of that order.” Exh. 58 at 5 (emphasis added.) ANC-6A provides no legal authority or factual support for this proposition. Moreover, ANC-6A misstates the law. The

Grandfather Clause applies to “[a]ll applications for building permits authorized by orders” of this Board. 11 DCMR § 3202.6. The Grandfather Clause does not contain the word “issuance,” nor does it refer to any of the other requirements for permit issuance that are beyond this Board’s authority to review.²

ANC-6A does not deny that this Board’s July 25, 2007 order authorized the Permit in accordance with *the Zoning Regulations*. That concession is fatal to ANC-6A’s appeal because this Board’s orders only authorize applications for building permits in accordance with the Zoning Regulations. This Board’s jurisdiction extends to appeals of *zoning-related* decisions, including (i) those granting or refusing building permits; (ii) those granting or refusing certificates of occupancy; and (iii) “other administrative decisions.” See D.C. Code § 6-641.07(f); *see also Bannum v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 430 (D.C. 2006). This jurisdiction is limited to reviewing questions about the “administration or enforcement of the Zoning Regulations, Title 11 DCMR.” 11 DCMR § 3100.2. Indeed, “while the Board may hear appeals from the final decisions of administrative officers other than the Zoning Administrator and from other agencies . . . the Board may *not* pass upon any regulatory scheme other than the Zoning Regulations.” BZA Appeal No. 16701 of ANC-2A, at 13 n.4 (July 12, 2001) (emphasis added). Thus, when the Grandfather Clause refers to building permits “authorized by order of the Board of Zoning Adjustment,” it refers unambiguously to this Board’s orders confirming compliance with the Zoning Regulations.

² ANC-6A has recently argued to OAH that its interpretation of the Grandfather Clause is supported by comments made by an attorney from the Office of the Attorney General to the Zoning Commission on May 14, 2007. ANC-6A is mistaken. The lawyer was discussing 11 DCMR § 3202.4, *not* the Grandfather Clause applicable here, § 3202.6. Exh. 25 at 93-94. Section 3202.6 did not apply on May 14 because this Board did not promulgate its order authorizing AppleTree Institute’s application until July 25, 2007.

This Board promulgated an order confirming AppleTree Institute's compliance with the Zoning Regulations on July 25, 2007. The order reversed the Zoning Administrator's only grounds for denying AppleTree Institute's application, rejected all arguments timely raised by ANC-6A, and therefore found that AppleTree Institute's application was in compliance with all applicable Zoning Regulations.

ANC-6A erroneously seeks to limit the applicability of the Grandfather Clause to orders that this Board *never* issues: ones that confirm the satisfaction of requirements, such as environmental or building code approvals, that are beyond this Board's jurisdiction to review. *See, e.g.,* BZA Appeal No. 16701 of ANC-2A, at 20 (noting that this Board lacks jurisdiction over the Environmental Policy Act); 12A DCMR § 112.2 (vesting jurisdiction to hear appeals over DCRA's interpretation of the construction code in the Office of Administrative Hearings). ANC-6A's proposed reading of the regulations is impermissible because it would render the Grandfather Clause meaningless. *See, e.g., Carlson Constr. Co., v. DuPont West Condo. Inc.*, 932 A.2d 1132, 1136 (D.C. 2007) ("A basic principle is that each provision of the [regulations] should be construed so as to give effect to all of the [regulation's] provisions, not rendering any provision superfluous." (alterations in original) (quoting *Thomas v. D.C. Dep't of Employ. Servs.*, 547 A.2d 1034, 1037 (D.C. 1988))).

Public policy considerations also preclude ANC-6A's proposed reading of the Grandfather Clause. ANC-6A's theory would impose a policy that would discourage investment in D.C. real estate, discourage development, and potentially diminish real estate value. If property rights were never fixed during the permit application process, regardless of that process's length, property rights would cease to be valuable. Applying the Grandfather Clause according to its plain text, however, enables all property owners in the District of Columbia to rely on the administra-

tive process to provide definitive rulings on their rights within the framework of the Zoning Regulations. It protects them from uncertainty and retroactive invalidation of their rights pending reviews by other DCRA disciplines, which generally follow zoning approval in sequence and are sometimes time-consuming.

2. AppleTree's Application Was Sufficiently Complete On July 25, 2007

ANC-6A also seeks to evade the Grandfather Clause by arguing that AppleTree Institute's "application was not sufficiently complete" because "DCRA could not approve the Environmental Discipline prior to September 14, 2007." Exh. 58 at 4 & 5. That argument overlooks the undisputed fact that DCRA *did* approve the Environmental Discipline on August 10, 2007. Exh. 32.

Moreover, the Grandfather Clause does not require the completion of environmental approvals or documentation. The protection of the Grandfather Clause requires only that the application be "accompanied by the *plans and other information required by § 3202.2*, which shall be sufficiently complete to permit processing without substantial change or deviation." 11 DCMR § 3202.6 (emphasis added). Section 3202.2, in turn, requires the submission of scaled drawings and an official building plat.³ Consistent with the scope of this Board's authority, Sec-

³ Section 3202.2 provides as follows:

3202.2 To determine compliance with the provisions of this title, each application for a building permit shall be accompanied by any of the following that is deemed necessary:

(a) Scaled drawings showing the:

- (1) Exact shape, topography, and dimensions of the lot to be built upon;
- (2) Plan, elevation, and location by dimensions of all existing and proposed structures, and the proposed use of those structures;
- (3) Parking and loading plans and the basis for computation of those plans; and
- (4) Other information necessary to determine compliance with this title; and

[Footnote continued on next page]

tion 3202.2 addresses information needed “[t]o determine compliance with the provisions of” Title 11 of the DCMR, which consists *only* of the Zoning Regulations. The Grandfather Clause requires sufficiently completed plans, drawings, and plats because these materials are necessary to assess compliance with the Zoning Regulations. Environmental statements, on other hand, are not. Consequently, they are not required as a condition to fixing the Zoning Regulations that apply to permit applications that this Board has reviewed.

Here, it is undisputed that AppleTree Institute had submitted sufficiently complete plans, scaled drawings, and an official building plat, permitting the processing of its application without substantial change or deviation, by the time of this Board’s July 25, 2007 order. *See* Exh. 59 at 54-55 (Zoning Administrator’s testimony that he was able to approve AppleTree Institute’s application based on the drawings, plans, and plat that AppleTree Institute submitted, which did not change). Having satisfied the Grandfather Clause’s only conditions, AppleTree Institute is entitled to the clause’s protection.

The D.C. Court of Appeals has squarely rejected an argument similar to the one ANC-6A asserts here. In *Page Associates*, a developer applied for Certificates of Occupancy that would permit it to convert an apartment building into a hotel, provided that sufficient parking was made available. 463 A.2d at 655. After the permit applications were submitted and stamped “Accepted for Filing,” and after a Certificate of Occupancy for some of the hotel’s rooms had issued, the Zoning Commission promulgated a series of orders that would have prohibited the hotel con-

[Footnote continued from previous page]

(b) An official building plat, in duplicate, prepared by the Surveyor of the District of Columbia, upon which the applicant shall indicate in ink and to the same scale dimensions:

- (1) All existing and proposed structures;
- (2) The number, size, and shape of all open parking spaces, open loading berths, and approaches to all parking and loading facilities; and
- (3) Other information necessary to determine compliance with the provisions of this title.

version. *Id.* at 653. The developer argued that a grandfather clause containing the same operative language as § 3202.6 ensured that the regulations in effect when it filed its applications would govern those applications.⁴ The Zoning Administrator contended that the applications were not “sufficiently complete,” and thus not protected by the grandfather clause, because they did not specify the location of all of the required parking spaces. This Board agreed, and the developer appealed. *Id.* at 654. The D.C. Court of Appeals held, “as a matter of law, that the finding of the Board of Zoning Adjustment that [the developer’s] applications were not grandfathered . . . is so clearly erroneous as to require reversal.” *Id.* at 657. Although the developer had not yet designated the “the particular parking spaces,” the court reasoned that “[t]here was no question that sufficient parking was available and could be provided to meet the zoning regulation requirement.” *Id.* at 655. The court rejected the Zoning Administrator’s restrictive interpretation of the grandfathering protection because it “would make it possible for the Board to act after the fact to divest a party of a vested right by exalting form over substance.” *Id.* at 656.

ANC-6A’s attempt to deprive AppleTree Institute of its vested rights retroactively is improper for the same reasons. In fact, AppleTree Institute’s entitlement to grandfathering is clearer. Whereas the developer in *Page Associates* had not provided the detail that would be ultimately necessary for its Certificate of Occupancy to be issued, AppleTree Institute has indisputably provided all of the completed plans, drawings, and plats required for both the Grandfather Clause to apply and for its building permit to issue. As the D.C. Court of Appeals reasoned in the less compelling case of *Page Associates*, “[i]f that [grandfathering] provision does not op-

⁴ Similar to Section 3202.6, the grandfathering provision applicable in *Page* requires only that “[t]he applications are accompanied by information *sufficiently complete to permit processing without substantial change or deviation*” *Page*, 463 A.2d at 654 (quoting §§ 8104.7, 8104.71 of the D.C. Building Regulations) (emphasis added).

erate here to permit [the developer's] applications to be processed and carried to completion under regulations in effect at the time of filing, it is difficult to imagine circumstances where that provision would have meaning.” *Id.* at 656. That reasoning applies *a fortiori* in these circumstances.

B. ANC-6A’s Environmental Challenges Are Meritless

In addition to challenging AppleTree Institute’s compliance with inapplicable Zoning Regulations, ANC-6A also contests DCRA’s and DDOE’s environmental review of AppleTree Institute’s project. This issue is not properly before this Board, was waived long ago, and is utterly without merit. Accordingly, ANC-6A’s appeal should be denied.

1. This Board Lacks Jurisdiction To Enforce The Environmental Policy Act Of 1989

This Board has unequivocally held that it “does not have jurisdiction to consider appeals relating to an administrative agency’s compliance with the Environmental Policy Act.” BZA Appeal No. 16701 of ANC-6A 2A, at 20; *see also* BZA Appeal No. 17356 of Bannum, Inc., at 3 (Feb. 7, 2006) (noting that BZA only has jurisdiction to review DCRA’s decisions based “in whole or in part” on the Zoning Regulations). *Cf. President & Dirs. of Georgetown Coll. v. D.C. Bd. of Zoning Adjustment*, 837 A.2d 58, 68-69 (D.C. 2003) (“[T]his court, like other courts, has been reluctant to read into a statute powers for a regulatory agency which are not fairly implied from the statutory language, since the agency is statutorily created.” (quoting *Spring Valley Heights Citizens’ Ass’n v. D.C. Bd. of Zoning Adjustment*, 644 A.2d 434, 436 (D.C. 1994))). No court has ever held or hinted that this Board has jurisdiction to review the determinations reached by government authorities responsible for approvals unrelated to zoning.

ANC-6A's environmental claim improperly asks this Board to do just that. At the outset of AppleTree Institute's application process, DCRA determined that AppleTree Institute was not required to submit an EISF. DDOE later reviewed AppleTree Institute's application and determined that it complied with environmental regulations. Following unfounded concerns belatedly raised by ANC-6A, DCRA referred AppleTree Institute's application to DDOE for further review. Upon consideration of a Phase I Environmental Assessment by Hillis-Carnes and a geophysical survey by ECS Mid-Atlantic, DDOE concluded again that it "did not have any environmental objections to allowing construction [contemplated in AppleTree Institute's Permit] to move forward." Exh. 66 at 2. ANC-6A's substantive challenge to AppleTree Institute's compliance with the environmental regulations asks this Board to substitute its judgment for the judgments already reached by DCRA and DDOE, the agencies that are responsible for enforcing the Environmental Policy Act. This Board should deny ANC-6A's request on jurisdictional grounds alone.

2. ANC-6A Waived Any Challenges To Environmental Approval

Even if this Board had jurisdiction to consider ANC-6A's environmental claims, ANC-6A waived those claims during AppleTree Institute's prior appeal to this Board.

The D.C. Court of Appeals has held that proceedings before this Board include sufficient procedural protections to permit this Board's judgments to have a preclusive effect. *Rhema Christian Ctr. v. D.C. Bd. of Zoning Adjustment*, 515 A.2d 189, 192 (D.C. 1986). The doctrines of both claim preclusion (which bars the re-litigation of claims after final adjudication, including any issues that *might* have been raised in the first proceeding) and issue preclusion (which bars re-litigation of issues actually decided in a previous adjudication, whether on the same or a different claim) apply to orders of this Board. *Id.* at 192-93. Claim preclusion prohibits re-

litigation “not only as to every ground of recovery or defense actually presented [an] action, but also as to every ground which *might have* been presented. . . .” *Shin v. Portals Confederation Corp*, 728 A.2d 615, 618 (D.C. 1999) (emphasis in original) (emphasis omitted) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1877)). Parties may not later assert challenges they failed to raise before, absent a material change of circumstances. *Rhema Christian Ctr.*, 515 A.2d at 194 n.1 (“Unless a material change of circumstances affecting the merits of [an] application has occurred . . . , the board of adjustment may not lawfully reach the merits of the petition.” (citing *Fisher v. City of Dover*, 412 A.2d 1024, 1027 (1980))).

ANC-6A failed to assert any environmental challenges to AppleTree Institute’s application when it had the chance. ANC-6A was granted party status in AppleTree Institute’s first appeal before this Board, and ANC-6A argued in support of the Zoning Administrator’s denial of AppleTree Institute’s permit. ANC-6A raised arguments related to lot area, lot width, and parking requirements. *See* Exh. 21 at 244-45, 381-397. But ANC-6A did not raise environmental claims of any kind during this appeal. Again on August 2, 2007, ANC-6A moved this Board to reconsider its judgment on AppleTree Institute’s first appeal. And again, ANC-6A failed to raise any environmental claims. *See generally* Exh. 29.

ANC-6A’s failure cannot be justified by a “material change of circumstances.” ANC-6A speculates that the Property may have been contaminated more than fifty years ago, when it served as an office facility for a heating-oil company. This historical information was readily available to ANC-6A during the last appeal to this Board. Since then, only one circumstance related to AppleTree Institute’s environmental compliance has changed: DDOE has determined again that AppleTree Institute’s application conforms to all applicable environmental standards.

Consequently, ANC-6A's appeals to this Board may not rest on newly raised environmental grounds. *See Rhema*, 515 A.2d at 193-94; *see also Glenbrook Rd. Ass'n v. D.C. Bd. of Zoning Adjustment*, 605 A.2d 22, 37 (D.C. 1992) (holding citizens' group that failed to raise Environmental Policy Act issue before this Board waived such arguments). A holding to the contrary would subject property owners to *seriatim* challenges on ever-changing rationales, would enable permit opponents to waste this Board's resources through successive appeals, and would defy the settled law of the District.

3. AppleTree Institute Complied With All Applicable Environmental Regulations

An EISF must be prepared for any proposed "major action." Major action is defined as (i) a project that will cost over one million dollars (based on 1989 dollars adjusted annually according to the consumer price index) *and* (ii) that may have a significant impact on the environment. 20 DCMR § 7201.1. Actions that "may have a significant impact on the environment" are enumerated in the D.C. Municipal Regulations and include, for example, actions that might have a significant adverse effect on a rare or endangered animal or plant species, violate ambient air quality standards or waste regulations, or cause a significant adverse change in existing surface water quality. *Id.* § 7201.2.⁵

ANC-6A misstates the plain text of the applicable regulations by asserting that an EISF is required "whenever the total cost of the project exceeds 1.5 million dollars, *or* the project will dispose of hazardous substances as defined in 20 DCMR § 7200 *or* will produce emissions of air

⁵ Alternatively, an EISF can be required for a project whose cost is less than one million dollars if such project "imminently and substantially affects the public health, safety, or welfare." *Id.* at § 7201.3. ANC-6A does not argue that this alternative test is applicable, and it plainly is not.

pollutants.” *See* Exh. 58 at 3 (emphasis added). The regulations unambiguously state that an EISF is required only for projects that both exceed the cost threshold “*and* that may have a significant impact on the environment.” *See* 20 DCMR § 7201.1 (emphasis added); *cf. id.* § 7202.1. Moreover, the regulations do not require an EISF merely because “the project will dispose of hazardous substances as defined in 20 DCMR § 7200 or will produce emissions of air pollutants.” Rather, a significant impact results when the conditions set forth in § 7201.2 are met, and ANC-6A utterly fails to argue, much less prove, that any of these conditions exist here.

AppleTree Institute’s proposed project is not a “major action,” and thus does not require an EISF, for two independent reasons. First, AppleTree Institute’s relevant project costs did not exceed the regulatory cost threshold. Second, AppleTree Institute clearly demonstrated that its project will not have a “significant impact on the environment.”

a. AppleTree Institute’s Project Does Not Exceed The Cost Threshold

The EISF cost threshold, adjusted to 2006 dollars by the consumer price index, amounts to approximately \$1,625,806. *See* U.S. Dep’t of Labor, Bureau of Labor Statistics, <http://www.bls.gov/CPI/> (last visited May 19, 2008) (providing an inflation calculator based on the consumer price index). Applicable project costs are defined by regulation. *See* 20 DCMR § 7213. When the application was filed, AppleTree Institute estimated such costs to be \$1,250,000. ANC-6A has presented no evidence that this estimate was incorrect.

Unable to argue that the project costs (as defined by regulation) exceed the limit, ANC-6A quotes a snippet from AppleTree Institute’s website to the effect that “[t]otal renovation *and soft costs* are \$2,300,000.” Exh. 58 at 3 (emphasis added). Although ANC-6A has cited the website correctly, ANC-6A overlooks the fact that AppleTree Institute’s substantial “soft costs”—such as books, teaching materials, desks, chalkboards, and playground equipment, as well as insurance, interest on the loan for the Property’s acquisition, taxes, and (ironically) fees

associated with the permitting process—are not within the regulatory definition of project costs for purposes of environmental review. Thus, while AppleTree Institute will incur such costs before the school can open, they are irrelevant to the line item on the application, which was accurate when filed. ANC-6A has made the classic mistake of comparing apples (defined costs) to oranges (total costs, including soft costs).

b. AppleTree Institute’s Project Will Not Have A Significant Impact On The Environment

An EISF is required only if the proposed action “may have a significant impact on the environment.” 20 DCMR § 7201.1. As indicated above, actions that “may have a significant impact on the environment” are defined by regulation and are generally actions that violate environmental laws. *See id.* § 7201.2.

ANC-6A contends that AppleTree Institute’s project would require the disposal of hazardous materials because “[w]hile Steuart Petroleum occupied the property [from 1915 until the mid-1960s], they fueled vehicles from the site and maintained a substantial workshop for repair and maintenance of company vehicles in the rear yard.” Exh. 58 at 4. Although ANC-6A provided no evidence to substantiate this claim, and although it further failed to demonstrate that such disposal would violate any environmental laws, ANC-6A concluded that “[t]he project will require the disposal of hazardous materials.” *Id.*

AppleTree Institute’s environmental studies prove the contrary. To ensure the safety of the community and future building occupants, AppleTree Institute voluntarily obtained an environmental site assessment for the Property. Exh. 43 at attachment. This study examined federal and state databases that record violations of environmental laws and the presence of tanks or hazardous substances. Additionally, the report described the results of a site visit by licensed environmental consultants. *Id.* at 2-3. Observations from the site visit indicated that there was

no evidence of current or former hazardous waste generation or storage, bulk chemical storage, or underground or aboveground storage tanks. *Id.* at 1. With respect to historical operations, the study explained that:

[Historical] Sanborn maps [of the Property] reviewed for this assessment did not specifically identify coal storage bins/stockpiles or tanks for fuel oil storage on the Site. Further, due to the relatively small size of the Site (i.e., appropriately 4,200 square feet), it is unlikely that bulk storage of coal or fuel oil occurred at the Site. Additionally, the Site was not identified on any of the databases [of registered tanks or environmental law violations] for this assessment. Based on these factors, the historical businesses/operations conducted on the Site do not appear to be a [recognized environmental condition] to the Site.

Id. at 24. The assessment concluded that there were no recognized environmental conditions.

Id. at 34. Additionally, in November 2005, Appletree sampled soil at the site to determine its suitability for the additional construction (*i.e.*, whether it would support the additional structure, drainage, *etc.*). No suspect conditions were observed at that time (*e.g.*, soil stains or discoloration, fuel odors, *etc.*). Exh. 42 at attachment, 4.

The District's Department of the Environment examined AppleTree Institute's environmental studies and plans for the Property and agreed that there are no environment concerns. The Chief of the Department's Land Remediation and Development Branch provided the following findings to DCRA:

- There are no registered underground storage tanks on the property.
- The site is not, and has never been, listed as a generator of hazardous waste.
- The site is not on the list of potential brownfield sites prepared by the Office of the Deputy Mayor for Planning and Economic Development.
- There do not appear to be any recognized environmental conditions at the site.

Exh. 61.

Out of an abundance of caution, the Department of the Environment recommended, and AppleTree Institute agreed, to undertake an additional geophysical survey of the site to look for underground storage tanks. In a report dated March 28, 2008, ECS Mid Atlantic LLC described their ground penetrating radar investigation of the asphalt parking lot and concluded that there are no buried fuel tanks on the Property. Exh. 64.

Since there is absolutely no evidence that AppleTree Institute's project will have "a significant impact on the environment," AppleTree Institute would not be required to submit an EISF even if its project had exceeded the inflation-adjusted cost threshold when the application was filed.

IV. CONCLUSION

AppleTree Institute purchased the Property at issue in 2005, and applied for a building permit in February 2006. That application has complied at all times with the applicable Zoning Regulations, as this Board has already concluded. The Permit has finally issued, and DCRA has expressly confirmed its validity over the objections raised by ANC-6A. AppleTree Institute respectfully submits that this Board should agree that the Permit is valid. The final two objections interposed by ANC-6A are baseless. Its attempt to invoke the September 14, 2007 amendments

cannot be reconciled with the Grandfather Clause in the Zoning Regulations; and its belated environmental concerns are jurisdictionally, procedurally, and substantively defective. The project should be allowed to proceed.

DATED: May 20, 2008.

Respectfully submitted,

~~GIBSON, DUNN & CRUTCHER LLP~~

By: _____

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**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

ADVISORY NEIGHBORHOOD COMMISSION 6A,
Appellant,

v.

APPLETREE INSTITUTE
FOR EDUCATION INNOVATION, INC.,
Applicant and Appellee.

BZA APPEAL NO. 17769

CERTIFICATE OF SERVICE

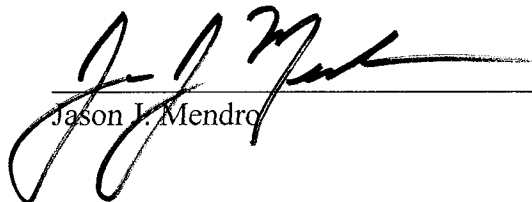
Pursuant to 11 DCMR § 3111, I certify that on May 20, 2008, I caused a correct copy of the foregoing **BRIEF FOR APPLETREE INSTITUTE FOR EDUCATION INNOVATION, INC.** to be served on the following persons by first class mail:

Advisory Neighborhood Commission 6A
c/o Mr. David Holmes, Vice Chair
P.O. Box 75115
Washington, D.C. 20013

Mr. Matthew Le Grant
Zoning Administrator
D.C. Dept. of Consumer and
Regulatory Affairs
941 North Capitol Street, NE
Suite 2000
Washington, D.C. 20002

Mr. Nicholas Alberti
1330 North Carolina Ave. NE
Washington, D.C. 20002

Dennis M. Taylor, Esq.
Assistant Attorney General
941 North Capitol Street, NE
Suite 9401
Washington, D.C. 20001



Jason I. Mendro

C

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

ADVISORY NEIGHBORHOOD COMMISSION 6A,
Appellant,

v.

APPLETREE INSTITUTE FOR
EDUCATION INNOVATION, INC.,
Applicant and Appellee.

BZA APPEAL No. 17769

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**APPENDIX TO BRIEF FOR APPLETREE INSTITUTE FOR EDUCATION
INNOVATION, INC.**

VOLUME 1 OF 2

DATED: May 20, 2008

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17769

EXHIBIT NO. 12-C

Appeal No. 17769
Appendix Accompanying AppleTree Brief

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C-TAB 1



Single Member District 6A-03
310 9th Street NE
Washington, DC 20002

October 6, 2005

Bill Crews
Zoning Administrator
Department of Consumer and Regulatory Affairs
941 North Capitol Street NE, Room 2000
Washington, DC 20002

Re: Attention to Permits for Child Development Center at 138 12th Street NE

Dear Mr. Crews:

I am writing to bring your attention to a new child development center planned for 138 12th Street NE in an R-4 District. My concern is that DCRA will incorrectly issue building permits and a certificate of occupancy for a "public school" use at this location.¹

According to the zoning regulations, a public school must be operated and maintained by the DC Board of Education. By definition, if a building is operated or maintained by another entity, then it cannot be a public school for zoning purposes.² In this case, the building will be operated and maintained by the AppleTree Institute for Education Innovation, a nonprofit organization seeking a charter through the DC Public Charter School Board for a pre-school educational program. Therefore, the building will not be operated and maintained by the DC Board of Education (which also has charter authority), and DCRA should not treat it as a public school for zoning purposes.

Instead, DCRA should recognize the intended use of the building as a "child development center." This use encompasses other educational uses such as child care centers, pre-schools, nursery schools, and before-and-after school programs.³ Child development centers are permitted in an R-4 District as a matter of right per 11 DCMR 330.5(d), provided that the center shall be limited to no more than sixteen (16) individuals. A child development center may serve additional children if the Board of Zoning Adjustment (BZA) grants a special exception and may expand beyond 40% lot occupancy if BZA grants a variance.

It is important to the residents of the neighborhood that DCRA correctly treat this property as a child development center and take steps to determine the number of children to be served at the location. If incorrectly treated as a public school, the neighbors of the property will have no effective venue for input on traffic, pedestrian safety, noise and parking demand associated with facility operations, nor on potential impacts to light, air, and property values of adjacent properties from expansion of the existing building to 80% lot occupancy as detailed in submissions to the Historic Preservation Review Board.

¹ Public schools are matter of right use beginning in the R-1 District per 11 DCMR 201.1(k) and may exceed 60% lot occupancy per 11 DCMR 403.1, subject to certain limitations.

² 11 DCMR 199.1 reads in relevant part: "School, public - a building operated and maintained by the District of Columbia Board of Education for educational purposes and such other community uses as deemed necessary and desirable."

³ 11 DCMR 199.1 reads in relevant part: "Child/Elderly development center - a building or part of a building, other than a child development home or elderly day care home, used for the licensed care, education, counseling, or training of individuals fifteen (15) years of age or less and/or for care of elderly individuals, totaling six (6) or more persons, who are not related by blood or marriage to the caregiver and who are present for less than twenty-four (24) hours per day. This definition encompasses facilities generally known as child care centers, pre-schools, nursery schools, before-and-after school programs, senior care centers, elder care programs, and similar programs and facilities."

Based on these concerns, I am requesting a review of any pending applications or issued building permits for this property to ensure that your staff has not made any errors in interpretation or application of the zoning regulations to this property. I would greatly appreciate the courtesy of a written response within two weeks.

Thank you for your attention to this matter. If you have any questions or need further information, please contact me at 202-544-3734 or rice6A03@verizon.net.

Respectfully yours,

//original signed//

Cody Rice

Advisory Neighborhood Commissioner (6A03)

cc: Councilmember Sharon Ambrose
Emily Paulus, Historic Preservation Office

C-TAB 2

AppleTree Institute for Education Innovation
400 7th Street, SE, Washington, DC 20003
Tel: 202.488.3990 | Fax: 202.488.3991

October 28, 2006

Bill Crews, DCRA Zoning Administrator
Department of Consumer and Regulatory Affairs
941 North Capitol Street, NE, Room 2000
Washington, DC 20002

Re: Public Charter School at 138 12th Street, N.E.

Dear Mr. Crews:

I am writing, on behalf of the AppleTree Institute for Education Innovation, in response to the October 6, 2005, letter from Advisory Neighborhood Commissioner Cody Rice to you regarding AppleTree's proposed development of the property located at 138 12th Street, N.E.

AppleTree is a nonprofit organization committed to improving the number of effective schools through innovation. We are working to develop a high quality early literacy program as a key to closing the achievement gap and breaking the cycle of poverty. Our vision is that students from all backgrounds should enter first grade able to read and ready to succeed. For more information, please visit our website (www.appletreeinstitute.org).

