

1 In some of the memoranda that you all have
2 reviewed as part of this process and in reviewing the
3 transcripts from previous meetings, I noted that there
4 was no reference from anybody with the Office of
5 Planning or anybody else who has made any contact with
6 my board relative to this issue of charter schools.
7 It seems to me that since we are the primary
8 authorizer for charter schools in the city, we should
9 have been consulted.

10 I also noticed that in the process of
11 documenting the approval of charters, there is a
12 reference in your memos that talk about no public
13 hearings. We have public hearings for approval of
14 charters. We have public hearings for amendment of
15 charters. Amendments of charters can include such
16 things as relocation where there is an enrollment
17 increase.

18 We have two nights of public hearings
19 coming up Monday and Tuesday of next week for 11 new
20 applications coming before our board. I would like to
21 suggest that perhaps between these two bodies maybe we
22 can have a way of resolving something that we can
23 build on, a line of communication between us that we
24 don't necessarily look specifically at land use
25 issues, but we do require the charter applications

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District of Columbia
CASE NO. 17769
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1 both for new schools and for schools that are looking
2 to increase their enrollment to give us a demographic
3 analysis of the location they are moving to, to give
4 us a competitive analysis of other schools they will
5 be competing for students with.

6 We look at getting information that shows
7 they have gotten some level of committee support
8 whether it is from ANC commissions or local
9 neighborhood groups just to show that there is
10 support, that they have actually done their homework
11 to become good neighbors in those communities.

12 I think perhaps my suggestion here tonight
13 is if we could build a line of communication between
14 our two respective bodies we could come up with a way
15 that we can address the concerns of all parties
16 concerned and we can do it from the standpoint of
17 having informed judgment on the part of all concerned.
18 Thank you.

19 CHAIRPERSON MITTEN: Thank you.

20 Mr. Musante.

21 MR. MUSANTE: Yes. Thank you. I would
22 like to thank the Committee for allowing me to testify
23 tonight. I am Michael Musante. I am a 10-year
24 Capitol Hill representative -- I'm sorry, 10-year
25 Capitol Hill resident. I currently reside on 11th

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1 Street, N.E. I'm a former ANC Commissioner. I am a
2 representative of the Center for Education Reform, a
3 national charter advocacy group here in Washington,
4 D.C.

5 First, the one part of this that we do
6 agree with is your changing the definition of public
7 school to include public charter schools that are
8 chartered by DCBOE and DCPCSB. This puts you in
9 accordance and the intent of the U.S. Congress when
10 they passed the law and described charter schools as
11 public schools. You would be in step with not only
12 the U.S. Congress but all of the federal agencies as
13 well recognizing charter schools as public.

14 Second, if the District of Columbia
15 allowed again the legally adopted first right of
16 abandoned buildings to charter schools, this would
17 alleviate many of the problems that we are now facing.
18 I heard nothing from my neighbors in the Capitol Hill
19 Historic District when Kingsman School sat empty for
20 28 years and attracted drug dealers, prostitution, and
21 all other sorts of crimes. There are now two charter
22 schools located in that building and, believe me, the
23 neighborhood is far better off with them there than
24 without them.

25 Finally, as Mr. Nida put it, there are

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1 organizations that charter schools are answerable to
2 here and that is the D.C. Public Charter School Board.
3 The whole point of a charter school, which is a
4 nonprofit entity, is the fact that they will close if
5 not meeting the requirements put forth by the DCPCSB.
6 They closed because they are not doing their jobs
7 right.

8 For these emergency measures to be slapped
9 down on them at this point in time really relays a
10 lack of thought into the process of what makes a
11 charter school. I would ask that this Committee sit
12 down with the District of Columbia Public Charter
13 School Board, the head of the D.C. Public Charter
14 School Association, the ANCs, and other groups
15 interested and I'm sure we could come up with a far
16 better solution than what has been offered tonight.
17 Thank you.

18 CHAIRPERSON MITTEN: Thank you.

19 Ms. Evans Cooley.

20 MS. EVANS COOLEY: Yes. Good evening.
21 Before I start, I am going to amend the statement I
22 turned in to add another title I had not planned on
23 adding tonight.

24 My name is Shirley Evans Cooley and I am
25 the President of the Washington Association of Child

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1 Care Centers, I am Director of Rehobeth Baptist Church
2 Child Development Center, a nationally accredited
3 center, and I am the Chairperson of the former
4 Southeast Academy Public Charter School which Mr. Nida
5 did close down when it was not doing the job it was
6 supposed to do and we successfully rolled it into
7 another school so they do their job.

8 The next thing is I am a native of
9 Washington, D.C. I pay taxes. The only thing that is
10 bothering me tonight is what about the children? What
11 about the children? Children thrive better in a
12 community that they are used to, they feel safe in,
13 where the environment is controlled and if the
14 neighbors partner and we make a sensible bridge that
15 we can connect the children, the schools, the
16 educators with the neighbors that say they don't want
17 the children in the communities.

18 It makes no sense because small child
19 development centers -- and I have been at Rehobeth for
20 27 and a half years. We have managed that school and
21 successfully moved it to national status. The Office
22 of Early Childhood Education has made sure that we
23 have been trained. We bridge with families.

24 We connect with our charter schools moving
25 our children from the child development centers to the

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1 public charter schools, to the public schools, to the
2 Catholic schools. Remember, it's about choice. It's
3 about parent choice where they want their children to
4 be educated. We pay taxes.

5 We should be able to move our children
6 into the spaces where we want the to be. By the
7 statistics based on what I have heard from Donald
8 Hense, the numbers are there. The choice is charter.
9 The only problem is it took the city too long to
10 realize there should not be a difference between
11 public schools and public charter schools because we
12 all use the same dollars.

13 Believe me, there is no profit in running
14 a public charter school because we have to (1) take
15 the money, find a building that we have no clue that
16 you are going to allow us to use, try to retrofit it
17 to be safe, conducive for education, quality education
18 for the children to learn. We have to hire qualified
19 teachers to serve those children and to ensure that
20 they get the education that they need.

21 We have to make sure our faith-based
22 organizations service the children. Our
23 prekindergarten programs DCPS has just rendered to
24 faith-based organizations and small environment
25 organizations because they understand that small

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1 environments are conducive to learning. Small
2 environments are conducive to parent involvement.

3 Small environments are conducive, believe
4 it or not, or should be to community connections. I
5 am almost embarrassed to tell you that I live in
6 Kingdom Park. For my people to sit and say they don't
7 want public charter schools and they don't want
8 children to be serviced in my community, I am
9 embarrassed.

10 So my closing statement simply is day care
11 centers, faith-based centers, home-based centers. Did
12 you know that Washington, D.C. is third in the country
13 for nationally accredited homes and child development
14 centers in the nation through the accrediting
15 organizations, one of them being NAEYC which is
16 National Association for the Education of Young
17 Children?

18 What I think we are missing is the
19 environment of a small environment is more conducive.
20 All we have to do is learn how to connect with the
21 community and you should not throw in an emergency
22 ruling without us knowing about it so we can have at
23 least input on it.

24 CHAIRPERSON MITTEN: Thank you, Ms.
25 Cooley. Thank you very much.

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1 Questions for the panel? I will ask you
2 not to clap, please.

3 Mr. Parsons.

4 MR. PARSONS: Mr. Nida, I'm a little
5 confused about what you said about your hearings. Are
6 you dealing with location at all or are you simply
7 dealing with the credentials of the organization and
8 whether it will perform in your judgment?

9 MR. NIDA: Well, we include location as a
10 matter of course because, first off, we have to know
11 where the school plans to locate. There is no way to
12 have a demographic or competitive assessment unless
13 you have a location. We also need to make sure that
14 the facility they are planning on is something that
15 will be adequately sized and appropriately outfitted
16 to educate children so we have input. We don't deal
17 with zoning issues.