AppleTree recently received a charter from the District of Columbia Charter School Board to operate a public charter school to serve preschool and pre-kindergarten children, ages 3-4. The mission of AppleTree Early Learning Public Charter School is to provide young children with the social, emotional & cognitive foundations that will enable them to succeed in school as they get older. We have recently purchased a building in Northeast to house the school, as well as certain administrative offices. It is located at 138 12th Street, N.E. and we recently submitted development plans to the D.C. Historic Preservation Review Board.

AppleTree's building is located in an area zoned R-4. For development in such areas, the Zoning Regulations generally give "of right" status to public schools, 11 DCMR § 330.5(a), and require exemptions for private schools, 11 DCMR § 332.1(a). But Mr. Rice, in his October 6 letter, maintains that a public charter school is not a "public school" under the Zoning Regulations. That is clearly incorrect. Public charter schools in the District of Columbia are "public schools" for all relevant purposes.

In 1996, Congress passed the Public Charter Schools Act (D.C. Law 11-135), which authorized charter schools to operate in the District. The term "public school" is defined in the Act as "either a public school under the authority and control of the Board [of Education] *or* a charter school." D.C. Code § 38-1701.01(14) (2001) (emphasis added). Congress has therefore decreed that public charter schools are, as their name indicates, *public* schools -- not private.

The Code provision defining "public school" to include public charter schools stands to reason. Charter schools in the District of Columbia receive public funding and are open to all residents, who pay no tuition. They are chartered by, and subject to the regulation and supervision of, public authorities. They were intended to "provide parents and students with expanded choices in the types of *public* educational opportunities available in the District of Columbia." D.C. Code § 38-1701.03(6) (emphasis added).

Mr. Rice's argument that a public charter school is not a public school is premised solely on a regulation that defines "school, public" as "a building operated and maintained by the District of Columbia Board of Education for educational purposes." 11 DCMR § 199 (2005). Because public charter schools are operated and maintained by nonprofit entities, Mr. Rice contends that they do not fall within this definition.

Mr. Rice's argument founders on history. The Zoning Regulations were adopted in 1958. At that time, there were just two kinds of schools in the District: public and private. The Zoning Regulations have not been amended to reflect the adoption of the public charter school law in 1996. (The definition of public school was apparently last amended in 1968.) But the 1996 law, which authorizes the creation of public charter schools and expressly defines such schools as public schools, was ratified by the Mayor and both Houses of Congress and overrides the outdated definition of "public school" in the Zoning Regulations. When those regulations were

adopted, all public schools were operated by the Board of Education; since 1996, an increasing number of public charter schools have been operated by nonprofit entities. But as the charter school law makes clear, such schools are “public schools” for legal purposes.

It does not appear that the zoning authorities have directly confronted this question, probably because no one has seriously challenged the status of public charter schools as public schools. For example, Chairperson Griffis recently observed during a public meeting of the Board of Zoning Adjustment that “[c]harter schools don’t come under the zoning regs” because “[t]hey are matter-of-right.” BZA Tr. (Apr. 26, 2005), at 114. Similarly, in discussions regarding development of the U.S. Armed Forces Retirement Home site, several members of the Zoning Commission appeared to understand that a public charter school was a “public school” for zoning purposes. ZC Tr. (June 6, 2003), at 16-38.

There are currently 52 public charter schools in the District of Columbia, serving more than 18,000 students. Yet it does not appear that any of them have been required to obtain an exemption from the Zoning Regulations in order to occupy or develop their respective spaces. This is strong evidence that the zoning authorities have treated charter schools as public schools, with “of right” zoning status, since the charter school law was passed in 1996.

It is telling that Mr. Rice does not even attempt to argue that a public charter school is a “private school.” Instead, he contends that AppleTree’s public charter school should be considered a “child development center,” presumably because AppleTree will be operating a school for preschool and pre-kindergarten children. But AppleTree holds one of only a few charters for this age children in the District. All other public charter schools are either elementary, middle, or high schools. The zoning authorities should establish a single rule for *all* public charter schools, regardless of the age of children being educated.

In any event, the public charter school does not meet the regulatory definition of “child development center,” which is a facility for the “licensed care” of specified persons. 11 DCMR § 199. Daycare centers, for example, are licensed by the Mayor. D.C. Code § 7-2034. A public charter school, by contrast, is not required to seek such a license. Rather, it receives a charter from one of the two chartering authorities, the D.C. Public Charter School

Board or the Board of Education, and operates under the supervision of that agency. It is an entirely different entity from the "child development centers" described in the Zoning Regulations. The Board of Zoning Adjustment appears to have recognized the distinction on at least one occasion. *See* BZA Tr. (Apr. 8, 2003), at 164. Our public charter school is more like the preschool programs operated at many public schools under the aegis of the federal Head Start program, which also are not considered "child development centers."

In summary, we understand a public charter school in the District of Columbia is a "public school" for most purposes, including the application of the Zoning Regulations. As a result, we believe AppleTree Early Learning Public Charter School may occupy the property at 138 12th Street, N.E., which is zoned R-4, as a matter of right. 11 DCMR § 330.5(a).

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me at 202.488.3990.

Respectfully yours,

A handwritten signature in black ink that reads "Russ Williams". The signature is fluid and cursive, with the first name "Russ" and last name "Williams" clearly distinguishable.

Russ Williams
Managing Director
AppleTree Institute for Education Innovation

CC: Mr. Cody Rice, Advisory Neighborhood Commissioner (SMD 6A03)
Hon. Sharon Ambrose, Ward 6 Councilmember
Mr. Tom Nida, Chair, DCPCSB
Dr. Patrick J. Canavan, Director, DCRA

C-TAB 3



Single Member District 6A-03
310 9th Street NE
Washington, DC 20002

November 2, 2005

Bill Crews
Zoning Administrator
Department of Consumer and Regulatory Affairs
941 North Capitol Street NE, Room 2000
Washington, DC 20002

Re: Response to AppleTree Letter on Zoning Treatment of Charter Schools

Dear Mr. Crews:

I am writing in response to a letter dated October 28, 2006 [sic] from the AppleTree Institute for Education Innovation to you regarding their proposed preschool at 138 12th Street NE. As you know, I wrote to you on October 6, 2005 regarding their need for zoning relief and requesting a written response on whether the zoning regulations have been correctly applied. In addition to responding to AppleTree's letter, I would also like to alert you to two additional zoning issues concerning AppleTree's proposed off-street parking and administrative office use.

With regard to the zoning regulations that you are charged with administering, the definition of what constitutes a "public school" for zoning purposes is clear. According to 11 DCMR 199.1, a public school must be "operated and maintained by the District of Columbia Board of Education." In this case, the proposed charter school will be operated and maintained by AppleTree, a nonprofit organization with a charter from the DC Public Charter School Board. Neither the organization operating and maintaining the building, nor the chartering authority, is the District of Columbia Board of Education (BOE).¹ Thus, at least for zoning purposes, the proposed use is not a public school.

There are sound public policy reasons for limiting "by right" zoning treatment to public school buildings that are operated and maintained by BOE:

- First, when BOE proposes a "by right" school there is a facility planning process with substantial community involvement and feedback. This process exists to engage affected neighbors and manages potential spillover effects. By contrast, AppleTree is claiming the right to 80% lot occupancy for a building with capacity for 72 students and 16-20 staff without any formal process to weigh concerns about traffic, noise, and effects on light and air of nearby properties.
- Second, for its public schools BOE has generally selected larger sites that provide for setback from neighboring properties, recreational fields, and adequate parking. By contrast, AppleTree proposes to embed their facility in the middle of a continuous block of residential rowhouses, leaving room for only three parking spaces and a rooftop play area.
- Third, if residents are dissatisfied with a BOE proposal or a public school's operation and maintenance, their elected school board representatives can be held accountable. By contrast, AppleTree answers first to their private board of directors and then to the DC Public Charter School Board, which is unelected.

¹ D.C. Code § 38-1702.05 (p) states that "A charter school shall be organized under subchapter I of Chapter 3 of Title 29, and shall not be deemed, considered, or construed to be an entity of the District of Columbia government."

- Fourth, BOE schools have enrollment boundaries that ensure that most of the public benefit of the school will accrue to the surrounding residential area that must absorb its impact. By contrast, charter schools have open admissions to all DC residents and cannot guarantee any level of enrollment benefit to residents in the immediate area of the school.

It is understandable that AppleTree would prefer the “by right” privilege rather than seeking zoning relief. If treated as a public school for zoning purposes, AppleTree can maximize their enrollment (and revenue) without regard to any other consideration. Having AppleTree seek zoning relief from the Board of Zoning Adjustment (BZA) would ensure a fair and open process to parallel what BOE undertakes in exchange for their “by right” treatment in the R-4 zone district. It also happens to be what the zoning regulations currently require.

AppleTree’s letter provides a number of quotes and citations in an attempt to confuse the issue of what a public school is for zoning purposes, but is unable to refute the clear language of the specific (zoning) regulations that you administer. AppleTree quotes a couple of passages from meeting transcripts, but these statements do not have any formal interpretive standing. As far as I know, there has been no BZA or Zoning Commission finding on this issue. AppleTree also cites a definition of “public school” from D.C. Code § 38-1701.01, however AppleTree leaves out the introductory language indicating that the definitions found there are only “for the purposes of this subchapter” and do not amend the zoning code. Furthermore, it appears that this definition may only refer to charter schools under the BOE chartering authority since Chapter 17 deals with BOE charters and does not mention the DC Public Charter School Board (which first appears in Chapter 18). AppleTree neglects to provide the definition of “public school” in Chapter 18 at D.C. Code § 38-1800.02(12)(B) which states in relevant part “Exception. -- The term “District of Columbia public school” does not include a public charter school.”²

Although AppleTree’s references ultimately have minimal bearing on the definitions in the zoning regulations, what AppleTree omits from the Chapter they cite is also interesting. First, there is D.C. Code § 38-1702.13(c) which notes that “Except as otherwise provided in this subchapter, a charter school shall be subject to all statutes, policies, rules, and regulations established by the District of Columbia that are applicable to nonprofit corporations.” Then there is D.C. Code § 38-1702.05(f)(3) which states that “If the Educational program of a charter school includes pre-school or pre-kindergarten, within 30 days of receipt of the charter, the Board of Trustees of a charter school shall seek to be licensed as a child development center by the District of Columbia government and shall maintain such a license once it is obtained.”

My proposed solution for the AppleTree project is to recognize the intended use of the building as a “child development center” for zoning purposes. This use encompasses educational uses similar to the AppleTree program such as child care centers, pre-schools, nursery schools, and before-and-after school programs. This use is permitted in an R-4 District as a matter of right per 11 DCMR 330.5(d) for up to 16 children. A child development center may serve additional children if the Board of Zoning Adjustment grants a special exception, and may expand beyond 40% lot occupancy with a variance.

AppleTree does raise an interesting issue of zoning consistency among charter schools. The Zoning Administrator could treat charter schools such as AppleTree that serve only 3 and 4 year olds as “child development centers” and treat charter schools with older children as “private schools.” Alternatively, the Zoning Administrator could treat all charter schools as “private schools.” Either treatment would conform to the zoning regulations as they are currently written, since the “public school” definition is reserved exclusively for buildings operated and maintained by BOE.

² Likewise per DC Code § 38-1800.02 (29): “Public charter school. -- The term “public charter school” means a publicly funded school in the District of Columbia that: (A) Is established pursuant to subchapter II of this chapter; and (B) Except as provided under §§ 38-1802.12(d)(5) and 38-1802.13(c)(5) is not a part of the District of Columbia public schools.”

As I mentioned earlier, there are two additional zoning-related issues that I would like to bring to your attention. These issues emerged during AppleTree's presentation to the Economic Development and Zoning Committee of ANC 6A (see attached report):

- First, the AppleTree proposal includes only 3 off-street parking spaces. AppleTree indicated that that these spaces would be reserved for loading and unloading of children. Thus, there are no off-street spaces for AppleTree's proposed maximum staffing capacity of 16 to 20 employees. If you decide to treat AppleTree as a public or private school for zoning purposes, 11 DCMR 2101.1 requires 2 off-street parking spaces for each 3 teachers and other employees (11 to 14 off-street parking spaces for the capacity of the building). These spaces could be provided on the existing lot behind the building, but would limit the lot occupancy. As you are aware, the requirement for child development centers is less onerous at 1 for each 4 teachers and other employees (4 to 5 off-street parking spaces for the capacity of the building). In either case, the current AppleTree proposal does not provide the required number of off-street parking spaces for teachers and other employees.
- Second, AppleTree proposes to have administrative offices for at least 2 staff members with responsibilities beyond the educational program at this location. If you decide to treat AppleTree as a public school for zoning purposes, note that the existing definition does not allow such administrative offices with responsibilities for "the entire school system." In this case, the entire school system is limited to the schools operated by AppleTree under their charter since each charter is treated as a local education agency. As a result, this administrative office use at this site is not permissible by right. Generally, in the R-4 zone, office uses beyond those covered by a Home Occupation Permit require a variance.

Based on these continuing concerns, I request that you provide a written response on your review of administrative actions for this property to ensure that your staff has not made any errors in interpretation or application of the zoning regulations.

Thank you for your continued attention to this matter. If you have any questions or need further information, please contact me at 202-544-3734 or rice6A03@verizon.net.

Respectfully yours,

//original signed//

Cody Rice

Advisory Neighborhood Commissioner (6A03)

cc: Dr. Patrick J. Canavan, Director, DCRA
Councilmember Sharon Ambrose
Russ Williams, AppleTree Institute for Education Innovation
Emily Paulus, DC Historic Preservation Office

**REPORT OF THE
ECONOMIC DEVELOPMENT AND ZONING COMMITTEE
OF ANC 6A
October 25, 2005**

Present: Commissioners Nick Alberti and Cody Rice; Resident Members Rich Luna, Drew Ronneberg, Bill Schultheiss, and Mary Spencer.

Commissioner Rice chaired the meeting.

HPA #05-522: AppleTree PCS at 138 12th Street NE

The committee heard a presentation by representatives of AppleTree Early Learning Public Charter School. AppleTree has purchased a building at 138 12th Street NE and applied for permits to expand the building for a preschool language and literacy program for 3 and 4 year olds. Because the building is in the Capitol Hill Historic District, the application has been referred to the Historic Preservation Review Board (HPRB) for design review. The HPRB hearing is scheduled for November 17, 2005.

AppleTree PCS was chartered by the DC Public Charter School Board (DCPCSB) in 2005 and is operated by the AppleTree Institute for Education Innovation, Inc., a 501(c)(3) nonprofit organization. AppleTree currently has a charter preschool for 35 children at Riverside Baptist Church at 680 I Street SW. They purchased 138 12th Street NE in May 2005 for a program expansion and administrative offices. Admission to their preschools is by lottery from applications for 3-4 year olds who reside in DC. There are no additional requirements aside from age and residency, and funding for the school comes from a per-pupil allotment of District tax dollars. Currently, ten families from Capitol Hill have applied for enrollment.

Since AppleTree has already received their charter from DCPCSB, they only need to file paperwork to expand their operation to a new building. No DCPCSB hearing is required. AppleTree has received an initial determination from the Zoning Administrator in the Department of Consumer and Regulatory Affairs (DCRA) that the use, number of students, and size of the expanded building would be a matter of right. Commissioner Rice has requested that the Zoning Administrator provide a written determination of whether there have been any errors in interpretation or application of the zoning regulations (see attached letter).

According to AppleTree's submission to HPRB, the existing 4,320 sq. ft. building is a two-story plus basement with dimensions of 36' x 40' on a lot that is 36' x 117.5'. This corresponds to 34% lot occupancy. Their plans call for an expansion to dimensions of 36' x 94' with an additional 800 sq. ft. third floor, patio and rooftop outdoor play area. This corresponds to 80% lot occupancy and 10,952 interior sq. ft. plus approximately 1,100 sq. ft. of usable roof space. The expansion would leave room for 3 parking spaces in the rear.

As proposed, the expanded building would have capacity for 72 students and 16-20 staff. There would be room for 4 classes of 18 students each. Each class would have 3 teaching staff. In addition, there would be a principal, a special education coordinator, 2 additional administrators with responsibility for organizational development, and potentially other part-time staff in the afternoon. Program hours would

be from 8 am to 6 pm with cleaning occurring after school hours until 7:30 or 8 pm. The program would initially run during the school year, but may expand to a summer program of 4-5 weeks. Student drop-off would be staggered and could occur in the front or rear. AppleTree has not requested a front loading zone and the three rear parking spaces would be for drop-off and pick-up. AppleTree is seeking other parking spaces off-site and would provide a transit subsidy to employees.

Several parents with current or prospective students spoke in favor of the effectiveness of the AppleTree program and the convenience of the new location to where they live. Some of these parents noted the large number of young children in the area and expressed the opinion that this is a use that the neighborhood needs and that schools belong in neighborhoods.

A large number of residents who live near 138 12th Street NE expressed opposition to the use of the building as a preschool. Concerns included:

- that this is an inappropriate use in the middle of a residential block with little parking and no buffer from surrounding residential properties like public schools usually have;
- the amount of traffic that would be generated by parents dropping off 72 children;
- potential blocking of the street, alley, and garages during rush hours while parents extract children from car seats, walk them into the building, and make the hand-off to staff;
- safety in the alley with additional traffic presenting a risk to children with yards that back up to the alley;
- excess traffic on several surrounding streets due to the difficulty of navigating one-way streets and Lincoln Park to reach the property;
- concerns about traffic/pedestrian safety related to the nearby unsignalized intersections at 12th & Constitution Ave NE and at Lincoln Park;
- noise from children playing on the rooftop recreation area;
- safety of children on the rooftop recreation area;
- effects on light and air of a 2+ story party wall extending past the rear of adjoining properties;
- that the proposal is trying to squeeze in a building that covers 80% of the lot when neighboring residential properties are limited to 60% by right;
- the visibility of the third story addition and play equipment on the roof;
- the compatibility of a building of this scale on the residential character of the historic district;
- the complete lack of green space in the rear of the property;
- no parking for 16-20 staff and the increased parking demand on the surrounding area;
- the possibility that AppleTree may go out of business and leave a vacant, non-conforming building;
- impact on the new preschool program at Maury ES;
- that slots for 3 and 4 year olds are not universally available and are being allocated through lottery system rather than by need of the student or family;
- operation will require food catering and trash pick-up, but the plans do not account for these needs.

Recommendation: 1) That the ANC send a letter to HPRB requesting a) that the hearing be delayed until DCRA makes a written determination of whether the proposed use is a matter of right or requires zoning relief and b) opposing the proposed design because of incompatibility with the surrounding neighborhood; 2) That the ANC send a letter to DCRA explaining the need for this project to received

prior approval from the Board of Zoning Adjustment; and 3) That the ANC send a letter to the District Department of Transportation asking them to require a traffic study for this proposal.

DDOT Request for Opinion Regarding Carsharing Spaces

Due to the late start in discussing this item, the committee decided to table discussion until the next meeting. In the interim, it would be helpful if Commissioners and residents would forward nominations to the committee (via Commissioner Rice) for on-street or off-street spaces that might be good locations to park carsharing vehicles. According to DDOT guidance, the on-street spaces should not be on streets with rush hour, street cleaning, Residential Permit Parking, or snow route restrictions. It was agreed that it would be helpful to invite representatives from DDOT, Zipcar, and Flexcar to the next committee meeting to answer questions about carsharing and the designation of on-street parking spaces for carsharing.

Next Scheduled ED&Z Committee Meeting:

Tuesday, November 29, 2005

7-9 PM

900 G Street, NE

Community Room of the Capitol Hill Towers

C-TAB 4

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November 21, 2005

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04753-00001

Mr. Bill Crews
Zoning Administrator
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Room 2000
Washington, D.C. 20002

Re: *Public Charter School at 138 12th Street, N.E.*

Dear Mr. Crews:

On behalf of the AppleTree Institute for Education Innovation, I am responding to the November 2, 2005 letter to you from Advisory Neighborhood Commissioner Cody Rice, as well as the November 14, 2005 letter to you from Advisory Neighborhood Commission Chair Joseph Fengler. Because Mr. Fengler's letter simply quotes excerpts from Mr. Rice's letter, this letter is directed to the points first made by Mr. Rice.

As you will recall from AppleTree's letter dated October 28, 2005, AppleTree recently purchased the property at 138 12th Street, N.E. for use as a public charter school serving preschool and pre-kindergarten children, ages 3-4. Some of the neighbors, apparently opposed to the locating of such a school in their community, have tried to block this project by a variety of means. One of their tactics involves the use of the Zoning Regulations.

Mr. Rice's core contention is that a public charter school is not a "public school" for zoning purposes, and thus that the AppleTree public charter school cannot develop and occupy its property "by right." The arguments advanced in support of this contention, however, are completely unpersuasive.

First, Mr. Rice invokes the definition of "school, public" in the Zoning Regulations, which refers to a building "operated and maintained by the District of Columbia Board of

Mr. Bill Crews
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Education.” 11 DCMR § 199 (2005). Because AppleTree is a non-profit organization, and is not the Board of Education, Mr. Rice argues that “at least for zoning purposes, the proposed use is not a public school.” 11/02/05 Letter at 1.

Mr. Rice simply ignores the fact that the regulatory definition was adopted in 1958, and last amended in 1968. At that time, all public schools were operated and maintained by the Board of Education. But times have changed. Since then, both Congress and the D.C. Council have enacted laws authorizing the creation and operation of public charter schools. The mere fact that the zoning regulations have not caught up with these legislative changes is no reason to ignore them. Yet Mr. Rice does just that: Although AppleTree made precisely this point in its October 28 letter, Mr. Rice has provided no response to this fact.

Mr. Rice does point out, correctly, that there are *two* charter school regimes in the District of Columbia. 11/02/05 Letter at 2. Yet a careful consideration of the statutes leads to the conclusion that both kinds of charter schools—*i.e.*, those chartered by the Board of Education *and* those chartered by the Public Charter School Board—are “public schools.”

Subtitle IV of Title 38 of the District of Columbia Code is entitled “Public Education — Charter Schools.” The heading alone is substantial evidence that D.C.’s elected officials consider charter schools to be institutions of *public* education—*i.e.*, public schools. And under this heading there are two chapters authorizing charter schools: Chapter 17, which was enacted by the D.C. Council and applies to schools chartered by the Board of Education; and Chapter 18, which was enacted by Congress and applies to schools chartered both by the Board of Education and by the Public Charter School Board.

There can be no serious dispute that schools chartered by the Board of Education under Chapter 17 are “public schools” for all pertinent purposes, because the statute says exactly that: “A charter school shall comply with all the terms and conditions of its charter *and shall be considered a public school for all purposes* except as otherwise provided in this subchapter.” D.C. Code § 38-1702.05(a) (emphasis added); *see also* § 38-1701-01(14) (“For the purposes of this subchapter, the term . . . ‘[p]ublic school’ means either a public school under the authority and control of the Board *or a charter school*”) (emphasis added). Since nothing in Chapter 17 provides that schools chartered by the Board of Education should *not* be considered public schools for zoning purposes, it necessarily follows from the statutory language that they are.

The only real question, then, is whether schools chartered under Chapter 18 should be treated *differently* than schools chartered under Chapter 17. The answer is no. Chapter 18 applies to all charter schools in the District of Columbia, including those chartered by the Board of Education. The D.C. Council’s decision in Chapter 17 that such schools are “public schools” is equally applicable to schools chartered by the Public Charter School Board. Congress did not distinguish between chartering authorities in Chapter 18 with regard to the public nature of the charter school.

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Mr. Rice points out that the definitions provided in Chapter 18 state that “[t]he term ‘District of Columbia public school’ does not include a public charter school.” D.C. Code § 38-1800.02(12)(B). It is important to note that this does *not* say that a public charter school is not a “public school”; rather, it says that a public charter school is not a “*District of Columbia* public school”—that is, a public school overseen by the District of Columbia Board of Education. One purpose of Chapter 18 was to set up an educational *alternative* to the Board of Education-run system. The definition makes that clear. Indeed, if Congress had intended for public charter schools not to be treated as public schools at all, it could have said so; instead, it subjected public charter schools to some regulations applicable to public schools (such as the civil rights laws) while exempting them from others.

Second, Mr. Rice asserts that there are “sound” public policy reasons not to treat public charter schools as public schools. In general, he is simply disagreeing with the judgment already made by Congress and the D.C. Council to establish a charter school system as an alternative to traditional public schools. The zoning authorities cannot rely on such policy arguments to disregard the clear commands of elected officials. In any event, Mr. Rice’s policy concerns are misdirected.

Mr. Rice asserts that the Board of Education “has generally selected larger sites.” 11/02/05 Letter at 1. Even if true, this is irrelevant: The charter school law was designed to allow *flexibility* in education, including the siting of educational facilities. Public charter schools are expressly given the authority “[t]o acquire real property for use as the public charter school’s facilities, from public or private sources.” D.C. Code § 38-1802.04(a)(2). If Congress had seen fit to regulate the size of such properties, it could easily have done so; but it did not. Rather, the express congressional authorization for public charter schools to acquire property from “private sources” would, if anything, seem to contemplate that such schools would be located in smaller, neighborhood locations.

Mr. Rice next points out that the members of the Board of Education are elected, whereas the members of the Public Charter School Board are not. 11/02/05 Letter at 1. But this is a policy decision that was made by Congress. Congress wanted to *insulate* public charter schools from the pressures faced by elected officials. *See, e.g.*, D.C. Code § 38-1802(j)(1) (“except for officers or employees of the eligible chartering authority with which a petition to establish a public charter school is filed, no governmental entity, elected official, or employee of the District of Columbia shall make, participate in making, or intervene in the making of, the decision to approve or deny such a petition”). But Mr. Rice is wrong to suggest that the chartering officials are unaccountable to the electorate. To the contrary, they are appointed by the Mayor, an elected official, from a list prepared by the Secretary of Education, in accordance with criteria specified by Congress. D.C. Code § 38-1802.14(a)(1).

Mr. Rice’s final policy argument is that Board of Education schools have enrollment boundaries, but public charter schools do not. 11/02/05 Letter at 2. Once again, Mr. Rice is

Mr. Bill Crews
November 21, 2005
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simply arguing with a policy decision made by Congress: "Enrollment in a public charter school shall be open to all students who are residents of the District of Columbia" D.C. Code § 1802.06(a). Congress intended that educational opportunities provided would be enhanced by fostering an environment in which all families have equal opportunity to enroll their children in new, and often times innovative (*e.g.* outward bound elementary curriculum, school-wide focus on public policy, etc.) public charter schools. Further, a lottery system for selected students only comes into play when a public charter school has sufficient applicants for full enrollment. Otherwise, children are enrolled in public charter schools on a first-come, first-served basis.

Third, Mr. Rice states that neither the Zoning Commission nor the Board of Zoning Adjustment (BZA) has formally addressed the question whether public charter schools are, as their name indicates, public schools. 11/02/05 Letter at 2. AppleTree acknowledged as much in its October 28th letter, pointing out the likely reason was that no one previously has seriously challenged the status of public charter schools as public schools. Indeed, today there are 52 charter schools (on 64 campuses) within the District of Columbia, and Mr. Rice has not identified a single one that has been required to seek a zoning variance or special exception in order to develop or occupy its selected property.

In AppleTree's previous letter, it was pointed out that the Chair of the BZA has stated, on the record, that "[c]harter schools don't come under the zoning regs" because "[t]hey are matter-of-right." BZA Tr. (Apr. 26, 2005), at 114 (attached). Mr. Rice responds that such statements "do not have any formal interpretive standing." 11/02/05 Letter at 2. This response fails to recognize the undisputed fact that the one zoning official who has addressed this issue on the public record has apparently agreed with AppleTree's position. As far as we know, all previous charter school facility projects in the District of Columbia have been treated as "matter of right" for zoning purposes.

Fourth, Mr. Rice states that his "proposed solution for the AppleTree project is to recognize the use of the building as a 'child development center' for zoning purposes." 11/02/05 Letter at 2. But Congress has already rejected this proposal. When it was enacted, the charter school law did require that a charter school offering preschool or pre-kindergarten education would be "licensed as a child development center by the District of Columbia Government." D.C. Code § 38-1802.02, Historical and Statutory Notes (quoting former subsection (17)). However, that requirement was *repealed* in 2000 by Public Law 106-552, § 120(c)(2)(A), and replaced with a new requirement that "[a] public charter school which offers a preschool or pre-kindergarten program shall be subject to the same child care licensing requirements (if any) which apply to a District of Columbia public school which offers such a program." D.C. Code § 38-1802.04(18). Since no such licensing requirement applies to D.C. public schools, public charter schools serving 3-4 year olds similarly cannot be required to be licensed as child development centers. The AppleTree school, therefore, does not fit the Zoning Regulations' definition of a child development center. 11 DCMR § 199.

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Mr. Rice states that “[a]lternatively, the Zoning Administrator could treat all charter schools as ‘private schools.’” 11/02/05 Letter at 2. But that is not an option. The D.C. Council has specifically provided that “A private . . . school shall not be granted a charter.” D.C. Code § 38-1702.01(d). The issuance of a charter, therefore, necessarily means that a school is *not* a private school. Rather, it is a public school unless Congress or the D.C. Council provides otherwise.

Public charter schools are public schools in every way except their freedom from the bureaucratic requirements of the traditional school system. They are open to and free of charge to D.C. residents, and they are publicly funded and publicly accountable. Each public charter school is organized as a non-profit corporation under D.C. law and is governed by a citizen board of directors, and at least two members must be parents of children attending the school. Each public charter school is overseen by one of the two chartering authorities, which closely monitor the finances and performance of the schools they oversee. *See* “The Facts About D.C.’s Charter Schools” (FOCUS Oct. 6, 2005) (attached). Mr. Rice’s contrary position simply cannot be reconciled with the realities of the charter school movement.

We understand that legal action has been threatened in the event that zoning officials conclude that public charter schools are public schools with “by right” development and occupancy privileges. AppleTree has no need to make, or respond to, such threats. Public charter schools in the District of Columbia are, in fact and law, “public schools” for virtually all purposes, including application of the Zoning Regulations. We are confident that you and other officials will agree with that conclusion. In the unfortunate event that litigation becomes necessary, we are also confident that a court would agree with AppleTree’s position. AppleTree wants to teach young children to read and write, not fight lawsuits with the neighbors.

Finally, AppleTree would like to update you regarding AppleTree’s attendance at the ANC 6A meeting held at Miner Elementary School on November 10th. At that meeting, AppleTree presented its revised proposal for its school, which responded to the feedback we received from some concerned neighbors at the October 25th ANC6A Economic Development & Zoning Committee meeting. In addition to offering a number of revisions to the original proposal (attached), AppleTree agreed to withdraw its original plans for the school from the HPRB and to cancel its appearance at the November 17th HPRB meeting. AppleTree withdrew these original plans and will submit revised plans to the HPRB this week.

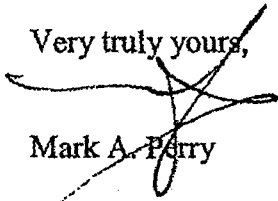
At the November 10th meeting, AppleTree again offered to meet with a group of concerned neighbors in an effort to resolve any outstanding issues. A meeting with a group of the neighbors has been tentatively scheduled for Tuesday, November 29th. We will keep you informed regarding any further developments as they occur.

GIBSON, DUNN & CRUTCHER LLP

Mr. Bill Crews
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We thank you for your attention to this matter. If you have any questions or I can provide any additional information, please let me know.

Very truly yours,


Mark A. Perry

MAP/dl

cc: Councilmember Sharon Ambrose
Councilmember Jim Graham
Councilmember Kathy Patterson
Dr. Patrick Canavan, DCRA Director
Neil Stanley, DCRA Deputy Director
Cody Rice, ANC Commissioner (6A03)
Emily Paulus, Historic Preservation Office

C-TAB 5

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
HISTORIC PRESERVATION REVIEW BOARD

EXCERPT OF PUBLIC HEARING:

Capitol Hill Historic District
Apple Tree Institute
138 12th Street, N.E.
HPA #05 -522

Thursday, December 15, 2005

Room 220 South
441 4th Street, N.W.
Washington, D.C. 20001

The Board convened the hearing on
construction permit applications and other items,
pursuant to notice.

Board Members Present:

TERSHER BOASBERG, Chairman

KATHY HENDE RSON
DENISE JOHNSON
JAMES S. KANE
ANNE LEWIS
GAIL S. LOWE
RONNIE W. MCGHEE
JACQUE PATTERSON
ROBERT SONDERMAN
JOHN VLACH
AMY WEINSTEIN

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P R O C E E D I N G S
Capitol Hill Historic District

Apple Tree Institute

138 12th Street, N.E.

HPA #05 -522

(concept/alteration, rear addition)

12:18 p.m.

CHAIRMAN BOASBERG: Let me just call this
matter up, which is 138 12th Street, N.E. This is
an application by the Apple Tree Institute for
Education for an expansion of the facility there,
and it's obviously a contentious issue because this
was one of the only commercial structures on a block
of residential structures and the use, obviously the
proposed use is not residential.

Now, we as a Board do not get into use. We
have no control over what goes on inside the
structure. It could be a bomb -making facility for
all we're concerned. We don't have anything to do
with use. Use is an issue that's taken up by the
Zoning Commission, as you know.

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Our jurisdiction also does not relate to traffic, and many of you were here before when we heard the previous case. We don't get into traffic, appropriate traffic, not appropriate traffic, except to the extent that it might shake the structure so much, like the St. James Church that we are concerned about.

So don't mention traffic and don't mention use, because we can't deal with that at all, and it just shows that you're not focusing on what the real issues are before us, the Historic Preservation Review Board. And those real issues are, is the addition compatible with the neighborhood as a whole, not necessarily with just this street but with the Capitol Hill Historic District as a whole. Is it compatible?

And obviously it matters what you see from the street, which is not going to be very much, if anything, but also the public alley behind there and what you see in that, elements of compatibility. What else is back there? What is on either side?

What else is in the alley? Those are considerations.

We know that you also have --to the citizens, now --other concerns with it, but again, those are out of our purview. We do have some additional letters. What I would like to do is, I would like to have Emily sort of discuss her issues with the case because she has been on top of this for a while. There has been a great deal of modifications since the case started. She is aware of that.

And then we will hear from the application, not to why you need the space or how much you need the space, or you've been looking all over for a space and you can't find anything, and this is the only place possible in the whole world that you could do this. We understand that. We're interested in, you know, what you're going to do, specific things you're going to do, as well.

And then for the neighborhood, let me just get an idea. First we will listen to groups. That's the ANC, if there an ANC. Is there an ANC

here that's going to testify? Yes, sir. And is there a neighborhood organization, not an individual, an organization? Okay. Then you're going to be next. Okay? We would like you, if you can, to limit the organizational testimony to five minutes.

And then if there are members from the community that feel that they need to speak out because their views have not been represented, or they feel compelled to speak out on a cold day like this, then we will hear from you but we'll limit that to three minutes. To the extent that you can combine your testimony, that would be helpful to us. Okay?

So let's get started. We're very pleased that you have come down on a day like this. Obviously it's of concern to you, and most of us are very concerned citizens who live in the historic districts as well, so we're very much aware of your concerns, but let's limit ourselves to the issues today.

Emily?

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MS. PAULUS: Thank you very much, Mr. Chair. I think you stole maybe a little bit of my thunder there, but I appreciate the comment, particularly about the zoning. The staff is very well aware that there are some pretty serious zoning issues that have yet to be resolved on this project and we are well aware that those issues will appropriately be addressed through the Zoning Administrator's office and DCRA.

So, with that, I will just give a brief overview of the proposal and just set the stage a little bit for the location and the context of this particular project. What is before you this afternoon is concept for a three-story with partial rooftop addition to the rear of a contributing former commercial property in the Capitol Hill Historic District. This building would accommodate the conversion of the property, which is currently vacant, into a charter school for the Apple Tree Institute for Education.

MR. KANE: I'm sorry to interrupt, but I'm unfamiliar with your use of the words "charter

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school" here. Has this school been chartered by either of the chartering authorities here in the District of Columbia?

MS. PAULUS: I will perhaps let the applicant answer that.

MR. KANE: Okay. Then I'll wait until later. But "charter school" means something. I'm on the board of a charter school, and so it makes a real, real difference --

MS. PAULUS: Yes, and frankly, I think that has been kind of the crux of the issue.

MR. KANE: But it's one that I would like to understand at the time. Thank you. Sorry to interrupt your presentation.

MS. PAULUS: Okay.

CHAIRMAN BOASBERG: Can we refer to the building as a --how would you like to refer to the building?

MS. PAULUS: An educational --

MR. KANE: Educational, until we find out that it's a charter school.

MS. PAULUS: Okay.

MR. KANE: Thank you.

CHAIRMAN BOASBERG: Let's just talk about it as educational.

MS. PAULUS: Okay, and I'm sure the applicant will address Mr. Kane's question directly.

CHAIRMAN BOASBERG: Yes. Go ahead.

MS. PAULUS: Okay. The property is located mid-block on the west side of 12th Street, N.E., just north of Lincoln Park. The immediate vicinity is composed primarily of row houses standing two and three stories in height, so the surrounding character is predominantly residential, and the subject property is really the only commercial or institutional facility on that particular block.

We know from some research that was conducted by the applicant that the property or the building on the site was constructed sometime in the 19-teens. We know it was there by 1916, when it first appears in the city directories, and at that time it was being used and functioned as an office facility.

Today the building, it's fair to say, retains a high degree of its architectural integrity. It has experienced very minor alterations on the exterior over the years, some very minor cosmetic modifications on the facade. Other than that, it is very much intact.

I just want to give a brief overview of how this project has evolved to the point that it is today. I have been working with the applicants over the past couple months, and there have been some substantial modifications made.

When this project first came to the staff back in late October, early November, the addition measured about 54 by 36 feet and had a lot occupancy of about 80 percent. The plans also included an outdoor play or recreational space on top of the second floor addition, and the elevator core was located within the original main block of the building.

After a staff report was issued and some discussion with the applicant, they did decide to withdraw that proposal from consideration at the

November HPRB meeting, and they went back to the drawing board and made some revisions, and that is what is before you today. As you can see, the project or the addition has been scaled back to about 60 percent lot occupancy, with the revised footprint measuring about 30 by 36 feet. The rooftop play area has been eliminated, and now there is a sunken courtyard at the basement level, which you can see in the site plan and in the building section.

The partial third floor addition does remain, and it includes a small classroom, bathroom, staircase, and the elevator shaft. It would be set back about 26 feet from the front facade, and the staff is relatively comfortable at this point that it would not be visible from 12th Street, although we are asking the applicant for some additional perspective views to ensure that invisibility. The elevator as well would be housed within the addition, as I mentioned, and that has addressed staff concerns that previously existed regarding the extent of demolition to the historic building.

The design of the addition, the staff is very comfortable with, brick with paired and single double-hung windows, very much in keeping with the character of this historic district. The minor cosmetic alterations on the front facade include straightforward window replacements, new doors, etcetera, which the staff has no issue with at this point.

We take no issue really with the fundamental aspects of this proposal. The addition and the partial rooftop addition are not uncommon projects that have been reviewed and approved by this Board. We feel that the reduction in the overall scale and size of the addition is much more in keeping with the character of this block and is much more proportional to the building that it's being added to, so we are very comfortable with the overall size and massing of the addition.

The proposed height of the addition with the partial third floor is not a concern in this instance for the staff. Certainly there have been many partial rooftop additions approved by this

Board in Capitol Hill, and I think the sort of main -the first thing that the staff looks like is the overall immediate context. In this alley you have buildings of two and three stories in height, as opposed to a very consistent or cohesive two-story height, so for that reason we are comfortable with the resulting height along the alley.

Certainly this lot in particular is wider than a typical Capitol Hill lot. It's about 36 feet wide, so the resulting mass will be larger than a typical row house addition. However, that's the historic condition of this particular property, and it's different than a situation of two row houses being combined to create one large addition, where we have seen that and that has presented some issues for the staff in other cases, but here we have no concern with that.

I think that generally wraps up the staff issues. Again, the visibility is always a concern, and I think as this project moves forward into design development, the staff would expect a flag test and some additional information on visibility,

just to ensure that the third floor is completely invisible from 12th Street. We will want to take a closer look at the sunken courtyard proposed for the rear and give a little bit more thought to how that would be treated and how that would actually impact the rear of the property.

So with that, I think I'll turn it over to the applicant.

CHAIRMAN BOASBERG: Thanks, Emily.

And could you identify yourselves? Make sure everybody who has testified will fill out a card. It's on the witness table. Give it to the reporter. Thank you.

Yes, sir. Who would like to proceed?

MR. MCCARTHY: My name is Jack McCarthy.

CHAIRMAN BOASBERG : You'll need to press your mike. You'll need to talk into the mike because everything is being recorded. Yes, Mr. McCarthy.

MR. MCCARTHY: My name is Jack McCarthy, and I'm the managing director of Apple Tree

Institute, and I would like our other people to introduce themselves.

MR. WILLIAMS: Hi. I'm Russ Williams. I'm the executive director of the Apple Tree Early Learning Public Charter School.

MR. deBETTENCOURT: And I'm Dan deBettencourt, president of DBF Associates, architects, the architect working on the project.

CHAIRMAN BOASBERG: Okay.

MR. MCCARTHY: And we were going to have Dan just kind of go over the information.

CHAIRMAN BOASBERG: Go ahead.

MR. MCCARTHY: Thank you.

CHAIRMAN BOASBERG: And we're not getting into use, whether you need it, whether we need the school, whether we don't need the school, what it is. Go ahead.

MR. deBETTENCOURT: I'm going to talk about what we're doing and what we're not doing. We're not doing anything to the front --

CHAIRMAN BOASBERG: Put your microphone on.

MR. deBETTENCOURT: The front of the building, as Emily said, we are leaving essentially intact. We are going to be replacing a rotten gutter/downspout, repainting, replacing single glazed windows with double glazed windows, essentially leaving the building intact.

And we do want to add some awning across the front. We have some evidence, from some rivets and holes in the front, that at some point in time there has been some type of awning there. But that's all we're doing to the front of the building.

The existing building is two stories plus a basement, extends 40 feet deep, for a total of 4,320 square feet. We're extending that building back to 70 feet. To my right you see a series of photographs showing our building and then the building to the left and the building to the right, as you look at it from the rear. The building to the right extends to 70 feet deep, and we are going to be lining up exactly with the rear of that building. That's a two and a half story structure,

of course above grade, because they have a third story partial basement on that one.

The height of the front of our building from 12th Street is 29 feet, between 29 -2 and 29 -4, given the condition of the copper roof roll that's on top of the building. The height of our addition as we place it on the back will be 34 feet 4 inches, or it will stand 5 feet above the top of the copper roof roll.

In addition to that, though, there is an elevator shaft, and as Emily mentioned earlier, we had initially placed the elevator inside the existing building. At staff's suggestion, and we've been talking to several construction experts to see about this, we have decided to move the elevator outside of the existing building. It does two things.

We had actually done a flag test before. When the elevator projected forward at its height of 13 feet 4 inches above the top floor landing, which elevators must, about the top 10 inches of the elevator was visible from an oblique angle on 12th

Street. Now that we've moved the elevator back an additional 12 feet, I'll just get up and I'll show you something.

CHAIRMAN BOASBERG: Yes, but you've got to talk into the mike.

MR. deBETTENCOURT: I understand. I'm just going to put a drawing up.

CHAIRMAN BOASBERG: Go ahead. Don't talk. You could yell, actually.

MR. deBETTENCOURT: On the wonderful weather we had yesterday, this photograph shows me standing on top of the building holding a flag that's 13 feet 4 inches tall. Russ Williams took a camera -- I first moved backward from the building until it was not visible, and this is the location of the front of the elevator shaft. Russ walked up and down 12th Street in every area, and it's not visible from 12th Street.

Now, one of the reasons is, on both sides of us are facades, and then two buildings down the building structures are much taller. So it's not visible --

CHAIRMAN BOASBERG: I'm sure Mr. Williams is objective, but you'll have to do it with Ms. Paulus.

MR. deBETTENCOURT: That's correct.

CHAIRMAN BOASBERG: Okay, thanks.

MR. deBETTENCOURT: I just wanted to make sure that you knew the weather yesterday, as much as anything else.

CHAIRMAN BOASBERG: You didn't want to try it today?

[Laughter.]

MR. deBETTENCOURT: Too late today.

CHAIRMAN BOASBERG: No, I understand.

MR. deBETTENCOURT: The rear of the building will be 70 feet back from the front property line. The property is about 117 feet and change deep, so we will stand 47 and a half feet off of the rear property line.

The rear of the property, as you can see right now, the rear photograph when you look at it shows a building of single and paired arched openings with double and triple header course brick

arches on top of those. We have strived to use the same architectural vocabulary on the back of the building.

Once again, this building we recognize is 36 feet wide, and it's a difference and a departure from the existing row homes that are built in the area. Our architecture, what I tried to do in the architecture was to mass paired windows in the center on the rear, have single windows on the side, and as I got to the top floor, to use individual arched window openings to break the vocabulary a bit, instead of standing three stories tall.

As you can also see from the photographs that I have, I have another series of photographs looking across the alley, this vocabulary is found in the neighborhood. I will stand up one other photograph. This photograph on the top shows an aerial satellite photograph of the neighborhood. The buildings in this neighborhood, as Emily talked about before, are a combination of two and three stories.

Some of the buildings -- there is a building across the street and down from us that is four units wide, that actually extends to an 80 percent lot coverage, about 80 feet deep, and stands a full 1 three stories tall. That being the one three-story rear facade, that was one of the reasons I felt comfortable with breaking the vocabulary from paired arched openings to single arched openings at the top, in reflection of what we saw for three stories of full rear walls.

In addition, once again I want to stress that we do not project beyond the building that you see on the rear of the elevation to the right. We will stand taller than that, of course. The existing buildings are not 34 feet 4 inches tall. We are.

The construction of our building by code must be noncombustible exterior walls. We will be building the exterior of this building out of masonry. All exposed sides and rear of the building will be masonry, and I think I have identified that with Emily, on a presentation to her.

The below -level courtyard is intended to be an extension of what's called a rainy day room, which is an activity center. We have three classrooms and a rainy day room. And that would be capped and surrounded, as it 's shown in the elevation, with a protective railing around that courtyard.

So I think that that's enough discussion. If you want to hold the discussion to the building, that's a discussion of the building.

CHAIRMAN BOASBERG: And the courtyard.

MR. de BETTENCOURT: And the courtyard.

CHAIRMAN BOASBERG: That's fine, and you'll have a chance, if there's something that's raised that you feel you have to reply to, that hasn't been raised, you know, we'll do it. Okay.

Now, Mr. McCarthy, Mr. Williams, do you have anything else to say? Yes? Architecture. Go ahead.

MR. MCCARTHY: Well, I wanted to answer Mr. Kane's question.

CHAIRMAN BOASBERG: Yes. Go ahead.

MR. MCCARTHY: Apple Tree Early Learning Public Charter School is chartered by the District of Columbia Public School Charter Board. We have a charter.

CHAIRMAN BOASBERG: Okay.

MR. KANE: Just so you know, there are two chartering authorities in the District of Columbia. One is the public school and one is the chartering authority.

MR. MCCARTHY: By the Mayor.

MR. KANE: Yes.

CHAIRMAN BOASBERG: So we can call it a charter school?

MR. KANE: If he represents it that way, yes.

CHAIRMAN BOASBERG: All right. Strike "educational institution," put "charter school." It's a little shorter, so that's good. Thank you Mr. Williams, anything?

MR. WILLIAMS: Not at this time, sir.

CHAIRMAN BOASBERG: Thank you.

Okay, why don't you guys sort of relax a little bit, go back to the seats, and let's hear from the neighbors. First the ANC, then the neighborhood associations, then individuals.

Okay, you heard our admonition at the top of the program.

MR. ALBERTI: Yes, and I will respect it.

CHAIRMAN BOASBERG: I know you will. Give us your name, and again, fill out your card.

MR. ALBERTI: My name is Nick Alberti, and I represent ANC 6A. The SMD I represent is actually across the street from the proposed structure. I thank you for hearing me today.

I believe that the Board has gotten a letter from the ANC several weeks ago. In that letter we voiced many concerns based on the original drawings and plans that we saw. Those concerns still apply to the revised plans, so I want to point that out.

I just want to say --

CHAIRMAN BOASBERG: Do we have such a letter, Emily?

MS. PAULUS: I don't think you do. I can pass it out. I didn't include it in the packets because it was specific to the earlier --

CHAIRMAN BOASBERG: To the earlier proposal.

MS. PAULUS: --proposal, so I don't know if maybe perhaps --

CHAIRMAN BOASBERG: Well, Mr. Alberti, maybe you could comment on -- in the first place, maybe you didn't get a chance to see the revised proposal.

MR. ALBERTI: Well, I have seen the drawings from two weeks ago, I believe. I'm not sure about that date. But many of the points that I will make are points that were made in the letter, and they apply today, and hopefully you will have a chance to see that letter.

CHAIRMAN BOASBERG: That's fine. Sure.

MR. ALBERTI: I think the overall design is something that the ANC opposes. I want to point out that care needs to be taken with the addition to this building because this building is the width of

two regular lots in a historic residential neighborhood. 12th Street is a very narrow residential street. This building, I think many of the concerns are going to center around the rear addition, so they really kind of are with respect to the alley.

The alley lies between two residential streets, 11th Street and 12th Street, both of which are residential blocks. Perpendicular, partway up the block, is another alley which is now named Walter Hoop Court, which is a residential alley. And the alley itself spills out onto Constitution Avenue, right in the middle of the block of Constitution Avenue, so when you're looking on Constitution Avenue you do see right down this alley and can see the rear of those homes from Constitution Avenue, so I want to point that out.

Although this building has a commercial past, its design fit into the residential neighborhood because the double width rested on a footprint that was less than 40 percent, so it didn't seem to loom over the neighborhood or be

obtrusive. The remainder of the lot in recent history has been used for parking, and much of this area will still be needed, under the proposed use, for parking requirements.

The proposed design does not fit into the residential context as a three story box. Regardless of how you decorate the windows in the back and what architecture is used, the rear wall of this building will be 36 feet wide, and as you have heard, it will be three stories tall, 34 feet tall, plus an elevator shaft extending above that.

I want to point out that more than 60 percent of the footprint of this building is going to be a full three stories, which is much different than the current building or surrounding properties. The surrounding contributing structures tend to step down as they approach the alley, and the back is highly articulated, with doglegs, porches, green space, and other features that soften the rear of the buildings, the rear massing. As proposed, the structure would dwarf those surrounding contributing

structures and it would dominate the other residential properties.

MR. MCGHEE: What is the height of the adjacent properties on either side?

MR. ALBERTI: I don't know the exact height at this point, but they are two stories above a sunken half -basement, an English basement. So I don't know exactly what they are at this time.

CHAIRMAN BOASBERG: I think the gentleman said that their roofs would be about five feet higher than the adjoining --

MR. deBETTENCOURT: I'll respond later.

CHAIRMAN BOASBERG: Okay.

MR. ALBERTI: And I think maybe some of the neighbors might have details on that.

CHAIRMAN BOASBERG: Okay. Thank you.

MR. ALBERTI: We have serious concerns about the visibility of various structural and mechanical elements that I don't think have been adequately addressed by the applicant. I mean, today is the first time we have heard anything about the flag test, and so we haven't had a chance and

neither have you had a chance to digest any of that information.

I think in particular we have concerns about the visibility of the rear structure from Constitution Avenue and the mechanical equipment that will sit on the roof. From Constitution Avenue you look down this wide alley, and it's a fairly wide alley, you look down this wide alley from Constitution Avenue. This property sits towards that end of the alley, and so you will see this, it's likely that you're going to see this rear addition from Constitution Avenue, which will be a huge box.

What we haven't heard anything about is the mechanical equipment that's going to sit on the roof. Presumably this is going to be a substantial amount of equipment. They're talking about housing 54 students and 20 staff, so the mechanical equipment will not be insubstantial, and it's going to sit in front of that addition on the 12th Street side. And we have heard no information about the height of that or the visibility of that mechanical

equipment or the massing of it, so that information is missing from us and from you.

I would like next to talk about the courtyard, that play area that they talk about. It's kind of an extension of the building, as they said. It's an extension of the basement area that juts out. We have very little information about the design of that courtyard.

Today for the first time it was mentioned that there will be fencing around that sunken area, which one would expect, since it's a children's play area. But this is historic back yards and gardens, and we don't know what that fencing will look like. We have no information.

This is a play area. Presumably it will have age-appropriate play equipment for 54 students, so presumably they're going to have play equipment that is of the nature that you would find in a public playground, not insubstantial play equipment. It's a play area that needs to be protected, so presumably there will be surfacing. We have no information on what that surfacing will be and how

it fits into the context of the neighborhood. So those are very much of concern to us.

I have sort of, I think, gone over our major concerns, and you'll hear more details from the neighbors and so I don't want to belabor that. But I would like to make a recommendation to the Board, and that is that we delay this review by your Board until DCRA has a chance to review the permit process.

As you know, there are open zoning issues on this building, and they may have a large impact on the building's footprint, the massing and the size, depending on what the Zoning Administrator rules. And I think that these questions should first be resolved, as they will have a large impact on the design that is submitted to your body. Despite, and I think this was said in the staff report, that the previous Zoning Administrator had ruled this as a matter of right, despite that ruling, the current Zoning Administrator has very clearly told us that that ruling is now under review.

CHAIRMAN BOASBERG: Okay, okay.

MR. ALBERTI: And just as a matter of as it relates to charter schools, I'll say that how charter schools are treated in the zoning laws is the crux of that zoning issue. I just want to point that out.

You know, as I said, there are open issues about the visibility and the features of the mechanical equipment. The applicant has had ample time and ample notification to provide full information to you and to the community, but they haven't done that yet. So I see no reason why HPRB could not defer this case until the applicant has submitted plans for permits. This deferral would likely generate additional information that would be useful to HPRB.

CHAIRMAN BOASBERG: Okay. Thank you.

MR. ALBERTI: Just in conclusion, let me just summarize what we would like to see happen. I mean, if you don't defer this, what we would like to see happen is that HPRB take steps, have Apple Tree take steps to reduce the looming institutional

presence of this addition, and further to submit exhibits that will allow us to properly evaluate all of the features that we are lacking information on now.

Thank you very much.

CHAIRMAN BOASBERG: Thanks, Mr. Alberti.

Very constructive, very helpful. Thank you.

Yes, sir?

MR. FALING: First of all I would like to take this opportunity to thank the Board for giving us an opportunity to express our views and our concerns related to Apple Tree's proposed institution.

I would like to introduce myself. My name is Herb Faling. I have lived on Capitol Hill for over 25 years. I have lived within a four-block radius of this proposed site throughout those 25 years. I currently live at 143 11th Street, where I have lived for the last 15 years with my family. It borders the alley just north of the proposed site. And for what it's worth, I have been involved in the construction business throughout my career. I am

vice president of construction operations for Civo(?) Construction.

I have looked at the information that we have received from Apple Tree. We have seen different iterations of the building, and we have had many concerns that have been expressed here, but what I would like to try and do is underscore many of the things that Nick was saying. And I think one of the things that's important is, to put this in context, I would like to use some visual aids, and if I can ask the architect, I would like to use their easels.

CHAIRMAN BOASBERG: Sure, you can ask them. Are those their easels?

MR. FALING: Okay. The first board that you see here is a bird's eye panorama of the 12th Street alleyscape, and Nick had mentioned how the roof lines descend. What we need to keep in mind is that most of these buildings are 16 to 18 feet wide. The majority are two -story with English basements. There are some three -story buildings on that block, but the buildings waterfall to back gardens, and

many of the existing structures have their original carriage houses, or they have been replaced with garages that blend in with the historic nature of that particular block.

What I think is important about that particular concept is that from our perspective, this particular alley is a very wide alley, and it's very important to the neighbors in that alley as an architectural feature. When you're driving down that alley, it's wide, it's clean. The back yards are clean. The garages are clean. And everything is descending, so that the mass is to the front, to the 12th Street side.

What Apple Tree has proposed to do is to extend the building back and up. The third story will actually be a full story above the adjacent properties, and it's going to be overwhelming to the adjacent properties.

The parapet on the building to the left is approximately 18 inches above the roofline of the existing Apple Tree Building at the rear. So they are relating it to the front elevation, but I think

you need to relate it to the rear elevation to be able to get a perspective of what this building is going to look like.

And with the information I had, I have attempted, we have attempted to create some massing diagrams of what the bulk of the building is going to look like. Now, again, I've done this with limited information and I've had to extrapolate from limited dimensional information that has been provided to us, but I have been able to extrapolate that off of their plans and then correlate that to the photographs that you see in these pictures.