18 We require the schools to get certificates
19 of occupancy before they open for business. We
20 require them to give us copies of building permits to
21 show they are complying with the building code before
22 they commence construction. And all of our meetings
23 are public meetings and the hearings that deal with
24 charter application processes are publicly advertised
25 so we have a public process. What we are missing here

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1 is the connection between the two boards here that may
2 deal with more specifically land use issues. That has
3 not come up before us at this point.

4 MR. PARSONS: Is your process then a two-
5 step process? That is, if somebody is kind of
6 creating a charter school, do they come to you
7 conceptually at the beginning or are you at the end of
8 a process where they have invested in a property, got
9 building permits, hired architects, spent money, and
10 there you are at the end of the movie saying yes or
11 no?

12 MR. NIDA: No. Typically speaking most
13 charter schools will not get site control until they
14 have a charter that has been executed because
15 obviously sellers of property, lessors of property
16 aren't going to sell to something that doesn't have
17 the right to exist yet.

18 What we have are letters of intent,
19 preliminary agreements where properties have been
20 identified and that we have done some preliminary
21 review as to their potential suitability based on the
22 type of program and their projected enrollment. We
23 also are factoring in what else was around them.

24 Not only other charter schools but D.C.
25 Public Schools as well and, occasionally, even

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1 parochial schools that may be in the same
2 neighborhood. We have a process but we are not at the
3 tail end of the wagon there signing off on something
4 that is already a done deal. They can't do a deal
5 until we bless it first.

6 MR. PARSONS: In your experience do you
7 have a turnout like this occasionally?

8 MR. NIDA: We have turnouts that require
9 us to go to full auditoriums to house the input both
10 pro and con. Yes, sir.

11 MR. PARSONS: I see. So citizens in a
12 community are coming to participate in this?

13 MR. NIDA: I would say that you could get
14 a direct answer from Ms. Cooley here about the kind of
15 turnout schools can produce in a given neighborhood
16 based on what kind of action is being contemplated for
17 a given school both to approve or to deny.

18 MR. PARSONS: Well, I hope we can work
19 together in the future.

20 MR. NIDA: I will look forward to it.

21 MR. PARSONS: There is no reason to
22 duplicate or have redundancy here.

23 MR. NIDA: Absolutely.

24 MR. PARSONS: Thank you.

25 MR. MUSANTE: May I add something, Mr.

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1 Parsons, quickly?

2 CHAIRPERSON MITTEN: As long as you do it
3 on the microphone.

4 MR. MUSANTE: Yes, absolutely. The
5 District of Columbia Public Charter School Board's
6 process for okaying a school and the accountability
7 that goes into it was actually just copied by the
8 State of Florida and passed into legislation as being
9 one of the finest in the country to approve charter
10 schools and after hold them accountable for what they
11 said they would do in their chartering things. I
12 thought that was important.

13 CHAIRPERSON MITTEN: I just want to follow
14 up on what I think was Mr. Parsons' original way of
15 articulating his question which is, is your process if
16 you denied someone a charter, say, based on the land
17 use issue, would that be a legitimate reason for you
18 to deny the charter? Or, as Mr. Parsons was asking,
19 is your focus the ability to function and provide a
20 proper educational environment, or how do you factor
21 in community concerns about some of the things we have
22 heard tonight about noise, trash, vandalism, bad
23 behavior?

24 MR. NIDA: One of the things that new
25 charters have got to deal with is providing evidence

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1 of potential support because all of their enrollments
2 at that point of application are merely projections so
3 they have to demonstrate community support for their
4 program. Typically they have to nail down a location
5 that they can be specific because parents aren't going
6 to commit to a school that is merely an idea that has
7 no location identified at all.

8 We have plenty of public input that comes
9 in. Our approach is to look at applications in a
10 three-fold process.

11 We look at the academic program that is
12 being proposed and its merits, we look at their
13 financial viability, which includes having an adequate
14 affordable facility and a location that serves the
15 population they intend to enroll, and then we look at
16 the quality of the governance of the board because
17 these are all individual not-for-profit 501(c)(3)
18 corporations that are governed by independent boards
19 of trustees. We want to make sure there are people
20 involved that have the requisite experience not only
21 to run a school but also to find and manage a facility
22 and to run a staff.

23 CHAIRPERSON MITTEN: What would you say to
24 some of the folks who testified earlier that are
25 having problems with adverse impacts, not necessarily

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1 land use impacts but just sort of behavioral impacts
2 from a public charter school? Should they come to
3 your board and complain?

4 MR. NIDA: They certainly can. I can give
5 you a story that illustrates how this can happen. I
6 used to be on the board of one charter school on
7 Blaine Street. It was the Arts and Technology
8 Academy. It was the original Richardson Elementary.
9 We had a lady who was on the local ANC commission who
10 came to a public meeting of ours complaining about
11 students misbehaving and vandalizing in her
12 neighborhood. We asked her to describe the children
13 and she did.

14 They were described as typical young kids,
15 you know, with the blue jeans hanging down their hips
16 and all this sort of thing. I asked her if she
17 realized that charter school across the street had all
18 their kids in uniforms. I described the uniform and
19 asked if at any time she had ever seen a kid in that
20 uniform misbehaving and she said she had not.

21 CHAIRPERSON MITTEN: That doesn't really
22 address my question.

23 MR. NIDA: The thing of it is that charter
24 school --

25 CHAIRPERSON MITTEN: I'm saying if there

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1 is a legitimate concern.

2 MR. NIDA: Then they can come to our board
3 and raise the issue.

4 CHAIRPERSON MITTEN: And your board will
5 take action?

6 MR. NIDA: Absolutely.

7 CHAIRPERSON MITTEN: Okay.

8 MR. NIDA: We would hope that they would
9 address the board of the individual school first but
10 if they are not getting satisfaction, we have a forum
11 for them to come for matters that are not resolved
12 with the individual board involved.

13 CHAIRPERSON MITTEN: Okay. Quickly, Mr.
14 Musante, and then Ms. Cooley.

15 MR. MUSANTE: As I said, I was actually a
16 sitting commissioner on ANC-6A where much of this
17 debate started and I took witnesses who actually
18 testified here tonight against Appletree -- let me
19 rephrase that. I took witnesses who testified against
20 Appletree into Kingsman school that houses two
21 charters to sit down and have community meetings with
22 those charter schools.

23 That principal and those teachers all sat
24 down and wanted to hear if their children were
25 misbehaving. There is more than enough of a dialogue

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1 that is open when ANC Commissioners are approached.
2 The ANC Commissioner can go to those schools at
3 anytime, discuss with those principals and teachers
4 problems with their children. I did it many times.
5 I shouldn't say many times. I did it once or twice.
6 They were friendly meetings and the problems were
7 resolved quickly.

8 CHAIRPERSON MITTEN: Ms. Cooley.

9 MS. COOLEY: I think that a couple of
10 things that concern me the most, child development
11 centers that are governed by a great deal of
12 restraints based on zoning and regulations. This kind
13 of movement to put this much restriction on children
14 to be placed in residential areas is going to back
15 flash on a lot of schools that have already been
16 established and proven that they can work.

17 The thing is that no school be it charter,
18 day care, Catholic, is going to go into a facility or
19 move into a facility and just jam the children in
20 there. There are space requirements for any facility
21 as it relates to children being in a class. Those
22 requirements are placed in the charter as it is
23 reviewed, at least the chartering authority I know and
24 understand. And there are public hearings.

25 When you finally find a site, which is far

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1 and in between, there are public hearings to notify
2 the community around that facility that you are coming
3 and that you are going to be there and the purpose of
4 you being there and inviting them into your school, or
5 what potentially is going to be your school, and
6 inviting them to tell us what can we bring to the
7 community.

8
9 I am not sure where these people are
10 coming from because I know the one I had to deal with
11 there were many hearings when we opened and there were
12 many hearings when we closed. Those families did not
13 want that school to close. Those families are still
14 in that particular building that we created for them
15 just under another name but still under the same
16 authority and they are being watched very closely.