And I would argue that in reality they are proposing to occupy 80 percent of the lot, because they are extending the basement out 24 feet beyond the back face of a three -story wall. In essence, it's going to be a four -story wall, and it's going to have a very institutional appearance, particularly because of the width of the lot. With the lot being 36 feet wide, this is going to be a massive structure embedded into these row homes.

The other element that this eliminates is green space at the back of the structure. I don't think we can take this totally out of context of what this building is going to be used for, because we don't know 5 or 10 years down the road what this building will be used for. And by allowing them to extend the basement out, it virtually takes away the opportunity to ever restore the back yard to the characteristics of the other adjacent properties. They have also proposed three parking places behind the sunken pit area that is their play area.

So we're very concerned about the mass, the institutional look, and the overwhelming nature of this building.

CHAIRMAN BOASBERG: Thanks, Mr. Faling.

Any other groups? Any other individuals that feel that they have not had their say?

Ms. Metzger, when do you want to go? Now, later?

MS. METZGER: I'll go later.

CHAIRMAN BOASBERG: You'll go later. All right. Let's have the individuals up, if you could,

as quickly as possible, and if you could take your seats as quickly as possible. Could you come up together? You've got three minutes.

Mr. Kane, I appoint you official timekeeper.

MR. KANE: Thank you. I'm going to decline. I don't have a watch, Mr. Boasberg.

CHAIRMAN BOASBERG: Mr. Kane, you are pretty casual, I will say. Do we have the time here? Anybody wealthy enough to have a watch, who could be the timekeeper? Oh, there it is. Okay, Mr. Kane, all you have to do is watch.

MR. KANE: Okay, I'll watch.

CHAIRMAN BOASBERG: Thanks.

MR. KANE: Are you ready?

CHAIRMAN BOASBERG: Yes. Go. Yes, ma'am?

MS. HOLWILL: Good morning. I'm Margaret Holwill.

MR. MCGHEE: Can you turn the mike on?

CHAIRMAN BOASBERG: Just press the red button. Talk into the mike. Thanks.

MS. HOLWILL: Good morning. I'm Margaret Holwill. I have resided at 145 11th Street, N.E. for 30 years. My home is across the alley from the property at 138 12th Street, N.E.

I am here because I will have to look at the rear facade of that building for a very long time. Apple Tree Corporation won't. They won't live there. Nobody will. This is ultimately a commercial building, and it looks like it.

This entire exercise may be moot. The proposed building will exceed the 40 percent lot occupancy limitation allowed for non-residential use under the zoning codes. But that can be decided by the Board of Zoning Adjustment.

I am concerned about the destruction of the architectural character of my neighborhood and the incompatibility of this design with the alley. The proposed building does not appear residential and it will not blend in with the adjacent buildings. None has a sheer, unbroken, three-story wall across an entire two-lot-wide rear facade. It lacks the waterfall effect referred to by Herb Faling in his

testimony. Its mass is such that it will overpower the row of historic homes and carriage houses over which it will loom.

I would like to call attention to three additional issues: the proportion of the windows, the color of the brick, and the refuse shed. I ask that the Historic Preservation Office pay particular attention to these details.

Although there are no specifications provided on the plans given to us by Apple Tree, the windows do not appear to be the Baltimore Standard windows common in every other building facing the alley. This further interrupts the rhythm of the alleyscape.

Should this great wall be constructed of any color brick other than the soft red of the period around 1900, it will appear even more commercial and be greatly intrusive. There is no possibility of landscaping to soften the reflection of light from a blond brick rear wall, due to the proposed sunken pit in the rear yard. This would have an enormous visual impact on the entire alley.

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The refuse shed has the appearance of a privy or an old-fashioned outhouse. Its size appears small for the proposed number of occupants and their trash output, which could lead to the placement of unattractive dumpsters in full view of the neighborhood.

MR. KANE: One more minute.

MS. HOLWILL: This is unacceptable in a historic residential neighborhood. The commercial appearance of the design is inappropriate in a neighborhood that has been almost totally residential from the day construction began in the late 1890's.

Our alley has remained largely unchanged since the historic row houses and their carriages houses and garages were built around 1900. We have exchanged the old wooden doors used for horses and carriages for modern garage doors to accommodate our cars. Sadly, the District of Columbia covered our lovely cobblestones with asphalt. Other than those changes, our alley is pretty much the same as it has been for more than a century.

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The proposal by Apple Tree threatens the historic character of that alley. It may not seem important to citizens in another state, but any erosion of the character of one small alley and one street is an assault on the very idea of a historic district. I respectfully request that you reject any design which does not mirror the residential style of our historic neighborhood and detracts from the character of our homes.

Thank you for your consideration of our arguments today. I hope that you can tell we care very deeply.

CHAIRMAN BOASBERG: Yes, we can tell.
Thank you, Ms. Holwill.

Yes, ma'am?

MS. HOLMES: My name is Shauna Holmes. I live at 919 Massachusetts Avenue, N.E., which is just a couple of blocks from the project site.

I just want to, in addition to saying that I agree with the points made by Mr. Alberti and Mr. Faling and Ms. Holwill, speak to an issue that has been mentioned earlier this morning and that I think

is very important. And that is to underscore the residential nature of this neighborhood.

The Capitol Hill Historic District, as I understand it, is the largest in the city and one of the largest in the country. It encompasses a wide variety of buildings and functions. And if you look on the perimeter, beyond the boundaries of the Capitol Hill Historic District, you will find the Capitol complex and all sorts of other things.

I respectfully disagree with the concept that because there are big office buildings in other places on the Hill or near the Hill Historic District, that any of those kinds of buildings therefore is appropriate in all parts of the Capitol Hill Historic District. This is residential. The people who live in this residential part of the historic district have chosen it because of its residential nature, and chose not to be closer to the Pennsylvania Avenue commercial and office strip, or Barracks Row, etcetera, with its many uses.

I just urge the Board to please view this in the context of the very large, almost exclusively

residential area that this is, and in particular that this block is. Thank you.

CHAIRMAN BOASBERG: Thanks, Ms. Holmes.

Anybody else? Yes, ma'am. Come on up.

Anybody else? Ms. Metzger, you come on up, too, and why don't you ladies retire? And we'll ask the architect to come up so he can sort of stand in the wings.

Yes, ma'am? Thank you.

MS. BLINICK: Thank you. My name is Ilene Blinick, and I am the unfortunate owner of the two houses north of the building in question, one of whom shares a party wall with 138 12th Street.

I would ask that you not act on this proposal because it's so incomplete. The neighbors have not been given ample time nor information to prepare a good refutation of the plans. We have been given information, the information has changed, it has not always been accurate, and we have had the unfortunate opinion that perhaps we were not all -- well, perhaps that maybe the petitioners were being

somewhat careless with the truth in what they told us.

We would then urge you to please make sure that you have very definitive plans before you, before you act. Also, I was very concerned to hear that the historic windows were going to be replaced. The front of the building, and I believe the rear, have the original windows. The two houses, the three houses that I have done on that street, I was required in all cases to reuse the windows. We had to rebuild them and put them back in. Actually, only two. One of them, the windows had already been replaced. I am wondering what is different from this proposal, that this applicant is permitted to replace the historic windows.

I won't belabor the issues that have already been raised, but I urge you to delay consideration of this until all the facts are before you.

CHAIRMAN BOASBERG: Ms. Blinick, I appreciate it.

Ms. Metzger?

MS. METZGER: Nancy Metzger, Capitol Hill Restoration Society. As Emily said, in the two months since we first saw the project, Apple Tree has responded to many of our concerns, and she mentioned those in particular. The restoration of the front facade of course will be a benefit to the block, even though it is minimal, but we would urge that any canopies, landscaping, signage, all be of a residential rather than an institutional nature. Those have not been --at least I haven't seen anything on that.

The sight line studies that have apparently been done are very important, and I will depend on the staff to really look at those. But we would also urge that the stucco of the third floor addition not be a blinding white color. Usually these third floor additions, I don't think we've ever been totally successful in being attractive, and I think the color choice should be dealt with with the staff so that it's not as obvious, because the people on the other side of 12th Street will

obviously be looking at this even if you can't see it from the ground.

MR. MCGHEE: Ms. Metzger, I thought the gentleman said it was masonry on all sides, did he not?

MS. METZGER: That was the addition.

MR. MCGHEE: The addition. Is there stucco there now somewhere?

MS. METZGER: Well, they had been at one point saying stucco on the --

MR. MCGHEE: On the front?

MS. METZGER: --the front.

MR. MCGHEE: The front. I see. All right. Thank you.

MS. METZGER: And while we appreciate the move of the play area from the roof, the construction of a deeply sunken play area presents its own problems of incompatibility with the historic residential neighborhood. We believe this area should really be very carefully studied. I mean, this is a very --it's not just sunken, it's

buried. It's 10 feet deep, I think, which is a very unusual thing.

Obviously window wells will be needed to let light into the basement room, but perhaps a multi-level play area would serve the children and the neighborhood better, with perhaps different levels, many of them closer to the ground level, but definitely having an area for plantings, trees, bushes. Two of our schools, Peabody and Watkins School, both have very attractive schoolyard gardens. This is another case where a very experienced designer needs to be looking at this issue, because the rear landscape is a very tricky element in this particular adaptation.

And, finally, the residents have given a very good presentation of how they view their alley and back yards, with the waterfalls and the doglegs. The lack of a prepared rear facade drawing where you could see the facades of the adjoining buildings made the residents approximate, do as best as they could to show the impact of that juxtaposition.

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With a height of 11 feet on that third story, it is I think possible that some height reduction of that third story could be found, and any effort to reduce the bulk and the impact of that rear facade with its flatness would be very helpful in the future. Thank you.

CHAIRMAN BOASBERG: Okay, thanks.

Architect? I'm sorry, let me just say if you could reply to anything specifically that's incorrect, and give us your name.

MR. deBETTENCOURT: I'm Dan deBettencourt, again, DBF Associates, architects. Yes, I want to confine my responses to comments that I've heard, and I'll take the last one that Nancy has just mentioned about a multi-level play area. That's a wrong thing to do when we all look at the issue of handicapped accessibility to various places. We would have a difficult time supporting a multi-level play space that's accessible to all.

Nancy mentioned a question about can we reduce the rear height of the building. The existing floor height in the building is 11 feet 8

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inches, for a second floor roof level, current roof level of 23 feet 4 inches. We have done that. We have reduced that down to 10 feet. It's not 11 feet 8 inches on the third floor.

There is a question that you have on your submission I have. The question was raised by Nancy Metzger about where would the mechanical equipment go, which we responded to and then added to the latest submission that we gave back to you. If you look at the roof plan, it shows roof plan and mechanical equipment.

The mechanical equipment for this is the decentralized, low -height mechanical equipment, and it will --the front parapet on our building, when I talked about the front height, I'm sorry, the 29 foot 2 inch front height --

MR. KANE: Excuse me , sir.

MR. deBETTENCOURT: Yes, sir?

MR. KANE: I just need a little clarification here. When I'm looking at the drawing, it says "proposed third floor plan." It says "existing roof and mechanical equipment."

MR. deBETTENCOURT: That is correct. That is correct.

MR. KANE: So --

MR. deBETTENCOURT: We are putting mechanical --

MR. KANE: May I finish? Thank you very much.

That's fairly ambiguous to me, and as Bob has been here 14 years, so have I. So when I see "existing roof and mechanical equipment," does that mean that there is existing mechanical equipment up there, or is this where you're going to put the new mechanical?

MR. deBETTENCOURT: I apologize for the ambiguity. The new mechanical equipment goes on the existing roof there. It's "existing roof and mechanical equipment."

MR. KANE: Okay. Thank you.

MR. deBETTENCOURT: It was important that the mechanical equipment go there and will be blocked by the parapet in the front, which is

approximately 70 inches to 72 inches tall, as well as the addition on the back.

The courtyard does have a protective railing. I wanted to talk about the --you have heard there are 54 students in this school. Obviously -- not obviously, but it would be a set -up that one class would use the courtyard at a time, so there would never be 54 children intended --

CHAIRMAN BOASBERG: We're not into that. That's use. Okay?

MR. deBETTENCOURT: And the brick, on my earliest presentation to Emily we certainly talked about compatibility of the brick. The brick on the building to the left as you look at it from the rear appears to be original brick. The brick on the right appears to have been a later brick. It certainly would be our intention to add a brick --we have worked at it with staff --compatible to these.

CHAIRMAN BOASBERG: All right. We understand that. Go ahead.

MR. deBETTENCOURT: I think that's all, to respond to the comments.

CHAIRMAN BOASBERG: Okay. You just stay there, and we'll see if there are questions or comments that Board members have. Let me just remind the Board members it's 1:15 now. This case was supposed to end at 1:00. No problem with the case, give it the full time, but just to remind the Board members.

Comments that you may have on this, two comments. One is, is a delay proper? That has been raised. Not for zoning reasons but because of anything else, incompleteness of the design, the drawings, the so -called play area. I want to talk to you about that. And then, secondly, comments that you might have to make about the compatibility of the addition. Who would like to start? Mr. Kane, is that your hand?

MR. KANE: I did, thank you. From what I can tell, it looks like there is a complete demolition of everything on the inside of the building plus the removal of the floor of the basement, but for where it attaches to, where the

slab attaches to the wall. Is that correct? And the rear, and the complete removal of the rear wall.

MR. deBETTENCOURT: After we prepared this presentation, we met once again, I told you earlier, with some construction talent, and the suggestion was made to keep the rear wall from the standpoint of cost. It is our intention --

MR. KANE: All I can do is go on the drawings I have.

MR. deBETTENCOURT: But it is, in response to your question, it is our intention to keep the rear wall of the building. But you are correct, it is our intention to perform demolition, pretty extensive demolition on all the interior partitions on the first and second floor.

MR. KANE: Given the amount of demolition here, including complete removal of the front windows, I don't think we have ever had a project where someone has come in and we have approved the wholesale replacement of exterior windows. I'm surprised that this doesn't have to go to the Mayor's Agent, given the extent of the demolition on

the inside. I think that would be my suggestion, is that we somehow have the staff look at that for a Mayor's Agent case, given the interior demolition. Thank you.

CHAIRMAN BOASBERG: Well, let me get Emily to talk about that. Where are we on that?

MS. PAULUS: We will go back and look at that, Mr. Kane. I think when we looked at the extent of demolition against what is outlined in the preservation law, we felt at that point that this was within the parameters of what's acceptable in the historic preservation law, that wouldn't require referral to the Mayor's Agent.

But we can certainly take a second look at that. Particularly if the applicant is representing that at least a portion of the rear wall would remain, I think that would be significant to us. But removal of interior partitions is something that has been approved by --

MR. KANE: It's 100 percent of existing windows on the front facade. It's the lower entrance to the basement. It's the basement slab.

It's the stairways and, as we had been presented, it was the rear wall. They're now saying there was a modification of that. But given the level of demolition, certainly in other cases that we have had that has usually triggered a Mayor's Agent case.

MS. PAULUS : Well, we can certainly go back and take a look at that.

MR. KANE: Okay. The other point that I have to make and would like you to explore, is I think that the questions about the 9 -foot, and it has been described as a "pit" versus an outdoor play area, and I don't want to use any of those words, but a 9 -foot excavation in the back of a historic building really causes me some trouble.

We have shied away now from the exterior, the lower light wells on the front. At night, if this is lit at all, this is just going to look like just a lunar landing down there. And if we approve this, we must then have to approve other cases. You know, the architect said that they can't accommodate a multi -level play area in this building. It might be the wrong building for their program.

CHAIRMAN BOASBERG: Okay, Mr. Kane. Thank you. Now, let's get others, and I think I am going to start at this end this time, and we'll start with Ms. Lewis, please.

MS. LEWIS: Thank you, Mr. Chairman. I'll just briefly address three issues. One is the floor height on the second and third floors. I don't see why you can't lower the floor height on both the second and third floors, and take a good two and a half to three feet out of that. There doesn't seem to me to be any reason to have 11 foot 8 on the second floor, either, and I would like to suggest that we do lower this building by two and a half to three feet. I think it can be done, and it would help the rear facade.

Also on the rear facade, I think it's too unrelieved. One of the reasons that it doesn't appear residential, as some of the residents have pointed out, is that it's too monotonous, and I think you need some kind of relief, for example, an oriel window on the second floor or something that is of a residential nature. I'm not speaking of

extending it very far, a foot or something like that, but something just to break up this unrelieved wall of brick and double -hung windows I think would go a long way.

The awnings, what you have designed are awnings that are probably really too high to be functional, and look very commercial, and also are on a window that doesn't really need an awning. So if you deal with the door coverings, I think they should be lower. They should actually relate to the door, and they should be only on those doors where you actually need them. That's something that is a very important part of this design, and I think we really need to see complete detail and materials of whatever coverings there are on the windows.

The most important thing of all my comments is the courtyard. I find, you know, it's an interesting philosophical question of whether something that you may not be able to see visually affects your sense of a historical environment, I guess is the word.

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And there's no question that if I lived next door to this courtyard, even though I couldn't see the courtyard, I would have a very different impression of my sense of space. If the courtyard had been in the front, we very clearly would have denied it.

And although we're more lenient on the back, I find that the courtyard is completely inappropriate with the residential area, and I would suggest that the courtyard be eliminated in favor of the small kind of areaway window that you would see in a residential area.

Now, I recognize that this may, the community may -- there is a noise issue here, which is not part of our purview. But if the community prefers a courtyard to an outdoor play area with 54 children, I would defer to the community. I think part of your mission here is to work with your community and get something that's mutually acceptable.

But from a purely aesthetic point of view and maybe you want to do some sound studies of, you

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know, whether the sound above -grade is worse than the sound below -grade, because it may serve as an echo-reflective chamber that actually increases the noise. But, one, I think you need to work with the community on this, and two, from a purely aesthetic point of view, I don't think it's appropriate to have such a courtyard in the rear at all

CHAIRMAN BOASBERG: Okay, thanks.

Ms. Henderson?

MS. HENDERSON: Thank you. I absolutely concur with Ms. Lewis regarding the height, and I do think you should reduce it accordingly. Two to three feet is fine.

I wanted to ask Commissioner Alberti, where does your single member district impact this property, in the front or in the rear?

CHAIRMAN BOASBERG: Mr. Alberti, you've got to come up here, and you've got to speak loudly or into one of the mikes. Okay?

MR. ALBERTI: First of all, let me point out that the person whose single member district

this does impact on the rear, who is 12th Street going west, was called out of town.

MS. HENDERSON: No, I want to know where

MR. ALBERTI: So my point is, is that I'm representing him and his views because we have worked closely on the points that I made.

MS. HENDERSON: Do you have a letter authorizing you to represent him?

MR. ALBERTI: No, I do not have a letter.

CHAIRMAN BOASBERG: We have a letter from the ANC.

MR. ALBERTI: Yes.

CHAIRMAN BOASBERG: And to the extent that your testimony is consistent with that, I think is what --

MS. HENDERSON: I don't have a copy of that letter.

CHAIRMAN BOASBERG: Does somebody have the letter down there? It's coming. Sorry. Thank you.

MR. ALBERTI: But just to answer your question directly, what you did ask us, is my SMD,

12th Street is the border of my SMD and it lies to the east, going east from that property.

MS. HENDERSON: Thank you.

CHAIRMAN BOASBERG: Okay, let's see. Mr. Sonderman, anything?

MR. SONDERMAN: Sure. On the front facade, I'd like a little clarification from Emily in terms of the amount of window replacement that's taking place. Are the windows just being replaced, or is the actual punched openings, the configuration going to change? What is actually taking place?

MS. PAULUS: To be perfectly honest with you, Mr. Sonderman, we haven't gotten into extensive detail regarding the window replacements. It was my understanding that this would be typical window replacement that's generally approved at the staff level, either just a sash replacement or a full sash and frame replacement, in kind. Obviously they would need to be consistent with the historic windows in order to meet our window standards.

MR. SONDERMAN: So the basic configuration of the front facade is not going to change?

MS. PAULUS: Correct.

MR. SONDERMAN: Let me ask a second question. Above the, sort of the storefront door, there is a closed or bricked -in window. Is that original?

MS. PAULUS: Let me get the photograph in front of me, because I don't know it off the top of my head.

MR. SONDERMAN: I mean, it looked like it to me when I stood there in front of it for half an hour the other day.

MR. deBETTENCOURT: May I respond to that?

CHAIRMAN BOASBERG: Sure.

MR. deBETTENCOURT: I have looked at that from the inside and out, taken a ladder and taken a peek at it. I can't find any evidence of any caulking or anything, that there ever was a window in that place. I think that is original.

MR. SONDERMAN: Okay.

MS. PAULUS: Oh, the blind opening on the first floor?

CHAIRMAN BOASBERG: Right.

MR. deBETTENCOURT: It's a different width than the windows on either side of it.

MS. PAULUS: Yes. Frankly, that may just be a design, a blind window.

MR. SONDERMAN: Okay, that's fine. I think my final comments will be about the rear. This is a gigantic alley. I live on 8th Street, N.E., and my alley is 12 feet wide. So when I walked in the back of that alley, I went, "Whoa, man, we could have a gigantic football game back here."

But, be that as it may, I think Ms. Lewis's comments are well -placed and I would concur with everything that she suggested. I think the pit thing is just a non -starter. Something else has to be designed for that space, and I think that has to be done in conjunction with the immediate neighbors, who are going to be the ones most impacted.

And I will just stop there.

CHAIRMAN BOASBERG: Okay. Ms. Johnson?

MS. JOHNSON: Thank you. First I would like to go back to Mr. Kane's comments about the windows, and I think Ms. Paulus addressed that as

well. In my experience with the Board, if we have an applicant that wants to replace the windows and replace them in like kind or with the appropriate windows, that is not considered to be demolition.

I also have an issue with the play area and the way it's currently designed. I would like to see you do something different, other than a sunken play area.

Third is, the awnings that are described I think are going to be problematic. That's not typical for a historic building, so I would suggest that you work with Ms. Paulus on that, but I would presume right now that awnings would not be appropriate.

In terms of the concerns of the community, and as much as I am sympathetic to your concerns and sympathetic to the fact that it is a residential neighborhood, it's also a commercial building, which is not necessarily unusual sometimes in a residential neighborhood. And so if the building was originally commercial --and I'm assuming it was Emily -- I have less of an issue with the addition,

with the rear addition, and with that rear addition being the size that it is.

I think one of the advantages that we have with this applicant is the fact that the applicant has provided a significant amount of detail on the rear of the building, where oftentimes when we see rear additions, because it is the lesser facade of the building, we don't see that level of attention.

So one of the things that I would like to suggest to the community as a way to try to reach some middle ground with this, is to try to work with the applicant on some of the details of that rear facade, as well as some of the landscaping of the rear facade, to see if you can reach some middle ground in terms of a comfort level of having a commercial building in your historic district and facing onto that alley.

And that's it for me.

CHAIRMAN BOASBERG: Mr. McGhee?

MR. MCGHEE: Yes, I have a couple of different comments. I am in disagreement with two of my colleagues' comments.

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First of all, as Ms. Johnson has said, we routinely allow windows to be replaced unless there are significant design -- we want to keep the exact material the same. We don't call it demolition.

We do not -- I mean, the staff routinely approves interior demolition of buildings, contributing buildings in historic districts that do not come before this Board at all, so I wouldn't call that substantial demolition.

And then we routinely allow basements to be excavated to make higher ceilings in basements, routinely, that do not come before this Board, so that's not considered substantial demolition. And even together, the three elements would not be considered substantial demolition in previous, many previous applications that we have accepted here.

There's three or four applications that came before the Board today where they are going down in the basement, in the packet we have right now, that is not going to be considered substantial demolition, judging the staff reports that have come

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forward by numerous staff members here . So I would be at odds with that.

The second comment is, we have never forced an applicant to reduce the height of a floor that's matching the height of the original floor. Why would we force the applicant to have a step -down on the second floor, if he 's matching the height of that exact floor? We've never forced an applicant to do that.

If we want to reduce the height of the floor above, step that floor down. If you want to reduce the height of the roof above, step that floor down. But we've never forced an applicant to have a fold in a floor to get the height to match, to get the height to match in the overall height.

And the height is not visible from the street. It is slightly taller, five or six feet taller than the houses around it. It is no t looming. It is not massive. It is wider. That is the issue that is on the table right now. And industrial buildings, commercial buildings,

typically are bigger than residences. So I don't accept that at all.

And then a couple of comments about the nature of the building being a school, so on and so forth. That, I am taken aback by the idea that a school in a residential neighborhood is not appropriate. Where do we put them, industrial districts? So that doesn't work for me.

So, anyway, I fully w ould not -- I would be exactly in the community's position to have a school building, if a commercial building is next to me, the noise and all the other things that might be a factor. But when you deal with this on historic preservation terms, the applican t has provided a very restrained, which we have required applicants to do before, brick rear elevation here that is not at odds with other elevations we have required.

The window sizes are slightly larger. Ms. Paulus or Ms. Brockett can easily take care of that. The detail on the brick is there, better than the brick detailing I have seen on all the other ones in the back. The color of the brick in the back, I see

a variety of colors of brick in the back. I don't understand what we're talking about, that at this building is so significant, except it's wider than the other buildings. It is also, significantly, it's going to be matching up with the massing of the building adjacent to it. The applicant has already said that.

The one area that I think the applicant needs to respond to is that we have not allowed rear or front facades to have moats in front of the buildings from public or private space, so I think that that has to be solved. So if you manipulate your program so that you have a ground level playground, then that would be compatible to me.

Now, if the community, as one Board member said, if the community wants to have a wall or have some depression or something there to provide some noise abatement, I would be all for that. But the idea of a moat there, when I drive down that alley I can't see anybody playing because they're 11 feet down, would be inappropriate.

But I think that this building can work. I think the community needs to be a little more flexible. The building type does not allow you to have a 20 -foot row house, so you're not going to be able to do that. So the community has to be a little more flexible and look at what they can mitigate if this is going to be a school.

And that would be my comments.

CHAIRMAN BOASBERG: Okay. Mr. Weinstein, comments?

MS. WEINSTEIN: The only thing I have to add to Mr. McGhee's would be that the only time I believe this Board has approved a depressed area in the rear of a building of the magnitude of this is behind the Penn Theater, between the office building and the condominium in the 600 block of Pennsylvania Avenue, and that was done in a very commercial environment where there were all just commercial buildings, not in this small scale of townhouse back yards. So I am troubled by that.

MR. KANE: And that was designed in 1981 or '82.

MS. WEINSTEIN: Or maybe '83 or '84, but

MR. KANE: It was designed in --David Schwartz did the design --

MS. WEINSTEIN: Right. That's right.

MR. KANE: --started in about 1980 and finished it, because Siegel did the construction starting in about 1981 -82.

CHAIRMAN BOASBERG: All right. Let's go on. So, Ms. Weinstein, your feeling is it's inappropriate, I take it?

MS. WEINSTEIN: I think so, the depression, yes.

CHAIRMAN BOASBERG: Anybody else? Okay . I think --and Board members, just chime in --I think this project has got to come back here to the Board again, and here are the concerns as I understand them.

One, we have to make sure, of course, that it's completely invisible, anything, equipment, blah, blah, blah, from 12th Street.

Number two, there is a feeling that anything that can be done to reduce the height, we

feel that there should be some reduction of the height. And we're obviously concerned about the massiveness of the rear. I think that Ms. Lewis is concerned about, you know, some kind of added decoration, an oriel window or something else.

I think that the big problem seems to be the play area, and I think that there is a feeling among the Board that that, as shown to us, is not compatible with the historic district, that extensive amount. On the other hand, I think the Board is very, very sensitive to the neighborhood. It is a back yard, and if there was to be a play area on the ground, then you get these noise problems, and it's obviously a difficult problem.

Plus it's not a historic issue, but I think the Board is so concerned with what goes into these neighborhoods and the historicity and the concern for livability, that the Board might bend if the neighborhood felt absolutely strongly about that. But right now, we feel that that sunken play area as shown is not compatible.

I think that in good faith to Mr. Kane, I think that the staff needs to take a look at the question of demolition of fabric, if there is so much demolition. If not, then okay.

So I think that --let's see --and that the canopies, landscaping, signage, blah, blah, blah, you know, all that, that level of detail obviously would have to be worked out with the staff.

Anything else? Staff? Board? Okay, so with that, to change the motion, or put that in the form of a motion that we not approve it today, but it would come back with emphasis to try to clarify those other matters.

Now, that doesn't mean we're going to wait until the zoning decision. This is independent of the zoning decision, and the staff admonition would go to any zoning authority. But we are concerned with our own jurisdiction, what we can do ourselves, not with what other agencies --we're obviously aware of it, but we've got to deal with what we have on our plate.

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So with that as a motion, then --yes, I'm sorry?

MS. JOHNSON: Mr. Chairman, I'm not sure that all of us are saying that we would not adopt the staff report with those changes, so --

CHAIRMAN BOASBERG: And not have it come back?

MS. JOHNSON: It could still come back, but, in other words, I think some of us feel that the staff report is --

CHAIRMAN BOASBERG: All right. Let me change it. We're going to adopt the staff report with the changes that we have noted, that is, the reduction in height, the elimination of the sunken well, and the concern about --

MR. MCGHEE: To check on the demolition.

CHAIRMAN BOASBERG: --the demolition, and the canopies and landscaping, right? Okay, if that's acceptable, then, we'll make that a motion. Is there a second?

MR. MCGHEE: So moved.

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CHAIRMAN BOASBERG: And is there further discussion?

[No response.]

CHAIRMAN BOASBERG: All in favor, signify by saying aye.

[A chorus of ayes.]

CHAIRMAN BOASBERG: Opposed?

[One nay.]

CHAIRMAN BOASBERG: You 're opposed? Mr. Kane is opposed. Thank you.

Thanks very much, and we hope that you can work with the community on this. It is important. Thank you, sir.

[Whereupon, the Board recessed at 1:35 p.m., to resume at 2:05 p.m.]

[End of requested excerpt.]

- - -

C-TAB 6

**HISTORIC PRESERVATION REVIEW BOARD
STAFF REPORT AND RECOMMENDATION**

Property Address:	138 12th Street, NE	X	Agenda
Landmark/District:	Capitol Hill Historic District		Consent Calendar
			Concept Review
Meeting Date:	December 15, 2005	X	Alteration
H.P.A. Number:	05-522		New Construction
Staff Reviewer:	Emily Paulus		Demolition
			Subdivision

The applicant, DBF Associates Architects for the AppleTree Institute for Education, seeks approval to construct a three-story with partial rooftop addition to the rear of a contributing two-story former commercial property in the Capitol Hill Historic District in order to accommodate the conversion of the property into a charter school. The addition would be largely invisible from 12th Street, but would be visible from the rear alley.

The property is situated mid-block on the west side of 12th Street, NE, just north of Lincoln Park. The immediate vicinity is composed of two and three-story rowhouses and is predominantly residential in character; the subject property appears to be the only commercial/institutional use on the block. The existing building on the site was constructed sometime in the 19-teens, first appearing in city directories in 1916 when it was owned by L.P. Steuart Brothers and functioned as an office facility. Subsequently, it was occupied by the Knights of Saint John and Women's Auxiliary and used as a community facility. The building retains a high degree of integrity and appears to have experienced only minor cosmetic modifications on the front façade. The existing building footprint measures 40 by 36 feet, totaling approximately 4,200 square feet.

Project Description

The applicant originally submitted the project for review in November, at which time the addition measured 54 by 36 feet and totaled approximately 6,800 square feet; the lot occupancy would have increased from 34% to 80%. The plans also included outdoor play/recreation space atop the rear of the second floor addition. The applicants electively withdrew this proposal after receiving negative feedback from the community and HPRB staff, who felt the applicant's program was simply too aggressive for the building and site and the proposed addition simply too large to be considered compatible.

The applicants have spent the last month scaling back the proposal to 60% lot occupancy, with the revised footprint measuring 30 by 36 feet. In addition, the rooftop play area has been eliminated in favor of a sunken courtyard at the basement level. The partial third floor remains and includes a classroom, bathroom, staircase, and elevator shaft; it would be set back approximately 26 feet from the front façade and extend approximately 44 feet deep. Approximately 12 feet of the third floor addition would sit atop the existing building; the elevator shaft would be housed within the new addition, rather than slicing

through the historic building. The front elevation of the third floor addition would be finished in stucco while the rear wall would be finished in brick and include a secondary entrance at the first floor, with paired double-hung windows topped by segmental brick arches at the first and second floors. In addition to the sunken courtyard, the rear yard would include accommodation for three parking spaces.

On the front façade, only minor cosmetic alterations are proposed, including new doors, replacement windows, and awnings atop the first floor apertures.

Evaluation and Recommendation

The most fundamental aspects of the proposal – including the rehabilitation of the front façade and the very basic notion of adding to the rear of the existing building – are not inconsistent with the character of the Capitol Hill Historic District, or with previously-approved projects on similar buildings. The staff's previous reservations with the proposed size and mass of the addition in relation to its immediate context have been substantially and satisfactorily addressed. The addition's depth is now consistent with the sizes of other additions in this single-family residential neighborhood, and the resulting open rear yard more characteristic of the historic district. The partial third floor addition is compatible among the varied heights of buildings and additions along the alley, and is consistent with other partial rooftop additions approved in this and other historic districts. The fact that the third floor stands less than a full floor higher than the adjacent buildings also mitigates the overall visual impact on the allyscape. The staff takes no issue with the overall design or material use proposed for the rear addition, which while perhaps more decorated than most rear facades, seems generally compatible with the character of the neighborhood.

In addition, the staff's previous concerns about visibility and demolition of historic fabric have largely been addressed through moving the elevator shaft into the addition and thus further back from the front façade. Nevertheless, because the submitted sight line section only addresses visibility from directly across the street, the staff would recommend including additional views that illustrate visibility from oblique vantage points. Ultimately, the applicant may want to conduct a flag test for the staff's review and consideration prior to finalizing an acceptable setback.

Zoning Considerations

While not within the purview of this Board, it should be noted that there are some zoning issues that, at the moment, remain unresolved. The applicant maintains they are considered a "public school" for zoning purposes, and thus can build to 80% lot occupancy with capacity for 72 students and 16-20 staff by right, or, without the need for zoning relief; this understanding was apparently confirmed through a preliminary meeting with a previous Zoning Administrator earlier this year. According to ANC 6A and others in the neighborhood, however, the facility does not meet the definition of what constitutes a public school for zoning purposes because it is not operated, maintained, or chartered by the District of Columbia Board of Education. Rather, they contend, it should be recognized as a "child development center," which is allowed by right in the subject

zoning district provided it serves no more than 16 children and occupies no more than 40% of the lot. The applicant has met with the current Zoning Administrator and, until very recently, was awaiting an advisory opinion on this issue; however, the Department of Consumer and Regulatory Affairs (DCRA) has indicated that the Zoning Administrator's Office will not be issuing an advisory opinion, but rather will make a ruling on a case-by-case basis once the permit application is submitted. In the meantime, the Office of Planning intends to work on zoning text to clarify the issue and address potential impacts and hopes to get this to the Zoning Commission sometime in early 2006. It should be stressed here that the Historic Preservation Review Board's action is completely separate from that of the Zoning Commission or Board of Zoning Adjustment, and any approvals should not be construed as an endorsement of the necessary zoning variances or zoning relief.

The staff recommends that the Review Board approve the project in concept as consistent with the purposes of the preservation act, with further study conducted to ensure invisibility of the third floor from 12th Street as described above, and delegate final approval to staff; however, any approvals should not be construed as an endorsement of any necessary zoning variances or zoning relief.

C-TAB 7

Steingasser, Jennifer (OP)

From: McCarthy, Ellen (OP)
Sent: Friday, December 16, 2005 5:51 PM
To: 'Mike Peabody'; McCarthy, Ellen (OP)
Cc: ROBERT CANE; Steingasser, Jennifer (OP)
Subject: RE: E-mail for Ellen McCarthy

Mike,

Jennifer Steingasser, our Deputy Director for Development Review and Historic Preservation, is in the lead, but she will be coordinating with us all. I believe our intent is to do a set of zoning regulations which will define charter schools as public schools for zoning purposes, but will also revise the regs that apply to all public schools in terms of separation from residential units, rear and side yards, lot occupancy, parking, etc.

Feel free to submit any language you and Robert have. Rest assured that, as soon as we have a rough draft, we will run it by you.

Ellen

-----Original Message-----

From: Mike Peabody [mailto:mpeabody@ptmanagement.com]
Sent: Friday, December 16, 2005 12:25 PM
To: ELLEN MCCARTHY
Cc: ROBERT CANE
Subject: Fwd: E-mail for Ellen McCarthy
Importance: High

>
> Dear Ellen:
>
> The Planning Office has received a request from the Zoning
> Commission to work on the zoning text as it relates to the right of
> a chartered public school to locate in a residential area in the
> same manner as a District public school.
>
> This is a matter of grave import to charter public schools and we
> would like to meet with your staff on the question when the matter
> is being addressed.
>
> Could you let us know who on your staff will be designated to this
> task?
>
> Thanks so much.
>
> Mike Peabody
>
> P.S. The specific case that the Commission is considering involves
> 138 - 12th St., N.E.

Steingasser, Jennifer (OP)

From: Steingasser, Jennifer (OP)
Sent: Monday, December 19, 2005 1:30 PM
To: Crews, Bill (DCRA)
Subject: RE: When can we get together to talk about definition of Public Schools?

No problem.

-----Original Message-----
From: Crews, Bill (DCRA)
Sent: Mon Dec 19 10:51:28 2005
To: Parker, Travis (OP); Steingasser, Jennifer (OP)
Subject: RE: When can we get together to talk about definition of Public Schools?

8:30 it is. Because I need to not be late for my 9:30 meeting with the director, might I impose on you all to come over here?

I am making copies of all my correspondence on charter schools.

Thanks, and

Best regards,

Bill Crews

Zoning Administrator for the District of Columbia
Department of Consumer and Regulatory Affairs
941 N. Capitol St. NE Suite 2000
Washington, DC 20002
202.442.4576 Office
202.442.4871 Fax
bill.crews@dc.gov

From: Parker, Travis (OP)
Sent: Monday, December 19, 2005 10:00 AM
To: Crews, Bill (DCRA); Steingasser, Jennifer (OP)
Subject: RE: When can we get together to talk about definition of Public Schools?

I'm in favor of the 8:30 meeting tomorrow if possible. We shouldn't need more than an hour right?

Bill, I can give you back the L'Enfant Plaza info as well so you can respond to them.

Travis

From: Crews, Bill (DCRA)
Sent: Friday, December 16, 2005 5:30 PM
To: Steingasser, Jennifer (OP); Parker, Travis (OP)
Subject: RE: When can we get together to talk about definition of Public Schools?

Jennifer and Travis,

Could we get together Tuesday morning at 11 AM? I have our weekly senior staff meeting before then.

If 11 am is too late for Jennifer, how about early Tuesday 8 or 8:30? My staff meeting starts at 9:30 and I can't be late for the Director :-)

Thanks, and

Best regards,

Bill Crews

Zoning Administrator for the District of Columbia
Department of Consumer and Regulatory Affairs
941 N. Capitol St. NE Suite 2000
Washington, DC 20002
202.442.4576 Office
202.442.4871 Fax
bill.crews@dc.gov

From: Steingasser, Jennifer (OP)
Sent: Friday, December 16, 2005 5:25 PM
To: Crews, Bill (DCRA)
Subject: RE: When can we get together to talk about definition of Public Schools?

Bill, Travis is working on this and will call you Monday. I am out most of next week but

if the meeting is in the morning of Tues Wed or Thur I can join you.

Travis' number is 741-5243

Jennifer

Jennifer Steingasser, AICP, Deputy Director

Development Review and Historic Preservation Division

DC Office of Planning

Ph: 202-442-8808

Fax: 202-535-2497

Jennifer.Steingasser@dc.gov

From: Crews, Bill (DCRA)

Sent: Thursday, December 15, 2005 5:07 PM

To: Steingasser, Jennifer (OP)

Subject: When can we get together to talk about definition of Public Schools?

Thanks,

Best regards,

Bill Crews

Zoning Administrator for the District of Columbia

Department of Consumer and Regulatory Affairs

941 N. Capitol St. NE Suite 2000

Washington, DC 20002

202.442.4576 Office

202.442.4871 Fax

bill.crews@dc.gov

C-TAB 8

Steingasser, Jennifer (OP)

From: McCarthy, Ellen (OP)
Sent: Wednesday, January 04, 2006 9:56 AM
To: KathyPatterson (COUNCIL)
Cc: Steingasser, Jennifer (OP)
Subject: RE: charters & matter of right

We have some ideas that we think will be acceptable to all. Would be happy to share and get comments. Would you like us to give you or your staff a call?

-----Original Message-----

From: KathyPatterson (COUNCIL)
Sent: Tue Jan 03 20:38:06 2006
To: McCarthy, Ellen (OP)
Subject: charters & matter of right

Hi -- It's my understanding that OP is looking at recommending an emergency rule-making to clarify when a public school/public charter school can locate in a residential area as a matter of right. Is that correct? I assume you're aware of the Christ Church issue in Ward 3 as well as the Appletree application on the Hill. We discussed options for clarifying the charter school law (as distinct from zoning regs) at an oversight hearing in the fall, in response to the legitimate concerns about the state of the law right now, prompted by concerns in both neighborhoods. We don't have language yet; I'm waiting for a General Counsel opinion on what the law says today. (Beyond saying that public charters are public schools some of the time and not other times!)

Senator Landrieu has been increasingly prescriptive in how and when the city turns public properties over to charters, based on both the Board of Ed and the Exec being slow to respond to facility needs. The five surplus resolutions at the Council now should have been acted on a year ago; she raised this again in our appropriation this past time -- threatening, again, prescriptive language regarding the five schools. She pulled back with commitments by the CA and me that we will address the five surplus properties. CM Orange continues to delay reporting these resolutions and at the end of a hearing last month (on 4 of the 5) he said he would only move forward with two or three. If all five don't go fairly quickly to charters -- as the law comes close to directing -- we will hear again from Landrieu. It's that context in which an emergency zoning action would be seen as an attack.

If my understanding of possible emergency action is correct, I have two concerns: one, that the govt would appear to be responding with policy to a particular not a general concern and, second, that something that has the effect of saying "no" to a charter school will prompt a reaction from the charter community and, immediately thereafter, the Hill. Landrieu in particular. It still may be the appropriate course; but it would be useful to run language by some of us who have been closely engaged in working on better relationships and better site acquisition with and for charters -- Deborah Gist, Gregory McCarthy, me and my staff, a couple of Board of Ed members. I am assuming that an emergency rulemaking would be followed by a thoughtful public hearing process that would give all concerned an opportunity to weigh in. It would also be useful to have land use regs from the zoning regulators be consistent with statutory changes that we will consider.

Thanks.

C-TAB 9

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

**Northeast Neighbors for Responsible
Growth, Inc.
144 12th Street, N.E.
Washington, D.C.**

Plaintiff,

v.

Civil Action No.

**District of Columbia
c/o Anthony Williams, Mayor
1333 1/2 Pennsylvania Avenue, N.W.
Washington, D.C. 20002**

and

**Anthony Williams, Mayor
in his Official Capacity
1333 1/2 Pennsylvania Avenue, N.W.
Washington, D.C. 20002**

and

**Department of Consumer and Regulatory
Affairs
c/o Dr. Patrick Canavan
in his capacity as Director
941 North Capitol Street, N.E.
Washington, D.C. 20001**

and

**Dr. Patrick Canavan
in his Official Capacity as Director of
Department of Consumer and Regulatory
Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20001**

and

**Williams Crews
in his Official Capacity as
Zoning Administrator
941 North Capitol Street, N.E.
Washington, D.C. 20001**

Defendants.

COMPLAINT FOR INJUNCTION RELIEF

Comes now, Plaintiff, Northeast Neighbors for Responsible Growth, Inc. ("Northeast Neighbors"), by and through counsel and requests this Court enjoin the defendants from issuing building permits to the AppleTree Institute for Education Innovation ("AppleTree") for demolition and construction at 138 12th Street, N.E., Washington, D.C. (the "Property").

I. JURISDICTION

1. This Court has jurisdiction pursuant to Chapter 11 § 1101 of the Code of the District of Columbia (2001 Ed.) as all parties and activities are located herein.

II. PARTIES

2. The Plaintiff is a non-profit corporation established by the residents in the Lincoln Park area of Capital Hill. It is organized for the purpose of ensuring that the appropriate zoning laws and regulations are followed and enforced though out the District of Columbia in the placement and construction of schools, and that orderly planning, pursuant to regulation promulgated by the Office of Planning govern such. It represents the interests of the neighbors of 138 12th Street, N.E..

3. The District of Columbia is a municipality wherein Anthony Williams as Mayor is the executive in charge.

4. Anthony Williams is the Mayor of the District of Columbia. He is named herein in his Official Capacity.

5. The District of Columbia Department of Consumer and Regulatory Affairs is the

entity with the District of Columbia government which issues and regulates, among other matters, any and all demolition and construction in the District of Columbia. It is the agency charged with the issuance of building permits in the District of Columbia. The Zoning Administrator is under this Department but independent and must sign off on these permit requests prior to their issuance.

6. Dr. Patrick Canavan is the Director of the Department of Consumer and Regulatory Affairs. He is named herein in his Official Capacity.

7. Williams Crews is the Zoning Administrator. He is named herein in his Official Capacity.

III. FACTS

8. The Plaintiff by and through its members are concerned about unregulated, unplanned development specifically in their neighborhood; as well as, other residential neighborhoods within the District of Columbia.

9. AppleTree, which plans to construct a school designed to accommodate 53 three to four year old students with a staff of 24 has already sent workmen to the site to do construction and demolition work although no permits have been issued.

10. The one hundred block of 12th Street, N.E. is narrow and residential. The Property is contiguous and abutting to the residential housing and the zoning is R-4 (Residential) and in the Capitol Hill Historic District.

11. AppleTree has taken the position that they are not covered by Zoning Regulations or Planning rules and regulations and do not need variances or exceptions despite the fact that this narrow tree-lined street and the present building are respectively too narrow and too small for their needs. There is no safe pick-up and drop-off spot. The building would hereto be bigger

than the 40 percent occupancy allowed for non-residential use in a R-4 zone.

12. AppleTree relies on a definition and a zoning regulation for charter schools created under the District of Columbia Board of Education for schools licensed by them. AppleTree is not licensed by the District of Columbia Board of Education.

13. The school proposed by AppleTree is a licensed charter school under federal law incorporated into D.C. law in Chapter 38 §§ 1800 et seq. of the D.C. Code and under the Public Charter School Board not the D.C. Board of Education. In § 38-1800.02(29)(B) the definition of a “public charter school” is as follows:

District of Columbia public school. -

(A) In general. - The term “District of Columbia public school” means a public school in the District of Columbia that offers classes:

- (i) At any of the grade levels from prekindergarten through grade 12; or
- (ii) Leading to a secondary school diploma, or its recognized equivalent.

(B) Exception. - The term “District of Columbia public school does not include a public charter school.

14. As part of the Capitol Hill Historic District, the Historic Preservation Review Board (HPRB) must rule on AppleTree’s application. The HPRB has indicated a favorable ruling is imminent. Further, on information and belief, Plaintiff has been led to believe DCRA will issue building permits for demolition and construction without regard for either the BZA or the Zoning Commission.

15. Clearly, the school AppleTree is proposing is not “a part of the District of Columbia public schools” and therefore is not exempt from the D.C. Zoning Regulations (see § 199 of the D.C. Zoning Regulations).

16. The District of Columbia Office of Planning has presented draft regulations to the D.C. Zoning Commission to ensure appropriate placement of public charter schools and other such institutions, especially as to residential neighborhoods with regards to traffic, safety, noise

and quality of life. The regulations are in the Second Draft stage, and on information and belief, are due to be issued on February 13, 2006.

17. These regulations will give all parties a reasonable framework under which to operate subject to an urban planning model for public schools and public charter schools and for all similar development in this and most other major cities residential areas so as a matter of public policy and interest they are clearly necessary.

18. Plaintiff represents the homeowners and neighbors of the proposed AppleTree school. They will suffer immediate and irreparable harm if the project is not enjoined and have standing to request enjoining of these imminent proposed demolitions.

19. The Defendants are the entities with the legal authority to issue there aforementioned permits and are required to follow their own statues, regulations and planning requirements that they have heretofore strongly supported; especially with regard to the impact on traffic, parking, safety of the public and the students, and noise.

20. An R-4 (Residential) zone, as herein, has limits on size of building, set backs, FAR and other requirements with which AppleTree's proposed plans do not comply.

21. Based on AppleTree's actions to date (trying to begin demolition) and its position that it is exempt from the relevant laws, it is likely they will attempt to proceed imminently and so an injunction is the sole possible remedy. AppleTree has issued statements to the press claiming that they had verbal permission from DCRA to do this work. This was denied by DCRA.

22. At a meeting before the Stanton Park Citizens Association, officials of DCRA said they would not guarantee that AppleTree would not receive permits under the existing regulations. They further said they would not guarantee that permits would not be granted to

AppleTree prior to the Office of Planning issuing its final regulations.

COUNT I

23. The Plaintiffs adopt and incorporate paragraphs 1 through 22 herein and relies on therein.

24. The permits once issued cannot easily be withdrawn and the intent of AppleTree to move quickly to avoid such planning and zoning considerations are obvious.

25. Any proposed urban planning and required zoning actions will be moot if the demolition is commenced so the only reasonable act is to enjoin such actions until the District of Columbia government is able to comply with its obligations.

26. Any such action as proposed would require approvals, use exceptions and variances from the Board of Zoning Adjustment and the Zoning Commission, as the case may be.

COUNT II

27. The Plaintiff adopts and incorporates paragraphs 1 through 26 of this Complaint and relies on them hereafter.

28. The actions of AppleTree, and their misrepresentation of the law, has shown the necessity for the city to promulgate regulations consistent with its urban planning model to govern the placement and construction of public schools and federally created Public Charter Schools, so as to insure they are reasonably and sensibly incorporated into appropriate locations in an urban residential community.

29. The Office of Planning has prepared and issued draft regulations to the Zoning Commission governing the placement and construction of public schools and Public Charter Schools, of which the proposed project is one, to insure their proper incorporation into the urban

residential plan and their compliance with necessary laws.

WHEREFORE, Plaintiff respectfully prays that this honorable Court issue an injunction ruling that the District of Columbia and its agencies, including but not limited to, the Zoning Administration and the Department of Consumer and Regulatory Affairs, are enjoined from:

1. Granting any permits, including but not limited to building permits for the AppleTree project until such time as the Board of Zoning Adjustments and the Zoning Commission has ruled on the project, such permits to be in accordance with those rulings.

2. Granting any permits for the AppleTree project until such time that the Office of Planning draft regulations are promulgated adopted, amended or denied by the Zoning Commission; such permits to be in accordance with those regulations, as adopted.

Respectfully submitted,

Donald R. Dinan (Bar No. 234997)
**HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.**
1120 20th Street, N.W.
Suite 700, North Building
Washington, DC 20036-3406
Telephone (202) 973-1200
Facsimile (202) 973-1212
ATTORNEYS FOR PLAINTIFF,

Verification

I herby swear and affirm the matter set forth in this Complaint are true and correct to the best of my belief.

Donald R. Dinan

Before me, _____, in and for Washington, D.C., on this _____ day of _____ personally appeared Donald R. Dinan, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Notary Public

My Commission Expires:

(SEAL)

My Commission No.:

C-TAB 10

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING



Office of the Director

MEMORANDUM

TO: Zoning Commission for the District of Columbia

FROM: *ELSPV*
Ellen M. McCarthy
Director

DATE: February 3, 2006

SUBJECT: Report for **Setdown** for Emergency Text Amendments to change public school regulations, initiated by the Office of Planning.

This report serves as the Prehearing Filing required by 11 DCMR § 3013 as a prerequisite to the advertisement of this proposed text amendment.

RECOMMENDATION

The Office of Planning recommends the following action **on an emergency basis** and that the matter be set down for hearing:

That the Zoning Commission adopt following text amendments

- a. The amended definition of public school;
- b. Amendment to the matter-of-right public school standards;
- c. Amendments to §§ 400, 401, & 403;
- d. Amendment to §206 to include public schools;
- e. Inclusion of public schools as a matter-of-right in the SP, CR, & W districts; and
- f. Amendments to the parking requirements for pre-elementary schools.

The Office of Planning also requests that the Commission authorize the issuance of a Notice of Proposed Rulemaking for the text and that the Commission allow the immediate advertisement of the text, without waiting for the submission of a supplemental report. This will allow for full consideration of the proposed rule within the 120-day length of the emergency.

The Office of Planning has coordinated this proposal with the District of Columbia Public Schools.

BACKGROUND

Charter schools in the District are granted charters by one of two bodies, either the District of Columbia Board of Education or the District of Columbia Public Charter School Board. The United States Congress has mandated that the District of Columbia treat charter schools the same as public schools for the purposes of the Zoning

#06-06

2006 FEB -3 PM 4:55

DC OFFICE OF ZONING

RECEIVED

ZONING COMMISSION

CASE No. *06-06*

EXHIBIT No. 1

Regulations. This requirement causes the need for modifications to the Zoning Regulations based on the differences between traditional public schools and charter schools.

Traditional public schools must be approved by the City Council for funding and have therefore been lightly monitored by zoning. They are static uses that, once approved, do not change location without further Council approval. Conversely, charter schools require only a charter from one of the two chartering bodies and no public hearing. Further, once a charter school has received its charter, it is not tied to a particular site and may move to any building in any zone district in the city where public schools are allowed. This can cause friction in small sites in residential neighborhoods where access is limited or the affects of a school would be more acute.

This emergency text amendment is designed to address several aspects of public/charter schools in the zoning regulations. First, it defines public schools to include public charter schools. Second, it allows collocation of school uses with other uses and sharing of recreational facilities. Third, it amends the lot area, lot width, FAR, and lot occupancy of public schools in residential zones to provide consistent standards that ensure neighborhood compatibility. Fourth, any schools in residential zones not meeting the requirements are proposed to be allowed as special exceptions. Fifth, it amends the regulations to allow public schools in the SP, CR, and W zones. Finally, this text amendment creates standards for preschools where none currently exist.

PROPOSAL

Proposed Text

1. Amend first sentence of definition of "Public School" §199.1 as follows:

A building or use within a building operated and maintained or chartered by the District of Columbia Board of Education or the District of Columbia Public Charter School Board for educational purposes and other such community uses as deemed necessary and desirable.

2. Amend §201.1(k) to change matter of right uses in R-1 as follows:

- (k) Public school, subject to the provisions of chapter 21 of this title; Public schools may collocate with other permitted schools or uses provided all applicable requirements of this title are met. Public schools may share common on-site recreation space including gymnasiums, playgrounds, and fields, and these shared recreational spaces may count toward the minimum lot area. On-site office use must be ancillary and necessary to the operation of the particular school.

3. Amend §§ 400, 401 and 403 as noted below as "Proposed" for Public Schools¹

Res Zone	Minimum Lot Area (§ 401) ²		Minimum Lot Width (§401)		Maximum FAR (§402)- no change proposed	Maximum Lot Occupancy (§403)		Maximum Height (§400.10-11) ³	
	Existing	Proposed	Existing	Proposed		Existing	Proposed	Existing (res max)	Proposed
R-1-A	7,500 sf	15,000 sf	75'	120'	0.9	60% *	60% *	60' (40')	60'
R-1-B	5,000 sf	15,000 sf	50'	120'	0.9	60%*	60%*	60' (40')	60'
R-2	4,000 sf	9,000 sf	40'	120'	0.9	60%*	70% max	60' (40')	60'
R-3	4,000 sf	9,000 sf	40'	120'	1.8	60%*	70% max	90' (40')	60'
R-4	4,000 sf	9,000 sf	40'	120'	1.8	60%*	70% max	90' (40')	60'
R-5-A	None	9,000 sf	None	120'	1.8	60%*	60%*	90' (40')	90'
R-5-B	None	9,000 sf	None	120'	1.8	60%*	60%*	90' (50')	90'
R-5-C	None	9,000 sf	None	120'	3.0	75% *	75% *	90' (60')	90'
R-5-D/E	None	9,000 sf	None	120'	3.0	75% *	75% *	90' (90')	90'

* Currently §403.3 allows for public schools to exceed lot occupancy subject to limitations on height and pedestrian access. Proposed there would be a maximum of 70% in the R-2, R-3 and R-4 zones

1 = Any public school that does not meet the proposed limitations of 401, 402 or 403 may request relief through the special exception process.

2 = Minimum lot area may include adjacent parcels that are separated only by a public alley.