17 CHAIRPERSON MITTEN: Thank you. Thanks to
18 the panel very much.

19 MR. JEFFRIES: Excuse me.

20 CHAIRPERSON MITTEN: I'm sorry.

21 MR. JEFFRIES: I'm sorry. I just have one
22 comment -- question for Mr. Nida. There has been some
23 testimony this evening about just saturation of a
24 number of smaller charter schools. When you are
25 considering the applications of these charters, you

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1 said you are not dealing with land use but are you
2 dealing with like numbers of existing charter schools,
3 let's say on the same block or how are you addressing
4 that?

5 MR. NIDA: We require the schools to
6 provide us with a demographic and competitive analysis
7 which we have been doing for the last couple of years
8 to show where they intend to draw their students from,
9 what groups are supporting that effort to look at what
10 schools they will be competing with in that location.
11 There is no sense in having a neighborhood that
12 happens to have too many schools. The reality is that
13 you may have several schools in a similar area but
14 they are serving different populations.

15 MR. JEFFRIES: So the first person to
16 testify was Mr. Gatson representing the Lamont
17 Community Action Group and he spoke of five public
18 charter schools in that community with two more
19 coming. Your assumption is that all those schools are
20 serving several different demographic areas.

21 MR. NIDA: Yes, sir. Clearly you run the
22 gambit from preschool through high school. You have
23 schools that cater to different academic programs.
24 You have schools that deal with special education
25 populations specifically. One of the issues with

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1 charter schools is they are all independent and they
2 are all different and that is the way that parents get
3 to exercise choice. The fact that two or three
4 schools are roughly approximate does not mean they are
5 drawing from the same student base. Many do draw from
6 the immediate neighborhood but by law it is a city-
7 wide enrollment for all the schools.

8 MR. JEFFRIES: Thank you.

9 CHAIRPERSON MITTEN: Thank you all very
10 much.

11 Liyah Brown, Michelle Sylva-Brown. Did I
12 get hits on either of those? Liyah Brown, Michelle
13 Sylva-Brown, Debbie Hall, Milton Shinberg, Paul
14 Corley. Paul Corley, Gail Martin. Gail Martin,
15 Niccola Reed.

16 Ms. Hall, why don't you go ahead and get
17 started.

18 MS. HALL: Good evening. My name is
19 Deborah Hall. I am the Executive Director of Big
20 Momma's Children Center located in Ward 8 in
21 Washington, D.C. I am also the Vice President of the
22 D.C. affiliate to D.C. Association for the Education
23 of Young Children which is the local affiliate to the
24 National Association for the Education of Young
25 Children, the largest early care and education

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1 organization in the world.

2 CHAIRPERSON MITTEN: Is your children's
3 center named for you?

4 MS. HALL: My mother.

5 CHAIRPERSON MITTEN: Okay.

6 MS. HALL: I wish. I'm writing on behalf
7 of children, families, teachers, teacher's assistants,
8 and all other professionals responsible for the
9 education and care for our children of the District of
10 Columbia. I am writing in opposition to the passing
11 of the emergency zoning restrictions that take away
12 the rights for small schools to locate in the city's
13 residential neighborhoods.

14 If we are not permitted to locate our
15 schools in our residential neighborhoods where our
16 children live, then where will we be permitted to put
17 these new schools and day care centers? Are you
18 telling us that we need to locate available space in
19 downtown D.C. where you and I both know it is so
20 costly that very few centers will be able to afford to
21 do business.

22 Or are you telling us maybe we locate the
23 centers or schools in other areas that are not
24 appropriate for our children to be educated and
25 nurtured in such as commercial and some industrial

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1 zones? Even some residential zones in D.C. are not
2 appropriate for our children.

3 The early care and education community
4 strives very hard to offer high quality early care and
5 education to the city's youngest children. As Ms.
6 Cooley testified, we are ranked No. 3 in the nation
7 for offering high quality care and education here in
8 the District of Columbia.

9 We do this in an effort to ensure that our
10 children entering kindergarten are prepared to excel
11 in elementary, middle, and high school. We need our
12 children to be able to compete in the global career
13 market. So many of our jobs are being out-sourced
14 some of our parents don't even have jobs.

15 The best way to do this is to be able to
16 offer early care and education and other education in
17 areas that are easily accessible to our families and
18 children. Just think, if the new schools and centers
19 cannot be located in our residential neighborhoods,
20 families will have to board buses, trains, and cars to
21 travel through a.m. and p.m. traffic with our
22 children.

23 Families will have to spend money on
24 travel, an expense that they would otherwise use to
25 purchase food and pay bills. Some of the children

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1 that we are unable to serve now because of a lack of
2 space available to current centers will never be
3 served because the price will not be right for new
4 centers to do business in D.C.

5 What a shame for the Capitol City of the
6 free world that we care so little for our children
7 living here that they would pass emergency
8 restrictions that would take away their rights to be
9 educated and nurtured in the neighborhoods where their
10 families live, work, and play.

11 I urge the Zoning Commission to consider
12 the families and children of the District of Columbia
13 and do not pass regulations that do not benefit them.
14 Remember, these children that we are talking about are
15 the future decision makers in D.C. Hopefully they
16 will be more considerate of us than we are of them.
17 Thank you.

18 CHAIRPERSON MITTEN: Thank you, Ms. Hall.

19 Mr. Shinberg.

20 MR. SHINBERG: Good evening members of the
21 Commission, staff. I want to particularly thank OP
22 who has given us a number of opportunities to discuss
23 some of these proposed text amendments.

24 I am going to in consideration of the hour
25 limit my comments to some technical issues related to

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1 the proposed text amendment. But I do want to start
2 with a broader statement briefly which is that I have
3 worked with as an architect over two dozen charter
4 schools.

5 They are enormously committed groups of
6 people. It is a very difficult thing to create and
7 operate a charter school. I found that washes over --
8 their commitment washes over to the philosophical base
9 that encourages their students and encourages very
10 good behavior. I have to say that in all the schools
11 I visited I have seen remarkable good behavior.

12 I can say that particularly as a graduate
13 of the D.C. Public Schools a few years ago. A current
14 native. I've also had as an architect 35 years of
15 experience working with a variety of building types
16 with many schools over the last 15 years, public and
17 private, and charter schools. I think that gives us
18 some particular perspective.

19 I am going to focus on a few things.
20 Let's start with matter of right and lot controls
21 particularly. The text amendment purports to grant
22 public charter schools parity with traditional public
23 schools but, in fact, the minimum lot standards are a
24 de facto taking of matter of right status from them.

25 This turns the stated purpose of the text

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1 amendment on its head. Previously every zoning
2 administrator, and we have worked with many, and we
3 have letters from many, granted this parity with the
4 minimum residential lot standards. Many public
5 schools again have to struggle over their most basic
6 right which is existence.

7 The minimum lot standards are overly
8 restrictive in terms of the realities of land use and
9 school design. While they wouldn't restrict the huge
10 land standards that DCPS sets for their traditional
11 public schools, they will greatly limit smaller public
12 charter schools.

13 To take R-4 as an example, the text
14 amendment has a 9,000 square foot minimum lot. Two-
15 thirds of the city's R-4 lots are less than 9,000
16 square feet. They are greater. Of those that are
17 smaller, typically R-4 lots are about 100 feet deep
18 and 18 to 20 feet wide which means it would take four
19 and a half to five of those lots to meet this minimum
20 lot standard. Pretty hard to find that in established
21 neighborhoods and most of these neighborhoods are
22 established neighborhoods. There is a natural
23 limitation that is already built into this.

24 The 120-foot frontage is also, I think,
25 excessive and oppressive. The argument in favor is

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1 safety for dropping student off. With all the schools
2 I've worked with, those for younger children
3 consistently, in fact, in every case I've worked with
4 send staff out to the curb and bring the children in.
5 There is not a lot of stopping. There is not a lot of
6 waiting. There is not unfolding of umbrella
7 strollers. There is not a lot of parking in the
8 neighborhood to drop kids off.

9 CHAIRPERSON MITTEN: I need your closing
10 thought. You are about out of time.

11 MR. SHINBERG: Okay. My conclusion is
12 that to allow adequate drop-off roughly three car
13 lanes or 55 feet will provide enough width that three
14 lots comprising that same amount of frontage, which
15 would be between 5,500 and 6,000 square feet would be
16 adequate as a maximum planning number.