3 = (res max) = the maximum height permitted for a residential structure in these residential zones

Amendments include:

400.10 In an R-1, R-2, R-3, and R-4 District, a public school building or structure may be erected to a height not exceeding sixty feet (60 ft).

400.11 In an R-3, R-4, R-5-A, R-5-B, and R-5-C District, a public school building or structure may be erected to a height not exceeding ninety feet (90 ft).

The table in 401.3 would be amended to Add a public school category to every residential zone district with the above noted lot area and lot width.

401.8 For public schools minimum lot area may include adjacent parcels under the same ownership that are separated only by a public alley.

403.1 A public school building may occupy the lot upon which it is located in excess of the permitted percentage of lot occupancy prescribed in §403.2; provided, that the portion of the building excluding closed courts exceeding the lot coverage shall not exceed twenty feet (20 ft.) in height or two (2) stories; and provided further, that direct pedestrian access not less than ten feet (10 ft) in width from at least two (2) public rights-of-way shall be provided to each roof area used for these purposes. The roof area shall be used only for open space, recreation areas, or other athletic and field equipment areas in lieu of similarly used space normally located at ground level. In the R-2, R-3, and R-4 zones, the total lot occupancy should not exceed 70 percent.

4. Amend §206 to include Public Schools as a Special Exception in the R Districts as follows:

206 PUBLIC AND PRIVATE SCHOOLS AND STAFF RESIDENCES (R-1)

206.1 Use as a public school that does not meet the requirements of chapter 4 of this title or as a private school, but not including a trade school, and residences for teachers and staff of a private school, shall be permitted as a special exception in an R-1 District if approved by the Board of Zoning Adjustment under § 3104, subject to the provisions of this section.

206.2 The private school shall be located so that it is not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students, or otherwise objectionable conditions.

206.3 Ample parking space, but not less than that required in chapter 21 of this title, shall be provided to accommodate the students, teachers, and visitors likely to come to the site by automobile.

5. Add §771.10 to allow for public school use in the C-1 zone up to a maximum FAR of 1.8

771.10 In a C-1 District, the maximum floor area ratio requirements may be increased for specific public school buildings or structures, but shall not exceed the floor area ratio 1.8

6. Add §501.1(i) to matter of right uses in SP-1 as follows:

(i) Public School, subject to the provisions of chapter 21 of this title.

7. Add §601.1(u) to matter of right uses in CR as follows:

(u) Public School, subject to the provisions of chapter 21 of this title.

8. Add §901.1(v) to matter of right uses in W districts as follows:

(v) Public School, subject to the provisions of chapter 21 of this title.

9. Amend 2101.1 "Parking for Schools" to add a standard for pre-elementary and pre-kindergarten schools as follows:

SCHOOLS	
<u>Pre-elementary schools and pre-kindergarten schools or facilities:</u>	<u>2 for each 3 teachers and other employees</u>

ANALYSIS

1. Amend first sentence of definition of "Public School" §199.1

This amendment accomplishes two purposes. It expands the definition of public school to include D.C. charter schools and to include schools collocated with other uses. This language is necessary to ensure that charter schools are considered public schools in terms of the Zoning Regulations. The collocation of schools with other uses, such as churches, allows for a more efficient use of land and allows the opportunity to locate schools with other large uses in residential zones where adequately sized lots might not otherwise be available.

2. Amend §201.1(k) to change matter of right uses in R-1

This language further addresses the collocation issue, specifically permitting it. It also addresses sharing of recreation space including gymnasiums, playgrounds, and fields. This provision allows opportunities for efficiency in land use where there are existing recreational facilities that may be underutilized. Finally, this change includes language that would limit office space in the school to offices ancillary to the school use.

3. Amend §§ 400, 401 and 403 for Public Schools

This section proposes minimum limits for lot area and lot width as well as maximum limits for height and lot occupancy. The proposal is for a minimum lot area of 15,000 square feet in the R-1 districts and 9,000 square feet in the R-2 through R-5 districts. R-1 districts allow only single family detached homes as

residential uses. The larger lot size in these districts should help to maintain the open, detached character of existing residential neighborhoods and provides space for the activity and impacts associated with schools. The R-2 through R-5 districts all allow some type of attached residential structures on various lot sizes. The 9,000 square foot minimum lot size in these districts recognizes the smaller lot sizes and greater densities in these zones while still requiring adequate space for a public school use.

The attached charts show land area for D.C. public schools and current D.C. public charter schools. Significantly, the proposed lot areas are greatly exceeded by every existing D.C. public school and all but one existing D.C. charter school

This section also calls for minimum lot width of 120' for public schools in residential districts. This regulation is an attempt to address the need of public schools for areas to load and unload children from buses or cars. While it would be generally preferable for this activity to be located on the site rather than in the street, the survey of existing schools showed that a large percentage of schools would be made non-conforming by a requirement for onsite student drop-off and pick-up. The compromise solution requires 120' of lot width, or street frontage to allow space that would ideally be marked for loading during school hours. 120' offers room for five to six cars to stop at once for drop-off/pick up.

The proposed text would also lower the maximum allowable height for schools in the R-3 and R-4 zones from 90 feet to 60 feet. In the R-1 through R-4 zones the maximum height for any structure other than a public school is 40 feet. The proposed change would ensure closer compatibility of future school buildings with the surrounding area and provide a more consistent change between the R-5 zones and lower zones in terms of height.

Currently, Section 403.3 allows public schools to exceed lot occupancy subject to limitations on height and pedestrian access. The proposed text amendment would amend Section 403.3 to limit that additional lot occupancy in the R-2, R-3, and R-4 zones to 70%. Currently, 70% is the maximum allowed for single family homes in these zones R-3 and above that go through the Section 223 special exception process.

4. Amend §206 to include Public Schools as a Special Exception in the R Districts

This amendment would simply add "a public school that does not meet the requirements of chapter four of this title" to the special exception standards for private schools. This amendment allows the option to develop schools that do not meet the new or existing requirements through a special exception.

5. Add §771.10 to allow for public school use in the C-1 zone up to a maximum FAR of 1.8

C-1 sites in the District tend to be individual properties or small areas in residential neighborhoods. Currently, the C-1 zone limits all development to an FAR of 1.0. This tends to be lower than the allowed FAR of surrounding zoning districts which for schools is usually 1.8. Raising the maximum FAR in the C-1 zone for public schools would allow use of these sites at similar density to what would be allowed in the surrounding neighborhood while still less than would be allowed in larger commercial areas.

6. *Add §501.1(i) to matter of right uses in SP districts*

7. *Add §601.1(u) to matter of right uses in CR district*

8. *Add §901.1(v) to matter of right uses in W districts*

Public schools are not currently permitted in the SP, CR, or W zone districts. These amendments would clean up what appears to be an oversight and effectively allow public schools to locate in any zone district in the city.

9. *Amend 2101.1 "Parking for Schools" to add a standard for pre-elementary and pre-kindergarten schools*

The existing parking regulations of chapter 21 do not specifically address pre-elementary schools. Since schools of this type would have similar parking needs as elementary schools, the parking standards for elementary schools have been used as the suggested standard for preschool uses. The requirement would be two parking spaces for every three teachers or other employees.

COMPREHENSIVE PLAN

The text amendment is not inconsistent with any of the Comprehensive Plan themes, goals, objectives and policies. No policies specifically address the placement or impacts of public schools. The major themes of the Plan tend to promote maintaining or improving the character of neighborhoods as well as enhancing public safety. The proposed changes further the goals of both of these themes and not inconsistent with any specific areas of the Plan.

EMERGENCY ACTION

The Office of Planning recommends that this text amendment be effective immediately upon setdown. This text is needed to clean up an existing ambiguity regarding charter schools in the Zoning Regulations. There are currently over fifty charter schools in the district and several more are granted charters each year. This language is needed to specifically equate charter schools to D.C. public schools and clarify the guidelines for public school buildings. Further, the text amendment would immediately open up some zones of the city that currently do not allow public schools. Delaying the effective date of this amendment until the final order would leave the issues resolved here in limbo and the standards and timing ambiguous for projects to happen later this year.

AGENCY COMMENT

OP has been in contact with DCPS throughout the process. DCPS has provided attached information regarding the lot areas and enrollment of existing schools. They have also

reviewed the proposed changes. While no written report has been submitted, verbal discussions have indicated no objections to the proposals.

COMMUNITY COMMENT

OP has worked closely with charter school groups including FOCUS and interested stakeholders. Comments were solicited throughout the month of January. We have tried to address a multitude of issues and ideas in this proposal and believe that we have reached a proposal that accomplishes the cities goals for public schools while offering the widest possible latitude for matter-of-right public school uses and balance impacts on adjoining residential neighbors.

CONCLUSION

The proposed text amendments are not inconsistent with the Comprehensive Plan goals and objectives and will serve an function in allowing charter schools the same opportunities as public schools in our city. The Office of Planning recommends that the proposed amendments to 11 DCMR (ZONING) be set down and advertised for hearing.

Attachments

EM/tp

C-TAB 11

GOVERNMENT OF THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

+ + + + +

PUBLIC MEETING
1203TH MEETING SESSION (5TH OF 2006)

+ + + + +

MONDAY

FEBRUARY 13, 2006

The Special Public Meeting of the District of Columbia Zoning Commission convened in Room 220 South, at 441 4th Street, Northwest, Washington, D.C., 20001, at 6:30 p.m., Carol Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY J. HOOD	Vice-Chairperson
GREGORY JEFFRIES	Commissioner
JOHN PARSONS	Commissioner (NPS)
MICHAEL G. TURNBULL	Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

SHARON SCHELLIN	Acting Secretary (ZC)
-----------------	-----------------------

OFFICE OF PLANNING STAFF PRESENT:

ELLEN MCCARTHY	Interim Director
MAXINE BROWN-ROBERTS	
STEVE COCHRAN	
TRAVIS PARKER	
JENNIFER STEINGASSER	
KAREN THOMAS	

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OFFICE OF THE ATTORNEY GENERAL STAFF PRESENT:

ALAN BERGSTEIN, ESQ.
MARY NAGELHOUT, ESQ.
JACOB RITTIG, ESQ.

This transcript constitutes the minutes
from the public meeting held on February 13, 2006.

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AGENDA ITEMPAGECALL TO ORDER:

Carol Mitten 5

PRELIMINARY MATTERS:

Ms. Schellin (None) 5

CONSENT CALENDAR:

A. Z.C. Case No. 04-04A 6
 VOTE: 7
 B. Z.C. Case No. 03-26A 7
 VOTE: 10

HEARING ACTION:

A. Z.C. Case No. 06-06
 Travis Parker 10
 VOTE 39
 B. Z.C. Case No. 06-05
 Karen Thomas 39
 VOTE 43
 AMENDED VOTE 45
 C. Z.C. Case No. 06-07
 Steven Mordfin 45
 VOTE 59
 D. Z.C. Case No. 05-02
 Jennifer Steingasser 60

PROPOSED ACTION:

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 B. Z.C. Case No. 05-18 89
 C. Z.C. Case No. 05-21 94
 VOTE 103
 D. Z.C. Case No. 05-24 104
 VOTE 127

FINAL ACTION:

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 VOTE 128
 B. Z.C. Case No. 03-12A 129
 VOTE 133

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CORRESPONDENCE:

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B. Letter from West End Citizens Association .	134
C. Letters from Councilmember Graham and the Gay and Lesbian Activists Alliance of Washington	134

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ADJOURN:

Carol Mitten	136
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1 just strike the language that says discount to reflect
2 early payment. And then that would satisfy the Zoning
3 Administrator that they could, in the alternative, do
4 a lump sum payment.

5 CHAIRPERSON MITTEN: Okay. Well then I
6 would move that.

7 VICE-CHAIRPERSON HOOD: I'll second.

8 CHAIRPERSON MITTEN: Any further
9 discussion? All those in favor, please say aye.

10 ALL: Aye.

11 CHAIRPERSON MITTEN: Those opposed, please
12 say no. Ms. Schellin?

13 MS. SCHELLIN: Staff will record the vote
14 five to zero to zero, to approve the modification as
15 discussed on the dias in Case No. 03-26A; Commissioner
16 Mitten moving; Commissioner Hood Seconding;
17 Commissioners Jeffries, Parsons, and Turnbull in
18 favor.

19 CHAIRPERSON MITTEN: Thank you. All right
20 then, the next up is Hearing Action. And, as I said,
21 we'll take up the Case No. 06-06 first; which is a
22 proposed emergency text amendment regarding public
23 schools. Mr. Parker?

24 MR. PARKER: Good evening, Madam Chair and
25 members of the Commission. My name is Travis Parker

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1 with the Office of Planning.

2 As you are aware, the Congress has passed
3 the Public Charter School Act, which amended the
4 definition in the City Code of Public Schools to
5 include charter schools. As of this date, the Zoning
6 Regulations haven't been amended to reflect that
7 change and this amendment would -- would do just that;
8 change the Zoning Regulations to reflect charter
9 schools as public schools in the District.

10 Inherent with that change is also language
11 necessary to address the similarities and differences
12 between charters and traditional public schools. As
13 you are aware, traditional public schools go to the
14 City Council for approval. And guidelines for schools
15 have traditionally come through that process.

16 In equating public schools to charter
17 schools, it's necessary to delineate development
18 guidelines for schools in the residential zones that
19 would otherwise come from Council oversight.

20 Further, this amendment would expand the
21 public schools, including charter schools, throughout
22 the District to include the CR, W, and SP districts,
23 and add clarifying language that results from these
24 changes.

25 OP has worked with the D.C. public schools

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1 and stake holders from there throughout the city over
2 the past couple of months, to address these issues.
3 And now, I'll briefly go over the specific changes
4 requested.

5 The first is amendment of Section 199 to
6 specifically include schools chartered by the D.C.
7 Board of Education and the D.C. Public Charter School
8 Board in the definition of public schools.

9 Second, we would change the matter of
10 right uses in R-1, under public schools, to encourage
11 co-location of public schools with other uses and the
12 sharing of recreation space, including gymnasiums,
13 playgrounds, fields, and etc.

14 The third change that we're proposing is
15 reflected in page 3 of the report, in the chart, and
16 deals with several areas of development regulations
17 for public schools. The minimum lot area and minimum
18 lot width would be amended in Section 401. The R-1
19 districts would have a minimum lot area of 15,000
20 square feet and the R-2 through R-5 districts of 9,000
21 square feet.

22 The reason for the difference between the
23 two; the R-1 districts are currently the only
24 districts in the city that have no -- have no
25 possibility for side lot line joining or always have

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1 a side yard. Every district from the R-2 up, has
2 duplexes or row house options. And so those -- there
3 is an inherent difference there between the districts.

4 As you'll note in the charts in the back
5 of the report, we have information on every school
6 that we've been able to locate; both public school and
7 charter school in the District, in regards to lot
8 area.

9 Every single D.C. public school in
10 existence now is greater than half an acre in size and
11 every charter school that's located in a residential
12 district is greater than 9,000 square feet in size.
13 So the effects of this change on existing schools
14 should be nearly nothing, as far as making schools not
15 conforming.

16 The minimum lot width proposed in
17 residential districts is 120 feet. This is an attempt
18 to address the drop off and pick up of students at
19 these schools. We didn't feel it was appropriate to
20 require schools to have drop off and pick up onsite
21 because it's not always possible. But, by providing
22 a minimum lot width of 120 feet, there is space in the
23 front of schools for up to six cars to stop and have
24 a school drop off loading zone.

25 Section 403, later in the chart, addresses

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1 maximum lot occupancy. Currently schools are limited
2 to 60 percent. All uses in the districts R-1 through
3 R-5B are limited to 60 percent, but schools are
4 granted extra leeway above that when they meet certain
5 requirements found in Section 403.

6 We're recommending to keep that for the R-
7 1 and the R-5 districts, but R-2, R-3, and R-4 would
8 cap that additional lot occupancy at 70 percent.

9 We're changing no -- nothing -- proposing
10 no changes to the FAR in Section 402 and only minor
11 changes to the maximum height in Section 400. You'll
12 note that currently schools are allowed greater
13 heights than the residential districts -- than the
14 residential uses in the districts in which they sit.
15 And, while they're allowed up to 60 in R-1 through R-
16 2, R-3 and R-4 are currently allowed 90 foot schools.

17 We're recommending that R-3 and R-4 be
18 lowered to a 60 foot maximum for public schools. It's
19 still higher than the 40 foot allowed for all other
20 buildings; and that the 90 foot and up be allowed for
21 R-5 Districts. You'll see in my report there that the
22 test for each of those changes is located below.

23 The fourth major change would change
24 Section 206 to allow any school that doesn't meet
25 those requirements to move forward as a special

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1 exception under similar standards as private schools
2 would. Therefore, lessening the requirements from a
3 variance and making it easier for schools to proceed
4 that don't meet all the guidelines of this section.

5 Section 5 addresses the C-1 district and
6 raises the FAR to 1.8. Currently, the C-1 district
7 has a 1.0 FAR with no exception for public schools.
8 You'll note that the R-5 and R-4 districts allow a
9 1.8, and the higher C districts allow higher. We felt
10 it was inappropriate for this district to step back
11 down to a 1.0 and we tried to bring it in line with
12 the R-4 and R-5 districts that tend to surround the C-
13 1 district.

14 Changes six, seven, and eight allow public
15 schools in SP, CR, and W districts. Currently, public
16 schools are not addressed in the text of those
17 districts and not allowed as a matter of right. This
18 text amendment would clean that -- clean up that
19 oversight and allow public schools in ever district in
20 the city.

21 The ninth proposed change is in the
22 Chapter 21, regarding parking. Currently, there are
23 no parking standards for pre-elementary schools. They
24 have traditionally fallen under the Child Development
25 Centers, but charter schools have not necessarily --

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1 do not necessarily fall under that definition. And
2 this would create a standard for pre-elementary
3 schools that would be in line with the standard for
4 elementary schools of two parking spaces for each
5 three students.

6 I don't know if you've received the
7 supplemental report, but the supplemental report calls
8 that a tenth change that would address split-zoned
9 lots. The lot area requirements, as you will note,
10 are for residential zones. We're proposing that any
11 existing lot that is split-zones, public schools be
12 allowed to follow the restrictions for the less
13 restrictive zone. So, if there's a commercial and a
14 residentially split zone, they would -- they would be
15 able to be a commercial lot for purposes of lot area
16 and lot width.

17 As I mentioned, we've worked closely with
18 the Department of Public -- D.C. Public Schools and
19 other community groups in outlining this. We feel that
20 we've created some standards that are -- are -- both
21 protect the residential neighborhoods and provide
22 flexibility in the development of schools in the
23 District.

24 And we recommend that this be -- this text
25 amendment be set down for emergency -- emergency

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1 action. Currently, there are over 50 charter schools
2 in the District and seven more charters are granted
3 each year. This language is needed to specifically
4 and immediately equate charter schools to D.C. public
5 schools and clarify the guidelines for public school
6 buildings.

7 Further, the text amendment would
8 immediately open up some zones of the city that do not
9 currently allow public schools. Delaying the
10 effective date of this amendment until the final order
11 would leave this issues unresolved and the standards
12 and timing of projects that would happen in the next
13 year ambiguous. So we recommend that the -- this text
14 amendment be set down and we recommend it as an
15 emergency amendment.

16 CHAIRPERSON MITTEN: Thank you. I just
17 have a general question before we get to some more
18 specific questions; which is, what -- you gave us a
19 list of charter schools on the back page of your
20 summary of locations and site areas and so on. Do any
21 of these charter schools have Certificates of
22 Occupancy?

23 MR. PARKER: It is my belief that all of
24 these are currently active. So they should all have
25 Certificates of Occupancy.

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1 CHAIRPERSON MITTEN: So, given that the
2 definition is one of the things that's at issue,
3 whatever -- whatever Certificate of Occupancy they
4 have is likely to be in error? Is that correct?

5 MR. PARKER: They were likely issued
6 Certificates of Occupancy as public schools. I've not
7 looked into the C of O's for these schools. If not,
8 they could -- when they made changes, they could be
9 issued C of O's as public schools.

10 CHAIRPERSON MITTEN: Okay. Mr. Bergstein,
11 do you see any issue that we need to be conscious of
12 when we act on this?

13 MR. BERGSTEIN: There's the procedural
14 question as to whether or not you would want this
15 emergency to apply to or not apply to persons which
16 have applied for building permits before DCRA, absent
17 some saving language.

18 CHAIRPERSON MITTEN: I'm actually focusing
19 on the existing charter schools and their Certificates
20 of Occupancy.

21 MR. BERGSTEIN: If -- if the -- there was
22 a case that came out about a year ago that's called
23 Chagnon, that said that if a use is defined, that the
24 Zoning Administrator doesn't have the authority to
25 issue C of O's for a use that's like that, unless it

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1 meets every part of the definition.

2 And indeed, the reason why the Zoning
3 Commission is taking up the question of adult daycare
4 is because the effect of that ruling was, in essence,
5 to invalidate all the existing C of O's for those
6 uses.

7 So there is an issue that, unless the
8 Zoning Commission creates a new definition for public
9 schools, the existing C of O's for any charter school
10 that has a public school -- particularly those that
11 were issued after Chagnon, would be suspect.

12 CHAIRPERSON MITTEN: So any charter school
13 that now has a Certificate of Occupancy for a public
14 school, this would actually make those correct, as
15 opposed to --

16 MR. BERGSTEIN: That is correct. The use
17 would then be correct.

18 CHAIRPERSON MITTEN: Okay. Thank you.
19 Questions for Mr. Parker? Mr. Hood?

20 VICE-CHAIRPERSON HOOD: Yes. Mr. Parker,
21 help me understand. And I notice in what's being
22 proposed, when it talks about the C-M-1 zone and
23 public charter schools, I think you were saying that
24 if it's in the C-M-1 zone and there's a proposal, then
25 it would go as a special exception?

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1 MR. PARKER: No. Not at all.

2 VICE-CHAIRPERSON HOOD: Okay.

3 MR. PARKER: Schools are currently allowed
4 in C-M-1 zone, and would follow the restrictions of
5 that zone. And we're not proposing any change to
6 that.

7 VICE-CHAIRPERSON HOOD: Okay. So schools
8 are currently allowed in the C-M-1 zone?

9 MR. PARKER: It's the CR, SP, and W zones
10 that don't currently allow schools. And this would
11 allow them in those zones subject to the requirements
12 of those zones. We're not proposing any changes to
13 the requirements of those zones.

14 VICE-CHAIRPERSON HOOD: Right. I
15 understand that. But I'm just trying to look back to,
16 like the Chair was talking about, some things that
17 already exist. Schools are already allowed -- I'm
18 trying to make sure I understand. Schools are already
19 allowed in the C-M-1 zone?

20 MR. PARKER: Yes.

21 VICE-CHAIRPERSON HOOD: I will go on
22 record to say we really need to revisit that. Because
23 when you have a school, whether it's public charter or
24 public school, and I'm not second guessing anyone,
25 next to a trash transfer station, there's a problem.

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1 There's a problem.

2 When I went to school, I didn't go to
3 school next to trash. I really didn't. And I think
4 -- I don't know if this is the proper time, but I'll
5 put it out there. We need to really revisit that.
6 And I'm looking at some of these schools that are in
7 the C-M zones. I know one in particular. I think
8 that it's a serious problem for this city to have
9 those kids going to school next to a trash transfer
10 station.

11 CHAIRPERSON MITTEN: Anyone else?
12 Questions for Mr. Parker? Mr. Parsons.

13 COMMISSIONER PARSONS: I'm not yet
14 convinced I understand the emergency here. You
15 mentioned that there was -- I think you mentioned
16 seven applications a year that are being dealt with.
17 What is the citywide emergency that causes us -- I
18 mean, we don't do emergencies very often. And we do
19 it in the context of something is wrong citywide here
20 and we need to declare an emergency.

21 MS. STEINGASSER: If I may, Mr. Parsons.
22 When we started to circulate these regulations we were
23 -- everyone who was involved with the public -- with
24 the public school charter process began to tell us of
25 one school after another that was going to be

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1 adversely impacted; one school after another that was
2 in the process of either designing a school,
3 purchasing land, teaming up with another school to
4 purchase land; was under constructions; was getting
5 ready to file for permits.

6 We felt it was in the best interest of all
7 of those schools to know what the regulations were
8 going to be as soon as possible. So, if they needed
9 to get a special exception, they could immediately
10 begin to work in that direction.

11 If they needed to change course and look
12 at other land alternatives, they would know that as
13 soon as possible. And that they wouldn't be delayed
14 for the standard set down; four month public hearing;
15 proposed action; costing them what could reasonably be
16 presumed to be a full education year.

17 They would be -- if they got to the end of
18 the text amendment; they found out they needed a
19 special exception, then they'd have to get in line for
20 that.

21 So we felt it was in the best interest of
22 the schools and the education process to let that be
23 known as soon as possible.

24 MS. MCCARTHY: In addition, the whole
25 origin of the Office of Planning looking at this was

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1 an indication by the Zoning Administrator that he had
2 applications either before him or expected them and
3 felt that the definition as it was currently
4 constituted did not include charter schools as public
5 schools. So he wanted a determination made by the
6 Zoning Commission.

7 The Commission then asked the Office of
8 Planning to weigh in with a proposal. So, at this
9 point, the Zoning Administrator feels that the zoning
10 regulations would not permit him to consider charter
11 schools to be public schools, even though there's
12 clear legislative history that would indicates that
13 that was the intention. But until section -- until
14 the Section 199 definition is revised, charter schools
15 could not technically be approved. So we -- we felt
16 we needed to act quickly and not wait for the 60 day
17 period, basically, for a set down, in order for the
18 definitional issue to be resolved.

19 COMMISSIONER PARSONS: Thank you. That's
20 very helpful. Thank you.

21 CHAIRPERSON MITTEN: Anyone else? I just
22 had a couple of technical points. In 201.1K, where we
23 would potentially allow the schools that shared
24 certain recreation space to basically each count them
25 towards their minimum lot area, would that be if they

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1 were located on either the same lot or immediately
2 adjacent lots? Or -- what's the degree of proximity
3 required?

4 MR. PARKER: Well, that's the intent. I
5 think it's adjacency. And we could -- we could
6 certainly clarify that language.

7 CHAIRPERSON MITTEN: And then, in terms of
8 adjacency, just to follow through on that, in 401.8
9 you're suggesting that for public schools the minimum
10 lot area may include adjacent parcels under the same
11 ownership that are separated only by an alley. So
12 would shared facilities that were separated by an
13 alley also be counted towards the minimum lot area if
14 they weren't, in fact, in the same ownership?

15 MR. PARKER: Not by -- not by this
16 language, but yes, we could certainly --

17 CHAIRPERSON MITTEN: I'm just wondering
18 what you intended.

19 MR. PARKER: -- modify that. Well, the
20 intent for this was two parcels, for example the
21 school and, you know, the recreation facility on
22 opposite sides of an alley, under the ownership of the
23 school. But, we could certainly play with the
24 language to include shared facilities on opposite
25 sides of an alley.

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1 CHAIRPERSON MITTEN: Okay. And then, just
2 because, you know, I think it's come up from time to
3 time when we're trying to measure something that maybe
4 is not -- I mean, I can measure a gymnasium fairly
5 easily because it's got four walls. I can't measure
6 a field quite so easily. I can't necessarily measure
7 a playground.

8 So anything you could add about how those
9 would be measured so that we don't just drift into the
10 landscaping and stuff I think would be helpful.

11 In 206.2, on your page 4; 206.2 deals with
12 a private school, whereas above you had introduced the
13 notion of a public school that doesn't meet the
14 requirements of Chapter 4, do you also want public
15 school added to 206.2?

16 MR. PARKER: You're right. We should put
17 public and private schools.

18 CHAIRPERSON MITTEN: Okay. And then I
19 just had sort of a general question, because it
20 occurred to me as I was reading the parking
21 requirements. When we talk about parking, we make the
22 distinctions for parking by the age groups of the
23 children that are attending the school. Everything
24 else is delineated on public/private.

25 So I didn't know if you guys had given any

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1 thought to is public/private really the proper
2 delineation? Because we don't do it for parking. Or
3 is it -- or should we be making -- slicing this a
4 different way?

5 MR. PARKER: In terms of 206?

6 CHAIRPERSON MITTEN: In terms of -- well,
7 just the way we handle schools everywhere except
8 Chapter 21. We handle them one way, by age groups,
9 for parking purposes. And we handle them by who runs
10 them for every other purpose. And I didn't know -- I
11 didn't know if you'd thought about it.

12 MR. PARKER: It hadn't really come up.

13 MS. STEINGASSER: Some of the comments we
14 have gotten back have asked us to revisit parking
15 standards for the schools, pointing out that, in many
16 cases high school kids can't actually drive to school
17 until they're 18, so there's not really -- the
18 standards may not be as applicable as they used to be.

19 So, we'll be happy to take a look at that
20 and look at it terms of -- of the use versus the age
21 group issue.

22 CHAIRPERSON MITTEN: And I just didn't
23 know if it was relevant in other context besides just
24 parking. Is the age of the student body relevant when
25 you're talking about, you know, lot occupancy and --

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1 MS. STEINGASSER: Well, we tried -- we
2 tried to stay away from anything that actually got to
3 dictating program. And that's why we're silent on
4 whether there -- a school should have fields or a
5 gymnasium. Because, especially when we're bring the
6 charter and public -- traditional public schools
7 together under one definition, the charter schools by
8 their very nature are alternative education to the
9 public traditional system.

10 So, we tried to stay away from things that
11 would kind of require program dictation to the schools
12 themselves in how they're used. We went with this on
13 the parking standard because it is the standard format
14 that's in -- that's in the current regs. We didn't
15 look -- we looked to change as little as we could in
16 this case. And revisit as little as we could. But
17 we'll -- we'll be happy to look at that again.

18 Like I said, we have gotten comments from
19 others that the parking standards may be a bit
20 archaic.

21 CHAIRPERSON MITTEN: Okay. Anyone else?

22 MS. MCCARTHY: I could also see that part
23 of why we determined the lot width that we determined
24 was to allow car -- the appropriate widths for a car
25 drop off and pick up. And we know from experience

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1 with the private school special exceptions that it's
2 because pre-school and smaller children take a lot
3 more time to get out of the car seats and get their
4 lunch boxes and various things together, as opposed to
5 older children, that maybe we should look as well as
6 to whether we could provide differently for pick up
7 and drop off for older children and require less --
8 less space for that.

9 CHAIRPERSON MITTEN: Okay. Thank you.
10 Any other questions?

11 COMMISSIONER JEFFRIES: Yes. Madam Chair,
12 I'm just -- I think there's a lot of -- a lot to chew
13 on here. There's a lot of information. And I went
14 through it and, you know, I just felt like I need to
15 absorb it a little bit longer. You know, I'm
16 wondering if there's a place in between sort of set
17 down and emergency basis. I -- I -- and I don't know
18 if we can get there.

19 I mean, I understand that the dilemma
20 around, you know, the text amendments and your notice
21 and so forth and so on. But, you know, I mean, I just
22 feel that there's a number of issues here. And I'm
23 just trying to figure if there's some other way in
24 which we can do this without setting down and then,
25 right away, it becomes --

1 CHAIRPERSON MITTEN: There's -- I guess
2 there's a couple of -- there's a couple of thing
3 available to us. One is, we do it all as an emergency
4 and we -- which is the first request from the Office
5 of Planning. And the second request is that we
6 authorize the issuance of a Notice of Proposed Rule
7 Making, based on what's here, rather than having a
8 supplemental report written.

9 The -- so -- so, we can do that. We can
10 parse it -- you know, we can parcel it out. And, you
11 know, for instance, the definition is I would say the
12 most crucial part because of what's pending out there.
13 And we can marry that with an immediate advertisement,
14 which would then accomplish at least part of what Ms.
15 Steingasser was saying, which is we're putting people
16 on notice that these are going to be the rules.

17 It's not quite the same. It doesn't have
18 the same teeth as doing all of it as an emergency, but
19 it certainly puts everyone on notice and gives the
20 Zoning Administrator a clear indication of the
21 direction that we intend to go.

22 And the other would just be to set down
23 the case as a normal case and not do anything on an
24 emergency. Or we can immediately advertise. So,
25 there's like four versions -- four variations. Mr.

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1 Turnbull?

2 COMMISSIONER TURNBULL: I think I would --
3 I kind of like the idea of at least defining the
4 charter school. I think that's something that sounds
5 like it needs to be done, and to call it a public
6 school. And let's get that off the table. But -- and
7 then, again, revisit some of these other things or
8 spend some more time on them, or whatever.

9 But it sounds like that's something that
10 they're looking -- the Administrator's looking for us
11 to deal with. I would go along with that.

12 CHAIRPERSON MITTEN: Okay. Let me -- let
13 me say it. And then, if you want to move it, then --
14 so that we would -- we would act on an emergency basis
15 to adopt the definition that the Office of Planning
16 has -- has suggested. So we would amend Section 199.1
17 in the definition of public school. And then we would
18 issue a Notice of Proposed Rule Making for that
19 definition and the balance of the amendments proposed
20 by the Office of Planning. Would you move that?

21 COMMISSIONER TURNBULL: I would.

22 CHAIRPERSON MITTEN: Okay.

23 COMMISSIONER JEFFRIES: I'll second.

24 CHAIRPERSON MITTEN: Okay. Any further
25 discussion on that? And I just want to be clear that

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1 we're adding in No. 10, which has to do with the split
2 zone lots.

3 VICE-CHAIRPERSON HOOD: Let me make sure
4 I understand. The only thing we're doing is the
5 definition. We're doing that as an emergency?

6 CHAIRPERSON MITTEN: Yes.

7 VICE-CHAIRPERSON HOOD: And everything
8 else we're doing comes upon our normal set down rules?

9 CHAIRPERSON MITTEN: Well, we wouldn't
10 wait for a supplemental report before the
11 advertisement.

12 VICE-CHAIRPERSON HOOD: But we will set it
13 down

14 CHAIRPERSON MITTEN: Yes.

15 VICE-CHAIRPERSON HOOD: But we're going to
16 set it down. So it's still --

17 CHAIRPERSON MITTEN: Correct.

18 VICE-CHAIRPERSON HOOD: -- everything will
19 still come up under the set down rules?

20 CHAIRPERSON MITTEN: Yes.

21 VICE-CHAIRPERSON HOOD: Okay.

22 CHAIRPERSON MITTEN: Although the set down
23 rule doesn't apply to a text amendment.

24 VICE-CHAIRPERSON HOOD: Okay. So, in
25 other words, this is still lingering on.

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1 CHAIRPERSON MITTEN: Well it's -- they're
2 -- they're -- the -- the Zoning Administrator can only
3 enforce on the definition; not the balance of it --
4 not the balance of the amendments being proposed.

5 VICE-CHAIRPERSON HOOD: Okay. Because I
6 -- I think the initial request was that we set
7 everything down to the emergency. Right?

8 CHAIRPERSON MITTEN: Correct.

9 VICE-CHAIRPERSON HOOD: So, obviously,
10 unless I missed something; so -- so that initial
11 request has not won a waiver. But I think that the --
12 I'm just wondering what harm are we doing? Because I
13 do -- I do agree with my colleagues. Because I have
14 some issues with some stuff that's -- that's in --
15 that's probably been in here. But I'm just curious,
16 are we creating more of a problem by not putting that
17 in as an emergency? That's just a question.

18 CHAIRPERSON MITTEN: Well, we can ask the
19 Office of Planning.

20 VICE-CHAIRPERSON HOOD: Okay. Through you
21 to the Office of Planning.

22 CHAIRPERSON MITTEN: Okay.

23 MS. STEINGASSER: I'll venture out. The
24 proposal we've brought to you today is an attempt to
25 balance the rights of the public schools, whether

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1 they're charter or traditional, with the potential
2 adverse impacts to neighborhoods. And, based on the
3 fact that some people -- half the group thinks we've
4 gone too far and the other half thinks we haven't gone
5 far enough, we think we've struck that balance.

6 The potential to setting down just the
7 definition as an emergency and leaving the rest of the
8 text in a standard rule making context is that all --
9 all the -- all schools now are a matter of right, with
10 no -- with the most minimal restrictions that are
11 currently on the zoning regs.

12 Where that's of concern to us is in the R-
13 2, R-3, and R-4 zone districts. Those allow buy right
14 adjoining buildings. So a -- somebody can build right
15 up to your property wall attached to your building and
16 operate a school of some sort with the most minimal --
17 and it's not even the most minimal.

18 Under the current regs, public schools of
19 any type have excessive lot occupancy. They can go up
20 to 100 percent lot occupancy in these zones, provided
21 that it's only two stories. They can -- they have an
22 excessive FAR and height that is not in character with
23 the residential zone of those three categories.

24 That's why we've focused on the R-2, R-3,
25 and R-4 zones. Those are zones that have the smallest

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1 lots; the most minimal areas and street frontage, and
2 the greatest potential for adverse impact of
3 complimentary land uses. I mean, we agree that that's
4 -- you know, there's a density issue; schools need to
5 be where there's families. But, when you get into
6 lots that are only 4,000 square feet, that's two row
7 house lots. That's a pretty darn small lot.

8 And the impact of being able to have a 90
9 foot building in an R-4 zone where residents can only
10 be 50 feet, and you can double your FAR, it's -- it's
11 a potential for a very great neighborhood impact.

12 So, that's why we kind of focused our most
13 stringent regulations on that rule. So, if you move
14 forward with the motion, as you've written, you've
15 allowed the maximum buy right opportunities with the
16 least amount of restrictions. So it kind of -- the
17 balance is now a little bit --

18 CHAIRPERSON MITTEN: I think I have a --
19 I think I have a solution. We'll see if it -- if it
20 takes. Mr. Turnbull, would you accept this as
21 friendly amendment, which is just that we add -- we
22 just take two of the -- of the suggestions that -- the
23 suggested amendments. So, the first one would be the
24 definition. The second would be what is articulated
25 as Number 3, by the Office of Planning, which is amend

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1 sections 400, 401, and 403 as noted in the chart. And
2 then the balance -- as in the chart and in the
3 subsequent text amendments that follow it for 400.10,
4 400.11, 401.8, and 403.1. And then we'll allow the
5 more housekeeping things to catch up. Would you
6 accept that as a friendly amendment?

7 COMMISSIONER TURNBULL: Yes. I think
8 you're key concern is the 120 foot width that you're
9 looking for in the future?

10 MS. STEINGASSER: I guess our key concern
11 is the fact that schools can be twice as dense as
12 their residential neighbors, and can attach to the
13 buildings.

14 COMMISSIONER TURNBULL: Okay.

15 MS. STEINGASSER: Yes. So it does -- it's
16 the lot size and the -- the street width and the
17 height. So that, it -- it's the physical structure
18 itself and the potential for that -- that impact on
19 the neighborhoods.

20 COMMISSIONER TURNBULL: I would -- I would
21 move to include that then.

22 CHAIRPERSON MITTEN: Okay. And who was
23 the second? Mr. Jeffries? Do you accept that?

24 COMMISSIONER JEFFRIES: Well, just a quick
25 question. So this is in terms of what you fear could

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1 happen in the R-1, R-2 zones. This is imminent? I
2 mean, we -- we can see this happening next month or
3 two?

4 MS. STEINGASSER: Imminent? I -- I don't
5 know if there's schools out there looking at this
6 category. But, under the proposed -- under the
7 original motion, it could be allowed as a matter of
8 right.

9 COMMISSIONER JEFFRIES: Okay. That's what
10 I'm -- yes. I guess what I'm saying in terms of the
11 window of time -- I mean, I -- I'm getting a sense,
12 based on emergency, that, you know, there's a line of
13 people sort of, you know, waiting; schools to go in
14 and build these -- monstrosities in R-1, R-2. And --
15 but you're -- am I missing something here? I mean --

16 MS. STEINGASSER: No. And I -- I wouldn't
17 call them monstrosities. It's -- it's just -- it's a
18 -- it's a scale difference.

19 COMMISSIONER JEFFRIES: Right. Right.
20 Right.

21 MS. STEINGASSER: I don't know where they
22 are. I know when we sent them out to the Association
23 for Public Charter Schools and -- and some other
24 charter groups, they responded that this is going to
25 impact a lot of schools that are out there; especially

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1 the smaller incubator schools that are looking at the
2 smaller pieces of land and the smaller -- because of
3 the -- because of the economics. And so that's our
4 concern is that they be given as much advance notice,
5 as well.

6 COMMISSIONER JEFFRIES: Okay. I -- I'm
7 fine. I will second this. I just have a general
8 comment. You know, when I see the word emergency, you
9 know, I'd like to feel that there's an emergency. And
10 I'm not quite feeling it. But -- but I -- I'm willing
11 to move the evening along here.

12 CHAIRPERSON MITTEN: I think there's a
13 couple of things -- if I could, just on the notion of
14 emergency. One of the emergencies that I recall was
15 when we did electronic facility regulations. And that
16 was because all of a sudden there were -- there were
17 a whole bunch of these uses that we'd never even heard
18 of before and we had to learn about. And they were --
19 had the potential to change the character of the whole
20 district. And that was -- and that was one kind of
21 sort of -- there was one kind of adverse impact that
22 would have resulted from that.

23 I think this issue, because as we all well
24 know, these are -- these are very sensitive issues, so
25 it might not be the potential for, in terms of land

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1 use potential, might not be there. But the potential
2 for impact to people, you know, and their lives is
3 great. It's a different kind of impact. But I don't
4 think it's any less than what we've experienced in
5 other cases.

6 COMMISSIONER JEFFRIES: Just -- we --we
7 dealt with, I believe, you know, occupancy issues
8 around Katrina and the students.

9 CHAIRPERSON MITTEN: Yes.

10 COMMISSIONER JEFFRIES: I mean, that what
11 clearly what I saw as an emergency. I clearly
12 understand the whole notion and the nuance of -- of,
13 you know, that in accumulation, something could, in
14 fact, be. But I -- I just, you know, I just don't
15 want to set a precedent that -- that, you know, we're
16 just constantly doing emergencies here.

17 CHAIRPERSON MITTEN: Right. Even though
18 we have two before us tonight. But, okay. So, just
19 to -- just to recap. We -- the motion is to take
20 emergency action with respect to the definition of
21 public school and the proposed amendments to Sections
22 400, 401, and 403. And then to set down the entire
23 text that the Office of Planning has proposed, with a
24 few little minor changes that we had suggested, and
25 authorize immediate publication of the Notice of

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1 Proposed Rule Making and Notice of Public Hearing.
2 And we have a -- Mr. Turnbull made that motion. Mr
3 Jeffries seconded that motion. Is there any further
4 discussion?

5 All those in favor, please say aye.

6 ALL: Aye.

7 CHAIRPERSON MITTEN: Those opposed, please
8 say no. Ms. Schellin.

9 MS. SCHELLIN: Staff will record the vote
10 five to zero to zero to set down the emergency action
11 -- I'm sorry, to set down Case No. 06-06 and to take
12 emergency action as discussed. Commissioner Turnbull
13 making the motion; Commissioner Jeffries seconding;
14 Commissioners Mitten, Hood, and Parsons in favor.

15 CHAIRPERSON MITTEN: Thank you. Now we
16 will go to Case No. 06-05. And this is a text
17 amendment; a proposed text amendment to -- this is our
18 second emergency -- to Section 401; which is something
19 that has become near and dear to my heart. Ms.
20 Thomas.

21 MS. THOMAS: Good evening Madam Chairman
22 and members of the Commission. I'm Karen Thomas with
23 the Office of Planning. And we are requesting set
24 down on an emergency basis for the amendment of
25 Section 410 to address an inconsistency in the

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C-TAB 12

Don Dinan

From: Faling, Herb [hfaling@sigal.com]
Sent: Thursday, February 23, 2006 10:38 AM
To: Don Dinan
Subject: FW: Charter School Emergency Zoning Regulations

-----Original Message-----

From: Crews, Bill (DCRA) [mailto:Bill.Crews@dc.gov]
Sent: Thursday, February 16, 2006 6:51 PM
To: George Keys
Cc: Cody Rice
Subject: RE: Charter School Emergency Zoning Regulations

George,

DCRA received a building permit application from Appletree last week.

From

my reading of the regs, it will have to comply with the emergency text amendment. With just a preliminary review, there are two areas where it doesn't comply with the previous regs - lot frontage and parking.

We will be reviewing the plans in the normal course of reviews, no special treatment.

If you have further questions, please let me know

Best regards,

Bill Crews

Zoning Administrator for the District of Columbia Department of Consumer and Regulatory Affairs

541 N. Capitol St. NE Suite 2000
Washington, DC 20002
202.442.4576 Office
202.442.4871 Fax
bill.crews@dc.gov

The Office of the Zoning Administrator is looking for additional zoning review technicians. If you or someone you know might be interested, please review the job description posting reference #2709 on the District Office of Personnel website www.dcop.dc.gov and contact the Zoning Administrator

-----Original Message-----

From: George Keys [mailto:gkeys@jordankeys.com]
Sent: Thursday, February 16, 2006 10:42 AM
To: Bill.crews@dc.gov
Subject: Charter School Emergency Zoning Regulations

Bill: Surely you have heard about the Zoning Commission meeting on Monday and the adoption of emergency regulations for a portion of the Office of Planning proposed text. I also understand that Appletree Institute Charter School filed a building permit application at the end of last week for the building at 138 12th Street, NE. This puts matters right back where we were when we discussed this last year. At that time you felt you lacked sufficient authority or clarity in the Zoning Regulations to apply the regulations to a "charter school" application as a "public school".

Now,

you have a clear indication where the Zoning Commission is heading and clearly they want to limit public school development on undersized lots in low density residential districts. How will this impact your consideration of the pending building permit? I

I'd like to discuss this with you, or if you prefer, I could write something up for you to consider. Please advise.

C-TAB 13

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

**Northeast Neighbors for Responsible
Growth, Inc.**

Plaintiff,

v.

District of Columbia, et al.

Defendants.

Civil Action No. 06-0685

Judge Robert E. Morin

**Next Court Event:
ICS on May 5, 2006**

**MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT**

Comes now, the Plaintiff by and through counsel and moves this Court to grant leave to file a first amended Complaint. The grounds for this Motion are that a number of events have occurred, which have substantive legal effect, since the Complaint was filed. This amendment also addresses, in part, the Rule 12 and Rule 19 motion to dismiss filed by the District of Columbia Attorney General's office, and is based upon Rule 15 and the new facts and occurrences since the original Complaint. The Amended Complaint is attached hereto.

1. The proposed zoning regulations referenced in our original complaint (§§ 15,16 and 17) have been passed on an emergency basis, in part, so the Complaint must be amended to recognize that fact (see Affidavit of Donald R. Dinan, Exhibit 1 and 9).

2. The regulations passed by the Zoning Commission, as promulgated by the Office of Planning, make the AppleTree proposal a non-conforming use (see, Affidavit of Herb Faling, §§ 3-4). This means that no permits can be granted by Department of Consumer and Regulatory Affairs (hereinafter "DCRA") until, and unless, the Board of Zoning Adjustment grants a special

exception or variance, as the case may be. On information and belief, DCRA and the Zoning Administrator (as well as the Zoning Commission) are under this belief and intend to so act (see Affidavit of Donald R. Dinan, Exhibits 2-6).

3. Despite the newly passed regulations, AppleTree is demolishing the Property as of February 15, 2006 under the guise of public health (see Affidavit of Herb Faling, ¶ 5 and Affidavit of Donald R. Dinan, Exhibits 7-8).

4. AppleTree has now written a letter to the Zoning Commission attacking it for issuing the emergency regulations and questioning their authority to do so in an apparent attempt to get the Zoning Commission to rescind the regulations and not adopt them on a permanent basis.

Motions for leave to amend should be granted liberally. These new substantive facts could not have been plead in the original Complaint as they had not then occurred. The policy favoring resolution of cases on the merits creates a virtual presumption that a Court should grant leave to amend where no good reason appears to the contrary. Bennett v. Fun and Fitness of Silver Hill, Inc., 434 A.2d 476 (D.C. App. 1981). Likewise, AppleTree should not have been named as a party defendant in the original complaint until they engaged in their egregious behavior to circumvent, avoid, and evade, the laws and regulations of the District of Columbia in their attempt to begin demolition and construction of a Property in violation of the zoning regulations.¹

Wherefore, Plaintiff respectfully requests that this Motion to Amend the Complaint be

¹ The District of Columbia, in its pending Motion to Dismiss, (most probably now rendered moot by these intervening causes) argued that AppleTree needed to be included as a defendant in the original complaint under Rule 19, and failure to do so constituted grounds for dismissal. Plaintiff totally disagrees, because at the time the original Complaint was filed, the suit was against the District of Columbia to prevent the District of Columbia from issuing permits; regardless, the point is moot as AppleTree is now affirmatively engaging in actions that warrant that it be made a party-defendant.

granted.

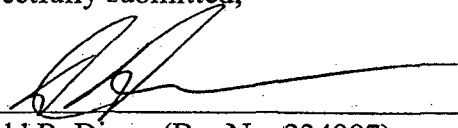
Rule 12-I

Defendant, the District of Columbia, consents to the granting of this motion.

Memorandum of Points and Authorities

S.C.R. - 12, 15 and 19

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Dinan', is written over a horizontal line.

Donald R. Dinan (Bar No. 234997)
**HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.**
1120 20th Street, N.W.
Suite 700, North Building
Washington, DC 20036-3406
Telephone (202) 973-1200
Facsimile (202) 973-1212
ATTORNEYS FOR PLAINTIFF,

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

**Northeast Neighbors for Responsible
Growth, Inc.**

Plaintiff,

v.

District of Columbia, et al.

Defendants.

**Civil Action No. 06-0685
Judge Robert E. Morin**

**Next Court Event:
ICS on May 5, 2006**

ORDER

Upon Plaintiff's Motion for Leave to File First Amended Complaint, it is, this ____ day
of _____, 2006,

ORDERED:

1. That said motion be, and the same hereby is, GRANTED.
2. The First Amended Complaint is hereby deemed filed.

Date

Judge Robert E. Morin

Copies to:

Donald R. Dinan
1120 20th Street, N.W.
Suite 700 North
Washington, D.C. 20036

AppleTree Institute for Education Innovation
William J. "Jack" McCarthy, Managing Director
Lex Towle, Co-Founder
400 7th Street, SE
Washington, D.C. 20003

Andrew J. Saindon
Assistant Attorney General
Office of the Attorney General
441 4th Street, N.W.
6th Floor
Washington, D.C. 20001

CERTIFICATE OF SERVICE

I, hereby certify, that on this 1st day of March 2006 a true and correct copy of the above and foregoing was sent by First Class Mail to:

Andrew J. Saindon
Assistant Attorney General
Office of the Attorney General
441 4th Street, N.W.
6th Floor
Washington, D.C. 20001

AppleTree Institute for Education Innovation
William J. "Jack" McCarthy, Managing Director
Lex Towle, Co-Founder
400 7th Street, SE
Washington, D.C. 20003


Donald R. Dinan

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

**Northeast Neighbors for Responsible
Growth, Inc.
144 12th Street, N.E.
Washington, D.C.**

Plaintiff,

v.

**District of Columbia
c/o Anthony Williams, Mayor
1333 1/2 Pennsylvania Avenue, N.W.
Washington, D.C. 20002**

and

**AppleTree Institute for Education Innovation
400 7th Street, SE
Washington, D.C. 20003**

Defendants.

Civil Action No. 06-0685

Judge Robert E. Morin

**Next Court Event:
ICS on May 5, 2006**

AMENDED COMPLAINT FOR INJUNCTION RELIEF

Comes now, Plaintiff, Northeast Neighbors for Responsible Growth, Inc. ("Northeast Neighbors"), by and through counsel and requests this Court enjoin the defendants from issuing building permits to the AppleTree Institute for Education Innovation ("AppleTree") for demolition and construction at 138 12th Street, N.E., Washington, D.C. (the "Property").

I. JURISDICTION

1. This Court has jurisdiction pursuant to Title 11 § 921 of the Code of the District of Columbia (2001 Ed.) (D.C. Code §11-921) as all parties and activities are located herein.

II. PARTIES

2. The Plaintiff is a non-profit corporation established by the residents in the Lincoln

Park area of Capital Hill. It is organized for the purpose of ensuring that the appropriate zoning laws and regulations are followed and enforced throughout the District of Columbia in the placement and construction of schools, and that orderly planning, pursuant to regulation promulgated by the Office of Planning govern such. It represents the interests of the neighbors of 138 12th Street, N.E..

3. The District of Columbia is a chartered municipality wherein the Property and all other parties are located.

4. Anthony Williams is the Mayor of the District of Columbia. He is named herein in his Official Capacity. AppleTree is a corporation based in the District of Columbia, which is in the business of running Public Charter Schools. It currently operates a Public Charter School at 400 7th Street, S.E., Washington, D.C. and plans to open another Public Charter School at 138 12th Street, N.E., Washington, D.C., which proposed school is the subject matter of this litigation.

III. FACTS

5. The Plaintiff by and through its members are concerned about unregulated, unplanned development specifically in their neighborhood; as well as, other residential neighborhoods within the District of Columbia. All of its members live in the area immediately adjacent to the Property and would suffer severe harm if the school which AppleTree plans to build on the Property were in fact built.

6. AppleTree has bought the Property. AppleTree seeks to place a Public Charter School on that site. The proposed school is chartered by the D.C. Public Charter School Board. The school plans to have approximately 54 three and four-year old children with a staff of approximately 24 persons.

7. The one hundred block of 12th Street, N.E. is narrow and residential. The Property is contiguous and abutting to the residential housing and the zoning is R-4 (Residential) and in the Capitol Hill Historic District.

8. AppleTree has taken the position that as a Public Charter School it is not covered by Zoning regulations or Planning rules and regulations and does not need variances or exceptions that would be required for a project of this size in an R-4 zone from either the Board of Zoning Adjustment or the Zoning Commission, as the case may be, despite the fact that this narrow tree-lined street and the present building are respectively too narrow and too small for their needs. There is no safe pick-up and drop-off spot. The building would hereto be bigger than the 40 percent occupancy allowed for non-residential use in a R-4 zone.

9. AppleTree has already sought the requisite building permits from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA). DCRA is the department within the District of Columbia government which issues and regulates, among other matters, any and all demolition and construction permits in the District of Columbia. These permits are currently before the Zoning Administrator for his approval. The Zoning Administrator is under this Department but is independent and must sign off on these permit requests prior to their issuance.

10. The building of a school of this size in a totally residential neighborhood will have a devastating effect on the residential and historical character of the neighborhood. The increased noise, traffic and congestion will cause irreparable harm to the neighborhood and its residents. The increased noise, traffic and congestion will not only affect the quality of life of the residents but will greatly depreciate the economic value of their homes, causing severe economic harm and threatening many with economic ruin should they go into a negative equity

position on their property.

11. AppleTree, in its position that it is not covered by the Zoning Regulations, relies on a definition and a zoning regulation for charter schools created under the District of Columbia Board of Education for schools licensed by them. AppleTree is not licensed by the District of Columbia Board of Education.

12. The school proposed by AppleTree is a licensed charter school under federal law incorporated into D.C. law in Chapter 38 §§ 1800 et seq. of the D.C. Code and under the Public Charter School Board not the D.C. Board of Education. In § 38-1800.02(29)(B) the definition of a "public charter school" is as follows:

District of Columbia public school. -

(A) In general. - The term "District of Columbia public school" means a public school in the District of Columbia that offers classes:

- (i) At any of the grade levels from prekindergarten through grade 12; or
- (ii) Leading to a secondary school diploma, or its recognized equivalent.

(B) Exception. - The term "District of Columbia public school does not include a public charter school."

13. As part of the Capitol Hill Historic District, the Historic Preservation Review Board (HPRB) must rule on AppleTree's application. The HPRB has indicated a favorable ruling is imminent. HPRB only has jurisdiction on the exterior appearance of the building, not its use. Further, on information and belief, Plaintiff has been led to believe DCRA will issue building permits for demolition and construction without regard for either the BZA or the Zoning Commission if there are no applicable zoning regulations in place.

14. The school AppleTree is proposing is not "a part of the District of Columbia public schools" and therefore is not exempt from the D.C. Zoning Regulations (see § 199 of the D.C. Zoning Regulations).

15. The District of Columbia Office of Planning has presented regulations to the D.C.

Zoning Commission to ensure appropriate placement of public charter schools and other such institutions, especially as to residential neighborhoods with regards to traffic, safety, noise and quality of life. These regulations were adopted on an emergency basis by the Zoning Commission on February 13, 2006. Emergency regulations go into effect immediately. These emergency regulations clearly apply to Public Charter Schools and, thus, AppleTree.