17 To go from 4,000 to 5,000 for those zones
18 that currently have 4,000 square foot limits would be
19 adequate and that the other factors do not need to be
20 changed to achieve these public goals.

21 CHAIRPERSON MITTEN: Thank you. We would
22 love to get your comments in writing, too. Thank you.

23 Ms. Reed?

24 MS. REED: Yes. I had to turn the mic on.
25 Hello. My name is Niccola Reed. I am the President

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1 of the New Family Child Care Providers Association.
2 Also, I live in an historical zone. I am the third
3 generation on top of that. I live across the street
4 from the Frederick Douglass Home. We have visitors
5 all the time and we have charter schools, we have
6 public schools. We have schools and we have centers.

7 We have it all and we all get along
8 believe it or not. Also, I am a product of public
9 schools but I'm not here to talk about me. I'm here
10 to talk about the association that I represent.

11 On behalf of the New Family Child Care
12 Providers Association in D.C. we are writing this
13 testimony to please reconsider not having the centers
14 or the public charter schools under H Chapter 21 with
15 off-street parking because if you all do allow this,
16 most of the family child care providers, we have 218
17 family child care providers in the District all over
18 D.C., the Metropolitan area.

19 Unfortunately in D.C. we only can have
20 five children according to the DCMR 29. The national
21 average, according to NACRA, is six. Unfortunately
22 most of our providers are unable to really maintain
23 their businesses so they have to look to other
24 measures as far as center-based care which more than
25 likely would be in residential areas or residential

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1 zones.

2 They just cannot afford the commercial
3 zones. Plus we like our children more so in
4 residential areas. Our community helpers are there.
5 Our historical sites are there. Our field trips are
6 there. Our exposure is there. Also, the parents
7 really look towards us for care, especially with the
8 infant and toddler waiting list that we have that is
9 still not being serviced so we prefer to stay in a
10 residential zone with that.

11 Also, we ask that you keep this an option
12 opened for us so those of us who have or will be
13 putting in our permits to become centers will have
14 that option to be a center and not be locked into just
15 taking care of five children which in the District of
16 Columbia is really nothing. You barely can pay your
17 mortgage in the District of Columbia with five
18 children.

19 Also the quality of care is different,
20 very different, from those who are in commercial
21 zones. I feel our children get the best of all worlds
22 because we are small but at the same time they get to
23 see a whole lot. If we were a small center, we have
24 so much more to offer our school systems, even our
25 community, and especially our parents and residents so

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1 please reconsider us. Thank you.

2 CHAIRPERSON MITTEN: Thank you, Ms. Reed.

3 Questions for this panel? Any questions?

4 Thank you all.

5 MS. HALL: Could I make a comment
6 concerning serving the population? At the present
7 time with the space in the D.C. Public Schools, the
8 charter schools, those licensed centers and child
9 development homes, we are still under-serving our
10 children.

11 We have approximately 32 percent of our
12 children who are not able to be served because we do
13 not have adequate space and we have thousands of
14 children on the waiting list for the infants and
15 toddler area. These are children under two and a half
16 so we need to take all of these things into account
17 when we are speaking of putting restrictions.

18 CHAIRPERSON MITTEN: Thank you.

19 MS. HALL: Thank you.

20 CHAIRPERSON MITTEN: Anyone else who would
21 like to testify in opposition? Anyone else? Please
22 come forward. Did you fill out a witness cards for
23 us? Great.

24 Anyone else? Now is the time.

25 All right. Please go ahead. I need you

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1 to turn on that microphone for us. There is a button
2 on the base. There you go.

3 MS. FORD: Thank you. My name is Delores
4 Ford and I am one of approximately 118 licensed homes
5 in the District of Columbia who wants to expand to 13
6 or more children depending upon the space that the
7 licensing board requires. Many of these homes are
8 accredited and the increase will still be providing an
9 intimate setting.

10 We are small businesses generating
11 revenue, paying taxes, and we are constituents who do
12 not want to be denied the opportunity to continue to
13 meet the needs of the low/no income families in the
14 District of Columbia.

15 The District of Columbia has approximately
16 5,000 low/no income children waiting to enter an early
17 learning facility. To deny a licensed home to expand
18 would be imposing a greater hardship on countless
19 numbers of low/no income families in the District of
20 Columbia thus preventing their families from seeking
21 and/or continuing employment for the lack of child
22 care.

23 At present family child care providers can
24 only accept five children, thus causing a hardship for
25 families with multiple children in the home. Many of

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1 these children will be put at risk even more if they
2 are denied an opportunity to receive an early
3 education at an early age. I'm speaking of infants,
4 toddlers, preschoolers, and school-age children. We
5 can relate back to the 1960s where Head Start proved
6 that fact.

7 Public schools with Head Start programs
8 are not equipped to care for all these children, thus
9 causing an overflow within the classrooms, as well as
10 turning away children. The No Child Left Behind Act
11 is still leaving children behind. How? There are
12 thousands of children whose parents cannot find
13 quality child care within their immediate communities.

14 The Early Childhood Education
15 Administration understands the rising demands and
16 needs of families in the District of Columbia, thus
17 their programs are offering subsidized child care to
18 meet the needs of the TANF, Temporary Assistance for
19 Needy Families, and the Welfare to Work which was
20 implemented by the Clinton Administration.

21 My suggestion as a family child
22 development home, off-street parking is not necessary
23 because only the working members would be at the
24 facility that would have a car. Most of the family
25 childcare providers in the District of Columbia have

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1 a working relationship and partnering with the
2 immediate community, the residents, the other
3 community workers, and they network so the parking is
4 not a problem.

5 CHAIRPERSON MITTEN: I need your closing
6 thought, Ms. Ford.

7 MS. FORD: My closing thought is all the
8 children need a place to grow and to be nurtured.
9 Also, education is key in a community setting to
10 foster foundations to create better citizens. Also,
11 I would like to add please I have applied for an
12 extension in September of 2005 and I was promised
13 action within six months of that and I have not heard
14 from anyone and I do have off-street parking.

15 CHAIRPERSON MITTEN: Thank you.

16 MS. FORD: Thank you.

17 CHAIRPERSON MITTEN: Any questions for Ms.
18 Ford? Any questions? Thank you. Thank you very
19 much.

20 What I would like to do for the moment, if
21 my colleagues agree, is that we would leave the record
22 open for approximately 30 days which would be June
23 12th. In that time if the Office of Planning felt
24 that there was sufficient time to do so, to follow up
25 on the items that I have mentioned, as well as to sit

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1 down and talk to the chartering authorities, Mr.
2 Nida's group, and I believe there is a second
3 chartering authority, and then make an additional
4 submission to the Commission by June 12th.

5 Do you have sufficient -- is that a
6 sufficient amount of time? All right. Then also for
7 the public if there is anyone who would like to submit
8 written testimony either that testified here tonight
9 or other folks, we would be more than happy to receive
10 that. We will close the record then June 12th and all
11 submissions should be made by 3:00 p.m. that day in
12 the office across the hall.

13 Then the Commission will make a decision
14 on the case at one of its regular monthly meetings and
15 we have those typically on the 2nd Monday at 6:30 p.m.
16 in this room. During that time we simply deliberate.
17 We don't typically take public testimony there. Then
18 if you are interested in finding out if it's on the
19 schedule for a particular meeting, you can contact
20 Mrs. Schellin in the Office of Zoning.

21 Then if the Commission proposes
22 affirmative action, we would publish that as a Notice
23 of Proposed Rulemaking in the D.C. Register and then
24 there would be an additional period of time for public
25 comment. Usually it's 30 days. Then the proposed

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1 rulemaking is referred to the National Capitol
2 Planning Commission for federal impact review.
3 Following all of that then we take final action at yet
4 another public meeting.

5 So I think we are finished this evening.
6 I thank all of you for hanging in there until this
7 late hour with us and thank you for your
8 participation. We are adjourned.

9 (Whereupon, at 9:13 p.m. the hearing was
10 adjourned.)
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C-TAB 18

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

NORTHEAST NEIGHBORS FOR RESPONSIBLE GROWTH, INC.,	)	Civil Case No. 06-CA-685
	)	
Plaintiff,	)	Calendar 12
	)	Judge Robert E. Morin
v.	)	
	)	
DISTRICT OF COLUMBIA, ET AL.,	)	
	)	
Defendant.		

ORDER

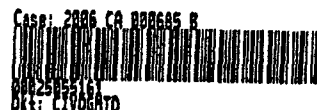
This comes before the Court on two separate Motions to Dismiss, one filed by Defendant District of Columbia and the other filed by Defendant AppleTree Institute, ("AppleTree"), and Plaintiff Northeast Neighbors for Responsible Growth, Inc.'s, ("Northeast") Consolidated Opposition thereto.

Plaintiff filed an action requesting injunctive relief against the District of Columbia and its agencies and AppleTree seeking to prevent the construction and opening of a public charter school at 138 12th Street, N.E. In summary, Northeast claims that the school would destroy the historic residential character of the neighborhood, would cause traffic and noise problems, would devalue the homes in the area, and possibly would violate existing zoning and municipal regulations.

Defendants move to dismiss the complaint asserting: (1) the Court lacks subject matter jurisdiction, (2) Northeast has failed to exhaust its administrative remedies, (3) the case is not yet ripe, and (4) Northeast lacks standing to bring the action.

DOCKETED In Chambers JUN 06 2006

MAILED From Chambers JUN 06 2006



1. Discussion:

The filing of a motion to dismiss pursuant to Rule 12(b)(6) does not call upon Plaintiff to offer proof. Rather the Court accepts the claim as true, and construes all facts and inferences in favor of the claimant. *Atkins v. Indus. Telecommunications Ass'n*, 660 A.2d 885, 887 (D.C. 1995). All that is required of the complaint is “a short and plain statement of the claim showing that the pleader is entitled to relief.” Super. Ct. Civ. R. 8(a)(2). Such a statement must simply “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957). “Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see also Sarete, Inc. v. 1344 U St. Ltd. P’ship*, 871 A.2d 480, 497 (D.C. 2005) (“[A] complaint [should not] be dismissed under Rule 12(b)(6) on the ground that no evidence has been offered by Plaintiffs since we take the facts alleged in the complaint as true, and the presentation of evidence to counter a Rule 12(b)(6) motion is not required.” (internal quotations, citation, and editing omitted)); *Vincent v. Anderson*, 621 A.2d 367, 372 (D.C. 1993) (“The Rule is designed to test solely the legal sufficiency of the complaint.”). The complaint satisfies the requirements of Rule 8(a) if it gives a defendant notice of the basis for this suit. Thereafter, if a defendant wishes to test the ability of plaintiffs to prove what they have alleged, he or she must present a motion for summary judgment or proceed to trial.

While the complaint is to be construed liberally, courts “need not accept inferences drawn by plaintiff if such inferences are unsupported by facts set out in the complaint. Nor must the court accept the legal conclusions cast in the form of factual allegations. *Kowal v. MCI Commc’ns Corp., Inc.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citing *Papasan v. Allain*,

478 U.S. 265, 286 (1986)). Moreover, if the motion to dismiss is a facial attack on the basis of the court's jurisdiction, plaintiff bears the burden of establishing that jurisdiction exists and "no presumptions of truthfulness adhere to the allegations of the complaint." *Heard v. Johnson*, 810 A.2d 871, 877-78 (D.C. 2002) (citations omitted). The Court will address each of the Defendants' grounds for dismissal *ad seriatim*.

1. Standing:

While this Court is not an Article III court, it must ensure that the constitutional requirement of a "case and controversy" and the prerequisite of a party having standing exist in each case. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002) (quotations and citations omitted). To establish standing to sue a party must demonstrate an actual or imminent threat of injury attributable to the defendant and redressable by the Court. *Id.* Northeast must demonstrate that (1) it has suffered a concrete (not hypothetical or conjectural) injury in fact, (2) a causal connection between the injury and defendant's action, and (3) that it is likely the injury will be redressed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Diamond v. Charles*, 476 U.S. 54, 70 (1986). A plaintiff may not attempt to litigate "generalized grievances," or seek an order from this Court requiring that the Zoning Commission decide a certain way. *York Apartments v. District of Columbia Zoning Commission*, 856 A.2d 1079, 1084 (D.C. 2004).

Moreover, there are additional criteria that must be met for an organization that sues on behalf of its members, such as Northeast, to have standing. Such an organization must demonstrate that (1) its members would have standing to sue in their own right, (2) the interests that the organization seeks to protect are germane to its purpose, and (3) neither the

claims asserted nor the relief requested requires the participation of each of its individual members. *Truckers United for Safety v. Mead*, 251 F.3d 183, 188-89 (D.C. Cir. 2001).

Northeast asserts that it represents the neighbors of 138 12th Street and that substantially all its members live either in the same block or across the street. With respect to its and its members' claim of injury, Northeast claims that the building of the school would have a "devastating effect" on the residential and historic character of the neighborhood, and that increased noise and traffic would affect its members' quiet enjoyment and depreciate the value of their homes. (Pl.'s Opp. 14.)

In response, the District and AppleTree argue that Northeast's complaints are at best "generalized grievance[s]" shared by a large class of citizens and affecting the neighborhood at large and not specific to Northeast or its members. Moreover, they assert that the complaints of injury found by the Court of Appeals to be insufficient in *York Apartments* are indistinguishable from Northeast's complaints.

In *York Apartments*, the Court of Appeals found that a neighborhood association failed to establish its standing to challenge a decision by the Zoning Commission. The Tenant Association claimed injury as a result of a proposed development because its members would suffer a loss of "quiet enjoyment" of their property as a result of the change in what its residents would "see and hear" out their windows. *York Apartments*, 856 A.2d at 1079. While noting that "threats to non-economic interests to use and enjoyment may constitute an injury in fact," the Court of Appeals found the injury in that case's complaint to be "conjectural" and "hypothetical" because of a lack of record evidence supporting the claims. *Id.*

In this case, in contrast to *York Apartments*, Northeast makes claims of both economic and non-economic injury. At the same time, as in *York Apartments*, Northeast has failed to make any showing that such injuries are likely to occur beyond general assertions. Whether Northeast has standing is a close question. The Court need not resolve this complicated standing issue, and instead relies on the body of cases which permits it to assume for the sake of argument that a party has standing if the issue clearly must be resolved against that same party on alternate grounds. See *Boy Scouts of Am. v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192, 1196-97 n.4 (D.C. 2002) (assuming, without deciding, that "tester" had standing to challenge the Boy Scouts' rejection of his membership application); *Smalls v. State Farm Mut. Auto. Ins. Co.*, 678 A.2d 32, 35 n.3 (D.C. 1995) (assuming, without deciding, that plaintiff had standing to bring action and accordingly addressing the merits of claim); see also *Hawkins v. W.R. Berkley Corp.*, 889 A.2d 290, 293-94 & n.9 (D.C. 2005); *Childs v. United States*, 760 A.2d 614, 617 & n.4 (D.C. 2000); *Friends of Tilden Park, Inc.*, 806 A.2d at 1207-10.

2. Lack of subject matter jurisdiction

Despite Northeast's assertion to the contrary, its complaint is a challenge to the actions and decisions of the Department of Consumer and Regulatory Affairs ("DCRA") and the Board of Zoning Adjustment ("BZA"). DCRA must decide in the first instance whether to issue any building permit. See D.C. Code §§ 6-1405.01, 1403(a)(1) (2005 Supp.). If Northeast is deemed to be an aggrieved party, it may initially appeal any decision to DCRA. 12 DCMR § 112.1. It may appeal any zoning decision to the BZA. See D.C. Code § 6-641.07. Thereafter, it may appeal any BZA decision to the Court of Appeals. D.C. Code § 2-510(a).