16. Under D.C. law, emergency regulations are only in effect for 90 days. In that time, they must be adopted by the Zoning Commission on a permanent basis in order to go into lasting effect:

17. Based on a study of the plat maps for the Property, the lot area is 4,230 square feet and the lot width is 36 feet. The lot occupancy appears to be 60 percent. Under the emergency regulations, the minimum lot area is 9,000 sq. feet and the minimum lot width is 120 feet. The maximum lot occupancy is 70 percent. The current FAR and the maximum height for the building as proposed by AppleTree, as opposed to the existing structure, are not known. On information and belief, the maximum lot occupancy under AppleTree's plans would exceed 70 percent.

18. These regulations will give all parties a reasonable framework under which to operate subject to an urban planning model for public schools and public charter schools and for all similar development in this (and most other major cities) residential area; so, as a matter of public policy and interest they are clearly necessary.

19. The public charter school which AppleTree plans to construct on the Property is a non-conforming use. Under the emergency regulations, regardless of the nature and size of the building which it plans to construct, which may also be non-conforming, the lot size and width are much too small. As a non-conforming use, AppleTree would have to obtain a special

exception and possible variances from the Board of Zoning Adjustment (hereinafter "BZA") before any building permits could be issued.

20. The Defendant, the District of Columbia, is the entity with the legal authority to issue these aforementioned permits and is required to follow their own statutes, regulations and planning requirements that it has heretofore strongly supported; especially with regard to the impact on traffic, parking, safety of the public and the students, and noise. No permits should be allowed to issue until the BZA has ruled on any appropriate application, and such ruling becomes final.

21. AppleTree has already begun preliminary demolition work despite the fact that the building permits have not been issued by DCRA and no special exceptions or variances have been sought from BZA. On January 12, 2006, AppleTree began demolition work in the back of the Property, although no permits were issued. They were only stopped by the interaction of the residents. Subsequently, on February 21, 2006, AppleTree, under a permit from the Department of Health, began demolition work on the building, allegedly removing asbestos floor tile and the mastic used to install it as well as removing asbestos pipe insulation located in the basement of the building. This demolition, which is occurring, appears to involve the removal of interior partitions and ceilings which may be beyond the scope allowed by the permit. AppleTree has been unloading heavy equipment including canisters at the Property.

22. On information and belief, AppleTree is doing everything possible to avoid and evade the laws and regulations of the District of Columbia in the demolition and construction of this building on the Property.

23. Based on AppleTree's actions to date, including trying to begin demolition, and its position that it is exempt from the relevant laws, it is likely they will attempt to proceed

regardless and so an injunction is the sole possible remedy. AppleTree has issued statements to the press claiming that they had verbal permission from DCRA to do the prohibited work in January. This has been denied by DCRA. AppleTree has now written a letter to the Zoning Commission attacking it for adopting the emergency regulations and questioning its legal authority in an apparent attempt to have the Zoning Commission rescind the emergency regulations, and not make them permanent.

24. On information and belief, AppleTree is conducting a disinformation campaign designed to spread false information about the project in an attempt to avoid and evade the zoning regulations of the District of Columbia.

25. At a meeting before the Stanton Park Citizens Association, officials of DCRA said they would not guarantee that AppleTree would not receive permits under the existing regulations. They further said they would not guarantee that permits would not be granted to AppleTree prior to the Office of Planning issuing its final regulations.

COUNT I

26. The Plaintiffs adopt and incorporate paragraphs 1 through 25 herein and relies on therein.

27. The permits once issued cannot easily be withdrawn and the intent of AppleTree to move quickly to avoid such planning and zoning considerations is obvious.

28. Any proposed urban planning and required zoning actions will be moot if the demolition is commenced so the only reasonable act is to enjoin such actions until the District of Columbia government is able to comply with its obligations.

29. Any such action as proposed would require approvals, use exceptions and variances from the Board of Zoning Adjustment and the Zoning Commission, as the case may

be.

WHEREFORE, Plaintiff respectfully prays that this honorable Court issue an injunction ruling that the District of Columbia and its agencies, including but not limited to, the Zoning Administration and the Department of Consumer and Regulatory Affairs, are enjoined from:

1. Granting any permits, including but not limited to building permits for the AppleTree project until such time as the Board of Zoning Adjustments and the Zoning Commission has ruled on the project, such permits to be in accordance with those rulings.
2. Granting any permits for the AppleTree project until such time as the Office of Planning draft regulations are promulgated, adopted, amended or denied by the Zoning Commission; such permits to be in accordance with those regulations, as adopted.

COUNT II

30. The Plaintiff adopts and incorporates paragraphs 1 through 29 of this Complaint and relies on them hereafter.

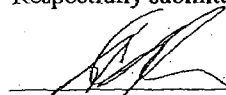
31. The actions of AppleTree, and their misrepresentation of the law, has shown the necessity for the city to promulgate regulations consistent with its urban planning model to govern the placement and construction of public schools and federally created Public Charter Schools, so as to insure they are reasonably and sensibly incorporated into appropriate locations in an urban residential community.

32. The Office of Planning has prepared and issued draft regulations to the Zoning Commission governing the placement and construction of public schools and Public Charter Schools, of which the proposed project is one, to insure their proper incorporation into the urban residential plan and their compliance with necessary laws.

WHEREFORE, Plaintiff respectfully prays that this honorable Court issue an injunction ruling that the District of Columbia and its agencies, including but not limited to, the Zoning Administration and the Department of Consumer and Regulatory Affairs, are enjoined from:

1. Granting any permits, including but not limited to building permits for the AppleTree project until such time as the Board of Zoning Adjustments and the Zoning Commission has ruled on the project, such permits to be in accordance with those rulings.
2. Granting any permits for the AppleTree project until such time as the Office of Planning draft regulations are promulgated, adopted, amended or denied by the Zoning Commission; such permits to be in accordance with those regulations, as adopted.

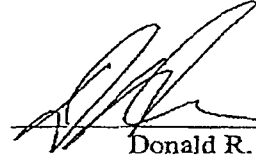
Respectfully submitted,



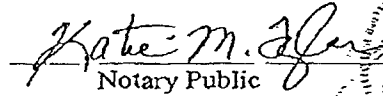
Donald R. Dinan (Bar No. 234997)
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
1120 20th Street, N.W.
Suite 700, North Building
Washington, DC 20036-3406
Telephone (202) 973-1200
Facsimile (202) 973-1212
ATTORNEYS FOR PLAINTIFF,

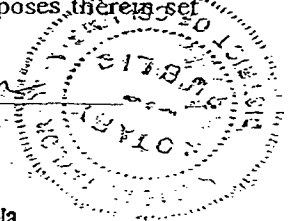
Verification

I herby swear and affirm the matter set forth in this Complaint are true and correct to the best of my belief.


Donald R. Dinan

Before me, KATIE M. TAYLOR, in and for Washington, D.C., on this 1ST day of MARCH, 2006 personally appeared Donald R. Dinan, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.


Notary Public



My Commission Expires:

8-31-2006
(SEAL)

Katie M. Taylor
Notary Public, District of Columbia
My Commission Expires 08-31-2008

My Commission No.:

C-TAB 14

Superior Court of the District of Columbia

CIVIL DIVISION

500 Indiana Avenue, N.W., Room JM-170
Washington, D.C. 20001 Telephone: 879-1133

Northeast Neighbors for
Responsible Growth, Inc.

Plaintiff

vs.

Civil Action No. 06-0683

AppleTree Institute for
Education Innovation

Defendant

400 7th Street, SE
Washington D.C. 20003

~~File~~ SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the party plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Room JM 170 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within five (5) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Clerk of the Court

Donald B. Dignan Esquire
Name of Plaintiff's Attorney

1120 20th Street NW Suite 700 North
Address
Washington DC 20036

(202) 493-1200
Telephone

By

Date

PUEDE OBTENERSE COPIAS DE ESTE FORMULARIO EN ESPANOL EN EL TRIBUNAL SUPERIOR DEL DISTRITO DE COLUMBIA, 500 INDIANA AVENUE, N.W., SALA JM 170

YOU MAY OBTAIN A COPY OF THIS FORM IN SPANISH AT THE SUPERIOR COURT OF D.C., 500 INDIANA AVENUE, N.W., ROOM JM 170

NOTE: SEE IMPORTANT INFORMATION ON BACK OF THIS FORM.

IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (624-1161) or the Neighborhood Legal Services (682-2700) for help or come to Room JM 170 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

**Northeast Neighbors for Responsible
Growth, Inc.
144 12th Street, N.E.
Washington, D.C.**

Plaintiff,

v.

**District of Columbia
c/o Anthony Williams, Mayor
1333 1/2 Pennsylvania Avenue, N.W.
Washington, D.C. 20002**

and

**AppleTree Institute for Education Innovation
400 7th Street, SE
Washington, D.C. 20003**

Defendants.

Civil Action No. 06-0685

Judge Robert E. Morin

**Next Court Event:
ICS on May 5, 2006**

AMENDED COMPLAINT FOR INJUNCTION RELIEF

Comes now, Plaintiff, Northeast Neighbors for Responsible Growth, Inc. ("Northeast Neighbors"), by and through counsel and requests this Court enjoin the defendants from issuing building permits to the AppleTree Institute for Education Innovation ("AppleTree") for demolition and construction at 138 12th Street, N.E., Washington, D.C. (the "Property").

I. JURISDICTION

1. This Court has jurisdiction pursuant to Title 11 § 921 of the Code of the District of Columbia (2001 Ed.) (D.C. Code §11-921) as all parties and activities are located herein.

II. PARTIES

2. The Plaintiff is a non-profit corporation established by the residents in the Lincoln

Park area of Capital Hill. It is organized for the purpose of ensuring that the appropriate zoning laws and regulations are followed and enforced throughout the District of Columbia in the placement and construction of schools, and that orderly planning, pursuant to regulation promulgated by the Office of Planning govern such. It represents the interests of the neighbors of 138 12th Street, N.E..

3. The District of Columbia is a chartered *municipality* wherein the Property and all other parties are located.

4. Anthony Williams is the Mayor of the District of Columbia. He is named herein in his Official Capacity. AppleTree is a corporation based in the District of Columbia, which is in the business of running Public Charter Schools. It currently operates a Public Charter School at 400 7th Street, S.E., Washington, D.C. and plans to open another Public Charter School at 138 12th Street, N.E., Washington, D.C., which proposed school is the subject matter of this litigation.

III. FACTS

5. The Plaintiff by and through its members are concerned about unregulated, unplanned development specifically in their neighborhood; as well as, other residential neighborhoods within the District of Columbia. All of its members live in the area immediately adjacent to the Property and would suffer severe harm if the school which AppleTree plans to build on the Property were in fact built.

6. AppleTree has bought the Property. AppleTree seeks to place a Public Charter School on that site. The proposed school is chartered by the D.C. Public Charter School Board. The school plans to have approximately 54 three and four-year old children with a staff of approximately 24 persons.

7. The one hundred block of 12th Street, N.E. is narrow and residential. The Property is contiguous and abutting to the residential housing and the zoning is R-4 (Residential) and in the Capitol Hill Historic District.

8. AppleTree has taken the position that as a Public Charter School it is not covered by Zoning regulations or Planning rules and regulations and does not need variances or exceptions that would be required for a project of this size in an R-4 zone from either the Board of Zoning Adjustment or the Zoning Commission, as the case may be, despite the fact that this narrow tree-lined street and the present building are respectively too narrow and too small for their needs. There is no safe pick-up and drop-off spot. The building would hereto be bigger than the 40 percent occupancy allowed for non-residential use in a R-4 zone.

9. AppleTree has already sought the requisite building permits from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA). DCRA is the department within the District of Columbia government which issues and regulates, among other matters, any and all demolition and construction permits in the District of Columbia. These permits are currently before the Zoning Administrator for his approval. The Zoning Administrator is under this Department but is independent and must sign off on these permit requests prior to their issuance.

10. The building of a school of this size in a totally residential neighborhood will have a devastating effect on the residential and historical character of the neighborhood. The increased noise, traffic and congestion will cause irreparable harm to the neighborhood and its residents. The increased noise, traffic and congestion will not only affect the quality of life of the residents but will greatly depreciate the economic value of their homes, causing severe economic harm and threatening many with economic ruin should they go into a negative equity

position on their property.

11. AppleTree, in its position that it is not covered by the Zoning Regulations, relies on a definition and a zoning regulation for charter schools created under the District of Columbia Board of Education for schools licensed by them. AppleTree is not licensed by the District of Columbia Board of Education.

12. The school proposed by AppleTree is a licensed charter school under federal law incorporated into D.C. law in Chapter 38 §§ 1800 et seq. of the D.C. Code and under the Public Charter School Board not the D.C. Board of Education. In § 38-1800.02(29)(B) the definition of a "public charter school" is as follows:

District of Columbia public school. -

(A) In general. - The term "District of Columbia public school" means a public school in the District of Columbia that offers classes:

- (i) At any of the grade levels from prekindergarten through grade 12; or
- (ii) Leading to a secondary school diploma, or its recognized equivalent.

(B) Exception. - The term "District of Columbia public school does not include a public charter school."

13. As part of the Capitol Hill Historic District, the Historic Preservation Review Board (HPRB) must rule on AppleTree's application. The HPRB has indicated a favorable ruling is imminent. HPRB only has jurisdiction on the exterior appearance of the building, not its use. Further, on information and belief, Plaintiff has been led to believe DCRA will issue building permits for demolition and construction without regard for either the BZA or the Zoning Commission if there are no applicable zoning regulations in place.

14. The school AppleTree is proposing is not "a part of the District of Columbia public schools" and therefore is not exempt from the D.C. Zoning Regulations (see § 199 of the D.C. Zoning Regulations).

15. The District of Columbia Office of Planning has presented regulations to the D.C.

Zoning Commission to ensure appropriate placement of public charter schools and other such institutions, especially as to residential neighborhoods with regards to traffic, safety, noise and quality of life. These regulations were adopted on an emergency basis by the Zoning Commission on February 13, 2006. Emergency regulations go into effect immediately. These emergency regulations clearly apply to Public Charter Schools and, thus, AppleTree.

16. Under D.C. law, emergency regulations are only in effect for 90 days. In that time, they must be adopted by the Zoning Commission on a permanent basis in order to go into lasting effect:

17. Based on a study of the plat maps for the Property, the lot area is 4,230 square feet and the lot width is 36 feet. The lot occupancy appears to be 60 percent. Under the emergency regulations, the minimum lot area is 9,000 sq. feet and the minimum lot width is 120 feet. The maximum lot occupancy is 70 percent. The current FAR and the maximum height for the building as proposed by AppleTree, as opposed to the existing structure, are not known. On information and belief, the maximum lot occupancy under AppleTree's plans would exceed 70 percent.

18. These regulations will give all parties a reasonable framework under which to operate subject to an urban planning model for public schools and public charter schools and for all similar development in this (and most other major cities) residential area; so, as a matter of public policy and interest they are clearly necessary.

19. The public charter school which AppleTree plans to construct on the Property is a non-conforming use. Under the emergency regulations, regardless of the nature and size of the building which it plans to construct, which may also be non-conforming, the lot size and width are much too small. As a non-conforming use, AppleTree would have to obtain a special

exception and possible variances from the Board of Zoning Adjustment (hereinafter "BZA") before any building permits could be issued.

20. The Defendant, the District of Columbia, is the entity with the legal authority to issue these aforementioned permits and is required to follow their own statutes, regulations and planning requirements that it has heretofore strongly supported; especially with regard to the impact on traffic, parking, safety of the public and the students, and noise. No permits should be allowed to issue until the BZA has ruled on any appropriate application, and such ruling becomes final.

21. AppleTree has already begun preliminary demolition work despite the fact that the building permits have not been issued by DCRA and no special exceptions or variances have been sought from BZA. On January 12, 2006, AppleTree began demolition work in the back of the Property, although no permits were issued. They were only stopped by the interaction of the residents. Subsequently, on February 21, 2006, AppleTree, under a permit from the Department of Health, began demolition work on the building, allegedly removing asbestos floor tile and the mastic used to install it as well as removing asbestos pipe insulation located in the basement of the building. This demolition, which is occurring, appears to involve the removal of interior partitions and ceilings which may be beyond the scope allowed by the permit. AppleTree has been unloading heavy equipment including canisters at the Property.

22. On information and belief, AppleTree is doing everything possible to avoid and evade the laws and regulations of the District of Columbia in the demolition and construction of this building on the Property.

23. Based on AppleTree's actions to date, including trying to begin demolition, and its position that it is exempt from the relevant laws, it is likely they will attempt to proceed

regardless and so an injunction is the sole possible remedy. AppleTree has issued statements to the press claiming that they had verbal permission from DCRA to do the prohibited work in January. This has been denied by DCRA. AppleTree has now written a letter to the Zoning Commission attacking it for adopting the emergency regulations and questioning its legal authority in an apparent attempt to have the Zoning Commission rescind the emergency regulations, and not make them permanent.

24. On information and belief, AppleTree is conducting a disinformation campaign designed to spread false information about the project in an attempt to avoid and evade the zoning regulations of the District of Columbia.

25. At a meeting before the Stanton Park Citizens Association, officials of DCRA said they would not guarantee that AppleTree would not receive permits under the existing regulations. They further said they would not guarantee that permits would not be granted to AppleTree prior to the Office of Planning issuing its final regulations.

COUNT I

26. The Plaintiffs adopt and in corporate paragraphs 1 through 25 herein and relies on therein.

27. The permits once issued cannot easily be withdrawn and the intent of AppleTree to move quickly to avoid such planning and zoning considerations is obvious.

28. Any proposed urban planning and required zoning actions will be moot if the demolition is commenced so the only reasonable act is to enjoin such actions until the District of Columbia government is able to comply with its obligations.

29. Any such action as proposed would require approvals, use exceptions and variances from the Board of Zoning Adjustment and the Zoning Commission, as the case may

be.

WHEREFORE, Plaintiff respectfully prays that this honorable Court issue an injunction ruling that the District of Columbia and its agencies, including but not limited to, the Zoning Administration and the Department of Consumer and Regulatory Affairs, are enjoined from:

1. Granting any permits, including but not limited to building permits for the AppleTree project until such time as the Board of Zoning Adjustments and the Zoning Commission has ruled on the project, such permits to be in accordance with those rulings.
2. Granting any permits for the AppleTree project until such time as the Office of Planning draft regulations are promulgated, adopted, amended or denied by the Zoning Commission; such permits to be in accordance with those regulations, as adopted.

COUNT II

30. The Plaintiff adopts and incorporates paragraphs 1 through 29 of this Complaint and relies on them hereafter.

31. The actions of AppleTree, and their misrepresentation of the law, has shown the necessity for the city to promulgate regulations consistent with its urban planning model to govern the placement and construction of public schools and federally created Public Charter Schools, so as to insure they are reasonably and sensibly incorporated into appropriate locations in an urban residential community.

32. The Office of Planning has prepared and issued draft regulations to the Zoning Commission governing the placement and construction of public schools and Public Charter Schools, of which the proposed project is one, to insure their proper incorporation into the urban residential plan and their compliance with necessary laws.

WHEREFORE, Plaintiff respectfully prays that this honorable Court issue an injunction ruling that the District of Columbia and its agencies, including but not limited to, the Zoning Administration and the Department of Consumer and Regulatory Affairs, are enjoined from:

1. Granting any permits, including but not limited to building permits for the AppleTree project until such time as the Board of Zoning Adjustments and the Zoning Commission has ruled on the project, such permits to be in accordance with those rulings.
2. Granting any permits for the AppleTree project until such time as the Office of Planning draft regulations are promulgated, adopted, amended or denied by the Zoning Commission; such permits to be in accordance with those regulations, as adopted.

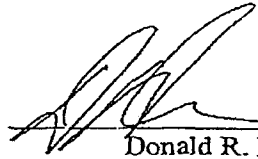
Respectfully submitted,



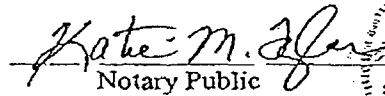
Donald R. Dinan (Bar No. 234997)
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
1120 20th Street, N.W.
Suite 700, North Building
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Telephone (202) 973-1200
Facsimile (202) 973-1212
ATTORNEYS FOR PLAINTIFF,

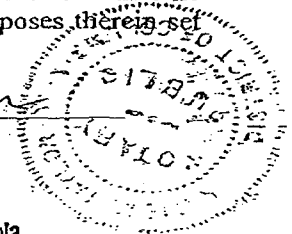
Verification

I herby swear and affirm the matter set forth in this Complaint are true and correct to the best of my belief.


Donald R. Dinan

Before me, KATIE M. TAYLOR, in and for Washington, D.C., on this 1ST day of MARCH, 2006 personally appeared Donald R. Dinan, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.


Notary Public



My Commission Expires:

8-31-2006
(SEAL)

Katie M. Taylor
Notary Public, District of Columbia
My Commission Expires 08-31-2008

My Commission No.:

C-TAB 15

dbf Associates, Architects

March 8, 2006

Bill Crews
Zoning Administrator for the District of Columbia
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

#16-26

2006 MAR 13 PM 2:47

D.C. OFFICE OF ZONING

RECEIVED

Re: Building Permit Application for Public Charter School at 138 12th Street, N.E.
(Tracking Number 3758-A-6)

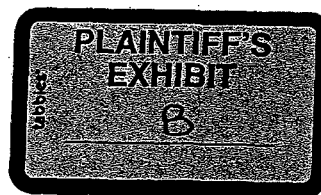
Dear Mr. Crews:

I write with regard to the building permit application filed on February 9, 2006, on behalf of AppleTree Institute for Education Innovation. On March 8, AppleTree received notice that the "Northeast Neighbors for Responsible Growth, Inc." had named AppleTree as a defendant in a lawsuit that seeks to prevent you and others in the District of Columbia government from following the usual procedures in processing AppleTree's application. The papers they filed with the D.C. Superior Court included copies of e-mail correspondence in which you expressed the view that AppleTree's pending application would need to comply with the text adopted pursuant to an emergency rulemaking by the Zoning Commission at its meeting on February 13, 2006.

Before the February 13 meeting of the Zoning Commission, AppleTree expressed some of its grave concerns about the process by which the Commission adopted the emergency text amendment, and the course of the meeting itself did not allay those concerns. Nevertheless, I write to note that AppleTree's pending application meets all applicable zoning requirements—even assuming for the sake of argument that the emergency text amendment is in effect and applies to your evaluation of AppleTree's application.

The emergency amendment makes clear that charter schools are "public schools" for purposes of the Zoning Regulations, just as AppleTree's counsel, Mark A. Perry of Gibson, Dunn & Crutcher LLP, explained in a letter to you on November 21, 2005.

Some of the residential height, area, and density regulations would not be affected by the emergency rulemaking. Thus, no change would be made to §§ 402, 404, 405, and 406, each of which is satisfied by AppleTree's application. Under § 402.4, the maximum floor area ratio would remain 1.8, well above AppleTree's actual floor area ratio of 1.53. Under § 404.1, a rear yard must be at least 20 feet deep, and AppleTree's would be 47 feet deep. Under §§ 405.1 and 405.2, no side yard is or would be required, and AppleTree's development would have none. Section 406 is inapplicable because there would be no open or closed court.



ZONING COMMISSION
CASE No. 01-016
EXHIBIT No. 5

dbf Associates, Architects

Other parts of Chapter 4 would be altered by the emergency text, but not to such a degree that AppleTree's proposed development would be non-compliant. Thus, under § 400.11, the permissible height for a public school in an R-4 district would be reduced from 90 feet to 60 feet—still much taller than AppleTree's building, which would be only 33 feet high. Similarly, under § 403.1, the maximum lot occupancy for a public school in an R-4 zone would be 70 percent, significantly more than the 60.4 percent that AppleTree's building would occupy (including 58.8 percent for the building and an additional 1.6 percent for a deck that would be less than 20 feet high and therefore meet the conditions of § 403.1).

The emergency text amendment would dramatically increase the minimum-lot-area and the minimum-lot-width requirements for public schools in R-4 districts. Under the amended version, the minimum lot area would jump from 4,000 square feet to 9,000 square feet, and the minimum lot width would triple by going from 40 feet to 120 feet. Although AppleTree's lot is 4,230 square feet in area and 36 feet wide, and would thus appear not to satisfy those requirements, *it is exempted from them by the operation of § 401.1*. That long-standing provision reads in relevant part:

[I]n the case of a building located, on May 12, 1958, on a lot with a *lot area or width of lot, or both*, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all *other* provisions of this title.

11 DCMR § 401.1 (2005) (emphases added). The emergency rulemaking did not purport to alter § 401.1. As the Board of Zoning Adjustment explained in one of its 2002 decisions, that provision "means that a replacement for a pre-1958 building on a nonconforming lot is permitted so long as it meets all zoning requirements *other* than lot width." *Appeal No. 16830 of Advisory Neighborhood Commission 2A and Richard J. Price*, at 5 (BZA Mar. 5, 2002). (Although lot area was not relevant in that case, § 401.1 also creates a parallel exception from the minimum-lot-area requirement.) As AppleTree's building permit application noted, the building on AppleTree's lot existed as of May 12, 1958. Accordingly, AppleTree's development *need not satisfy § 401.3* unless it cannot meet some other zoning requirement.

The only other requirements that AppleTree could be alleged to fail are those in Chapter 21 governing parking. There again, however, a pre-existing exemption would, even under the emergency rulemaking, continue to apply to AppleTree's proposed development. Under the standard formula for elementary schools, AppleTree's 15 staff members would necessitate 10 parking spaces, while there is room for only 3 spaces on-site (though, as the application made clear, AppleTree has also secured a long-term lease in a nearby parking lot for a minimum of 10 parking spaces). Nevertheless, that requirement is made inapplicable by the exemption in § 2100.5, which reads as follows:

No additional parking spaces shall be required for a historic landmark or a building or structure located in a historic district that is certified by the State Historic Preservation Officer as contributing to the character of that historic district.

11 DCMR § 2100.5 (emphasis added). As AppleTree's application noted, its building has been certified by the D.C. Historic Preservation Office as a contributing element in

McLean

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Charlottesville

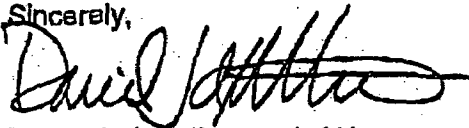
dbf Associates, Architects

the Capitol Hill Historic District. Accordingly, AppleTree would not even need to provide for both the 3 on-site and the 10 nearby parking spaces that it proposes.

In light of the foregoing, I trust that you will process AppleTree's application expeditiously and recognize that—even assuming the emergency rulemaking has taken effect and applies—AppleTree needs no special exception or variance to meet all applicable requirements of the Zoning Regulations.

Please do not hesitate to call me if you would like to discuss any of these issues further.

Sincerely,



Daniel J. deBettencourt, AIA

Cc: Zoning Commission Members

Andrew J. Saindon, Esq.

McLean

6821 Whittier Ave., McLean, VA 22101 ph:703.356.2215 fax:703.356.4304 email: dbfaa@aol.com

Charlottesville

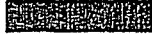
C-TAB 16

②

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR



April 28, 2006



Mr. Russ Williams
Managing Director
Apple Tree Institute for Education Innovation
400 7th Street, S.E.
Washington, D.C. 20003

Re: 138 12th Street, N.E.

Dear Mr. Williams:

The Department of Consumer and Regulatory Affairs (DCRA) has reviewed your Application for Construction Permits on Private Property, regarding 138 12th Street, N.E. (File Job #3758-A), which was received on February 9, 2006.

This letter serves to notify you that the above-referenced application does not meet applicable District of Columbia Zoning Regulations and therefore can not be approved. More specifically, the proposed use as a public charter school fails to meet the District of Columbia's R-4 residential zone district requirements for:

1. minimum lot area (9,000 square feet required),
2. minimum width of lot (120 feet required), and
3. minimum parking spaces (10 spaces required).

Our decision not to approve the submitted application is based on the District of Columbia Zoning Commission's adoption of an Emergency Text Amendment defining charter schools as public schools, and changing various requirements for public schools to locate in the R-4 Residential District as matter of right on February 13, 2006, and the District of Columbia Zoning Regulations codified at Title 11 of the District of Columbia Municipal Regulations (DCMR). The Zoning Commission's Emergency Text Amendment was effective immediately and applies to all pending applications on the date the text amendment was adopted.

Please be advised that decisions of the Zoning Administrator may be appealed to the Board of Zoning Adjustment, in accordance with DCMR Chapter 31.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Crews".

Bill Crews
Zoning Administrator