As the Court of Appeals has made clear:

Under the doctrine of primary jurisdiction, when a claim is originally cognizable in the courts but requires resolution of an issue within the special competence of an administrative agency, the party must first resort to the agency before he or she may sue for an adjudication. *Drayton v. Poretsky v. Management, Inc.*, 462 A.2d 1115, 1118 (D.C. 1983).

[R]eview of such zoning matters has been 'placed within [the] special competence of the BZA.' *Id.* 'BZA is charged with interpreting the zoning regulations,' and the courts 'must defer to the BZA's interpretation of those regulations, related to matter within its expertise, unless that interpretation is plainly wrong or inconsistent with the regulations or with the statute under which the BZA acts.' (Citation omitted.) Our cases have been uniform in requiring such matters to be decided by the administrative body charged with their resolution. [F]ar from enjoining the continuation of proceedings before the BZA, the trial court should have awaited the BZA's resolution

District of Columbia v. L.G. Indus., 758 A.2d 950, 955-6 (D.C. 2000).

Moreover, under the applicable statutory and regulatory framework, the Court of Appeals, not the Superior Court, maintains exclusive jurisdiction over appellate challenges to administrative actions. *Fair Care Found v. District of Columbia Dept. of Ins. and Securities Regulation*, 716 A.2d 987, 997 (D.C. 1998) (quoting *District of Columbia v. Douglass*, 452 A.2d 329, 332-33 (D.C. 1982)) (internal quotation marks and footnotes omitted). This exclusive administrative and appellate review process "precludes concurrent jurisdiction in the Superior Court. Any Superior Court action that constitutes a challenge to a previous agency action, therefore, would be brought in the wrong court." *Id.*¹

Facing these clear pronouncements by the Court of Appeals, Northeast argues that the Court should maintain jurisdiction of this action because "[t]his is not the standard zoning

¹ The Court of Appeals has recognized an exception to the general prohibition of bringing civil actions in Superior Court that are concurrent to proceedings before an administrative agency. A court may issue injunctive relief to preserve its jurisdiction or maintain the status quo pending review of the agency action. *District of Columbia v. Greene*, 806 A.2d 216, 219 (D.C. 2002) (*per curiam*). However, because review of an agency decision lies exclusively with the Court of Appeals and not this Court, the exception does not apply to these circumstances.

case.” (Pl.’s Opp. 9.) Northeast asserts that AppleTree’s position is that, as a public charter school, AppleTree is not subject to the zoning laws, and it therefore can build the proposed school as a matter of right. Additionally, Northeast avers that AppleTree had begun some work purportedly without the appropriate permits. Under these circumstances Northeast posits that the BZA would have “no jurisdiction over the issues presented,” (Pl.’s Opp. 10), and therefore this Court should invoke jurisdiction over the matter at the very least to monitor proceedings.

Even if the Court were to accept Northeast’s facts as true,² it is undisputed that both the DCRA and the Zoning Commission are actively considering this matter and Northeast’s complaint to the proposed school. Whether such a school is in compliance with existing and newly enacted zoning ordinances is precisely the type of issue that has been placed within the special competence of the BZA. Moreover, since the institution of these proceedings, Northeast admits that the Zoning Commission has promulgated amendments that arguably make AppleTree’s intended construction a non-conforming use of the property. In light of the fact that the appropriate administrative agencies are presently considering all issues raised by Northeast’s Complaint, its attempts to avoid the application of the primary jurisdiction doctrine are unavailing.

3. Failure to Exhaust Administrative Remedies:

The parties agree that any party to an action is not entitled to judicial relief until it has exhausted available administrative remedies. *Fisher v. District of Columbia*, 803 A.2d 962,

² Contrary to Northeast’s assertions, AppleTree’s legal position, as set forth in its Reply, is not that it is not subject to Zoning Regulations or that the matter is not subject to the Zoning Commission or BZA. Rather, AppleTree asserts that construction of the school constitutes a use as a matter of right under the property’s existing zoning regulations. Whether or not a building permit application relates to a use of right, the DCRA and BZA must still determine whether the proposed use complies with the appropriate regulations. As of the time of the filing of the motion, the Zoning Administrator at the DCRA announced that the AppleTree’s building application was not approved, thus establishing that the regulatory authorities are exercising jurisdiction over the dispute and Northeast’s complaints.

964 (D.C. 2002); *Burton v. District of Columbia*, 835 A.2d 1076, 1079 (D.C. 2003); *Dano Resource Recovery v. District of Columbia*, 566 A.2d 483, 485 (D.C. 1989). It is also undisputed that Northeast “is actively engaged in pursuing its administrative remedies before the bodies by participating” before both the DCRA and the Zoning Commission and that those processes are not yet final. (Pl.’s Opp. 12.) Nevertheless, Northeast argues that it has not failed to exhaust its administrative remedies because AppleTree is arguing before those agencies that it is not subject to the zoning regulations. Initially, the Court observes that AppleTree is not arguing that it is not subject to zoning regulations, only that it has a right to construct the school under the use for which the property is zoned. *See footnote 2, infra*. Even if that were the case, however, the mere fact that a party to a zoning dispute makes a particular argument before the administrative agency does not relieve the opposing party of its obligation to exhaust its administrative remedies before it seeks judicial relief. The exhaustion doctrine is based on several well-recognized policy considerations, including judicial economy, deferring to agency expertise to resolve issues, and development of the factual record before the agency. *See e.g., Davis & Associates v. Williams*, 892 A.2d 1144, 1152 n.11 (D.C. 2006); *Artis Bey v. District of Columbia*, 884 A.2d 626, 636 n.17 (D.C. 2005). Allowing any party to bypass its administrative remedies merely because the other party to the administrative action makes particular arguments about the applicability or inapplicability of the agency regulations would undermine the policies upon which the exhaustion doctrine is based. It is clear that Northeast, which is actively participating in the agency proceedings considering its dispute with AppleTree, has failed to exhaust its available administrative remedies before filing this action.

4. Ripeness:

A claim is not ripe for judicial decision if it is predicated solely on harm that might occur in the future. See e.g. *Metropolitan Baptist Church v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 718 A.2d 119, 130 (D.C. 1998). It is undisputed that in this case there has been no decision on Northeast's building permit application or any request for a certificate of occupancy. At the administrative agency level the case is at its early stages. Northeast is attempting to obtain relief from the administrative process and no final decisions have been made concerning its requests and objections. The filing of this action before a final decision by the administrative agencies is manifestly premature. Nevertheless, Northeast argues that its action is ripe, repeating its erroneous assertion that AppleTree's position is that it is not subject to the zoning regulations. As with application of the exhaustion doctrine, however, AppleTree's purported argument made before the administrative agency does not transform an otherwise manifestly unripe claim to one that is ripe for judicial review. The question of which zoning regulations apply to AppleTree's proposal initially should be addressed by the administrative agencies that routinely decide such issues.

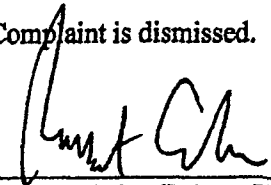
The only other argument advanced by Northeast is its assertion that AppleTree had already begun demolition work at the site without the proper permits and that this harm is not reviewable by the BZA. Northeast does not assert that AppleTree is presently working at the site, only that it had done so early, admittedly before the institution of administrative proceedings. There is no showing that AppleTree is likely to work at the site pending a final decision by the administrative agencies charged with reviewing the matter. Because AppleTree has recently filed an application for a building permit, the DCRA has not made its

zoning determination. Northeast's assertion that the issue is ripe presumes that DCRA (or the BZA) will make erroneous determinations about the zoning issues and the issuance of the building permit against the interest of Northeast. These contingent future events may or may not occur, but Northeast cannot assume an adverse outcome for the purpose of bringing a concurrent civil action. *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations omitted); *Metropolitan Baptist*, 718 A.2d at 132 (citations omitted). Manifestly, Northeast's claims are not ripe.

Wherefore, for the reasons stated, it is this 21 day of June 2006 hereby,

ORDERED, that Defendants' Motions to Dismiss are granted; it is further,

ORDERED, that Plaintiff's Complaint is dismissed.



Judge Robert E. Morin
(Signed in Chambers)

Copies to:

Richard S. Love, Chief,
Andrew J. Saindon
Equity Section I
441 Fourth Street, N.W.
6th Floor South
Washington, D.C. 20001

Donald R. Dinan
Hall, Estill, Hardwick, Gable, Golden & Nelson
1120 20th Street, N.W.
Suite 700, North Building
Washington, D.C. 20036-3406

Mark A. Perry
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

C-TAB 19

17532

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

APPEAL

Notice: [Click Here for Appeal Form Instructions](#)

Pursuant to Section (s) §3100 and §3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken:

from the administrative decision of:* Bill Crews, Zoning Administrator

Made on* 04/28/2006

, to the effect that*

see attached information

The Application for Construction Permits on Private Property, regarding 138 12th Street, N.E. (File Job #3758-A), is denied for failure to meet R-4 zone district requirements for minimum lot area, minimum width of lot, and minimum parking spaces.

Address(es)* of Affected Premises	Square(s)*	Lot(s)*	Zoning Districts*
138 12th St., N.E.	988	820	R-4

Present Use of Property:* Assembly

Proposed Use of Property:* Public School

Owner of Property:* AppleTree Institute for Education Innovation

Telephone No.:* (202)488-3990

Name, address and telephone number of lessee:

to lessee

Name, address and telephone number of appellant, if other than owner:

Specifically, manner in which appellant is aggrieved by the administrative decision, the allegations of error in the administrative decision, and the relevant sections of the Zoning Regulations (see reverse for more detailed explanation).

Please use a separate piece of 8 1/2" x 11" to respond and attach it to the Form 125 Appeal.

Date:* 06/27/2006

Signature:

Russ Williams

If appeal is filed by agent of the Appellant, Form 125 Appeal shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal.

To be notified of hearing and decision:

(Appellant or Authorized Agent)*

Name:*	Russ Williams	City:*	Washington	State:*	DC	Zip:*	20003
Address:*	4007th St, S.E.	Phone No.:	(202)488-3990	Fax No.:	(202)488-3991	E-Mail:	

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

REC'D
D.C. OFFICE
2006 JUN 2

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17532

EXHIBIT NO. 1

Form 125 Appeal — Attachment
AppleTree Institute for Education Innovation
June 27, 2006

EXCEPTIONS TO ADMINISTRATIVE DECISION

The Zoning Administrator concluded that the proposed use failed to meet the requirements for minimum lot area, minimum lot width, and minimum parking spaces. Appellant AppleTree argues that the Zoning Administrator erred in the following ways:

- I. Even assuming the validity and applicability of the Zoning Commission's February 13, 2006 "emergency" rulemaking regarding charter schools, AppleTree's proposed use is exempted from the minimum-lot-area and minimum-lot-width requirements by § 401.1 of the Zoning Regulations, because the building AppleTree seeks to enlarge was located on the lot on May 12, 1958, and the proposed use complies with all other provisions of the Zoning Regulations.
- II. Again assuming the validity and applicability of the February 13, 2006 "emergency" rulemaking regarding charter schools, AppleTree's proposed use does not require the ten parking spaces demanded by the Zoning Administrator because, under § 2100.5 of the Zoning Regulations, "[n]o additional parking spaces shall be required for" a building—such as AppleTree's—that is certified as contributing to the character of a historic district.
- III. The Zoning Administrator erroneously relied upon the Zoning Commission's February 13, 2006 "emergency" rulemaking, which is a legal nullity because there was no "emergency" (as required by § 2-505(c) of the D.C. Code) and no clear explanation of any "emergency" (as required by § 311.4(e) of title 1 of the D.C. Municipal Regulations). Even without the "emergency" rules, which are null and void, AppleTree's application still complies with all applicable zoning requirements due to the operation, *inter alia*, of §§ 401.1 and 2100.5 of the Zoning Regulations.
- IV. Even assuming that the February 13, 2006 "emergency" rulemaking was initially valid and applied to AppleTree's application, the "emergency" rules cannot be applied for "longer than 120 days" under § 2-505(c) of the D.C. Code. The Zoning Commission's purported "extension" of the "emergency" rulemaking on June 12, 2006 is a legal nullity because the D.C. Code makes no provision for such an extension, because there was no "emergency" (as required by § 2-505(c) of the D.C. Code), and because no clear explanation of any "emergency" (as required by § 311.4(e) of title 1 of the D.C. Municipal Regulations) appears in the record. The Zoning Administrator erred in not responding to a request to reconsider AppleTree's application after the expiration of the 120-day emergency period. Even without the "emergency" rules, which were null and void after June 13, 2006, AppleTree's application still complies with all applicable zoning requirements.
- V. Because AppleTree's application complied with all applicable zoning requirements on the date the Zoning Administrator made his decision (or, in the alternative, after the emergency rules expired on June 13, 2006), it should be granted without regard to any

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17532

EXHIBIT NO. 2

→

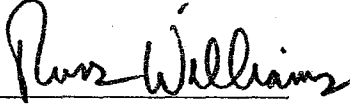
future rulemakings, because § 3202.4 of the Zoning Regulations provides that the applicable rules are those “in effect on the date that the permit is issued,” and the Board should conclude that the permit should have been issued at one of those times.

HOW APPELLANT INTENDS ON PROVING ITS CASE

Appellant intends to file a pre-hearing brief explaining its arguments in greater depth and including evidence of pertinent facts (such as the certification of the building as contributing to a historic district).

PROOF OF SERVICE

On June 27, 2006, I personally delivered a copy of this application to the Office of the Zoning Administrator and sent a copy by first-class mail to the Advisory Neighborhood Commission.


Russ Williams

C-TAB 20

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

+ + + + +

SPECIAL PUBLIC MEETING

+ + + + +

MONDAY, SEPTEMBER 25, 2006

+ + + + +

The special meeting of the District of Columbia Zoning Commission convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 5:30 p.m., CAROL J. MITTEN, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chair
ANTHONY J. HOOD	Vice-Chairperson
GREGORY JEFFRIES	Commissioner
MICHAEL TURNBULL	Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN	Secretary
ESTHER BUSHMAN	General Counsel
DONNA HANOUSEK	Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

STEVE COCHRAN
TRAVIS PARKER
JENNIFER STEINGASSER

This transcript constitutes the minutes from the special meeting held on September 25, 2006.

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I-N-D-E-X

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1 Wednesday, October 25th.

2 CHAIRPERSON MITTEN: Okay.

3 MS. SCHELLIN: And then we could take it
4 up at our November meeting, which would be the 13th.

5 CHAIRPERSON MITTEN: Okay. That sounds
6 good. Thank you. IV. FINAL ACTION

7 A. Z.C. CASE NO. 06-06

8 CHAIRPERSON MITTEN: All right. Then the
9 last item on our special public meeting agenda is for
10 final action, Zoning Commission case number 06-06,
11 which is the text amendment related to public schools.

12 VICE-CHAIRPERSON HOOD: Madam Chair, I
13 will not be participating. I did not hear in this
14 case.

15 CHAIRPERSON MITTEN: Thank you, Mr. Hood.

16 I did want to start off because we got a
17 letter from the superintendent asking us to delay
18 action because DCPS hadn't been consulted. And we
19 also -- we have heard from a number of folks about
20 their lack of opportunity to participate. And I just
21 wanted to ask the Office of Planning what efforts that
22 they had made to reach out to DCPS and other entities
23 that have written to us.

24 MS. STEINGASSER: Thank you, Madam Chair.

25 We also read that letter. We did indeed

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1 reach out to DCPS. We sent them -- while we didn't
2 have direct communications with the superintendent or
3 the board, we did deal with the facilities staff
4 directly. And we sent them via e-mail a prefiling
5 report that we were circulating to as many interested
6 parties as we could get hold of. And that went out in
7 January, 31st.

8 We then sent them a copy of the final
9 report. Having heard no comments back from them, May
10 2nd of 2006 and then in July, after the hearings when
11 we still had not heard from DCPS, we sent them a
12 follow-up e-mail volunteering and asking if they would
13 like us to come over and meet, brief the board or
14 brief the superintendent on those regulations.

15 We also work closely with the facilities
16 staff in developing the database that's in the record
17 to confirm that none of the public schools or the
18 public charter schools were currently being made
19 nonconforming.

20 So we did have communications. While I
21 agree we did not deal directly with Superintendent
22 Chaney, we did deal with DCPS. We also sent a copy of
23 the final report our records show to D.C. Public
24 Charter Schools, to some staff there, and did not hear
25 directly back from them.

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1 We met subsequently after the hearing when
2 Mr. Nida showed and testified and the Commission asked
3 us to meet with him. We did so the following week.
4 That would have been around May 17th.

5 CHAIRPERSON MITTEN: And I think there was
6 also submitted for the record that there was
7 correspondence early one I guess with Deborah Gist,
8 who is the state education officer.

9 MS. STEINGASSER: Yes as well as some of
10 the councilmen's offices, including Mrs. Paterson and
11 Mrs. Ambrose's office as well as a group called FOCUS,
12 which is a charter advocacy group. We also met with
13 them. Kindrina Rodriguez and Kevin Clinton of the
14 Mayor's office were also circulated copies of our
15 report as well as several individuals, several ANCs,
16 and different parties that were interested.

17 CHAIRPERSON MITTEN: It's a little bit
18 confusing because some of the -- well, first of all,
19 you described a pretty healthy effort to engage DCPS.
20 Then as far as the State Education Office goes, the
21 e-mails that were exchanged were early when we were
22 considering taking emergency action. And then I don't
23 believe we even had testimony from anybody.

24 MS. STEINGASSER: They did not testify.
25 However, to their credit, they did meet several times

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1 with OP and expressed concerns about the direction the
2 regs were taking.

3 We went through the database with them,
4 showed them what we were doing, assured them that we
5 had double-checked also with DCRA to make sure that
6 there were no pending permits or any schools that were
7 in process that would be snagged by this and made
8 nonconforming.

9 CHAIRPERSON MITTEN: Okay.

10 MS. STEINGASSER: We also met with the
11 interim executive director of the D.C. Public Charter
12 School Association prior to the filing of these
13 regulations.

14 CHAIRPERSON MITTEN: So some of the
15 concerns that might have been voiced early on, there
16 was ample opportunity to deal with them through the
17 folks that you had engaged?

18 MS. STEINGASSER: Right. We did. And
19 then after the Commission held its hearing and tried
20 to propose action, we also met with several of the
21 small school advocates to talk about the small school
22 situation, which seems to be the crux of the
23 controversy. And that's when we came back to the
24 Commission with the 16-student proposal as a matter of
25 right.

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1 CHAIRPERSON MITTEN: Are you aware of any
2 schools that are that small?

3 MS. STEINGASSER: No.

4 CHAIRPERSON MITTEN: We did get in the
5 record from Appletree -- they said that, you know,
6 there aren't even any schools that are that small.

7 MS. STEINGASSER: We don't know of any
8 schools that small. What we were trying to do at that
9 point was come up with an option that was still
10 balancing the issues between a rowhouse neighborhood,
11 which is what we were really focusing on, not citywide
12 but just the rowhouse neighborhoods, where you have
13 very narrow, very tight lots, and based on the figures
14 that one of the architects had issued, had entered
15 into the file -- I believe his name was Daniel D.
16 Bettencourt who had entered into the Zoning
17 Commission's record that 150 to 200 square feet was a
18 typical number for students.

19 Using that in the typical R-4 zone, we
20 came up with the equivalent of 16 students. So we
21 thought that was kind of a low-impact standard that
22 might be considered. Since that time, many of the
23 neighborhood associations and certain citizens have
24 contacted us and have expressed their concern about
25 the space, that if the Commission go forward, that

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1 there be a spacing of something that size, that there
2 not be multiple rowhouses bought and that same
3 congestion brought in through the back door.

4 CHAIRPERSON MITTEN: Right. Okay. Thank
5 you.

6 Anyone else have questions for the Office
7 of Planning?

8 COMMISSIONER TURNBULL: Are we awaiting
9 response from anyone, then, on --

10 CHAIRPERSON MITTEN: No. We're ready to
11 roll tonight. I do want to just call out that I
12 thought we got a real -- one particularly helpful
13 submission was from Lindsley Williams about some
14 things that we might want to take up, things that we
15 could take up within the context of this case and
16 other issues related to parking, loading, clarifying
17 the definition of employees and so on.

18 And, rather than piecemeal this any more
19 than we have -- and I suspect that depending on how
20 the Commission decides momentarily, there will be some
21 additional work for the Office of Planning anyway on
22 this -- I would like to have the issues raised that I
23 think have merit by Lindsley Williams taken up in
24 another case.

25 I thought the volume of disagreement with

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1 our attempt to accommodate the small schools coupled
2 with the fact that we now have Ms. Steingasser's
3 testimony as well as the submission from the folks who
4 seem to be advocating on the part of small schools,
5 that we haven't helped anybody. So all we did was get
6 everybody mad.

7 So I would move -- and I do want to say
8 something else, but I would move that we take final
9 action in case number 06-06 and delete the inclusion
10 of the language in 401.11 that allowed the schools of
11 16 students or fewer as a matter of right.

12 COMMISSIONER JEFFRIES: Second.

13 CHAIRPERSON MITTEN: The other thing that
14 I want to say is that I do hope there will be a
15 further ongoing discussion about whether or not small
16 schools can be accommodated appropriately, but what is
17 really frustrating is that the spokespeople for the
18 small schools appears to be Appletree.

19 And, you know, this reminds me it's not
20 parallel other than in process, but it reminds me of
21 when we did the EEFs. And there were actually a
22 number of EEFs in process at the time that the Office
23 of Planning became aware of the fact that, you know,
24 we didn't even know what EEFs were at the time,
25 electronic equipment facilities. And they came

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1 forward with an emergency rulemaking to gain control
2 of this because they had the potential for adverse
3 impacts in neighborhoods. And so the emergency put a
4 special exception provision in place. And they
5 immediately availed themselves of that.

6 And they were coming through at the same
7 time that we were taking final action on the
8 rulemaking. So all this time since February -- and,
9 Ms. Steingasser, I don't know if you know or not
10 whether Appletree filed a special exception with the
11 BZA. I haven't seen anything.

12 MS. STEINGASSER: To my knowledge, they
13 have not filed.

14 CHAIRPERSON MITTEN: I think they could
15 have been through the process by now. So that's a
16 little frustrating. But the way I would like to move
17 forward is that we take final action in this case sans
18 the matter-of-right accommodation for the schools that
19 may have 16 students or fewer and ask the Office of
20 Planning to continue to try and shape something that
21 might accommodate small schools if you can or perhaps
22 it's just some more minor refinements of this effort
23 that are mentioned in Mr. Williams' letter to the
24 Commission, but when you get that balance between
25 folks, on the one hand, or you get the advocates, on

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1 the one hand, that want absolutely unfettered ability
2 of charter schools to locate in neighborhoods and at
3 the other end of the spectrum we have neighborhoods
4 that are advocating for the kind of control on charter
5 schools that we have on private schools and that
6 everyone has to come in as a special exception,
7 regardless of size, I think that, you know, we have
8 done the best we can to strike the balance to promote
9 the Mayor's objectives of encouraging charter schools,
10 on the one hand, and encouraging and protecting
11 residential communities, on the other hand.

12 So I don't know if others want to comment
13 further. Mr. Jeffries?

14 COMMISSIONER JEFFRIES: Well, the only
15 comment I have is actually from the very beginning,
16 you know, when the word "emergency" was thrown out. I
17 think a few of us were sort of concerned about whether
18 it's really an emergency or not.

19 I think what happens when we do the
20 emergency thing is that we might end up being in a
21 position where the transparency piece of it becomes a
22 little unsettling for the community. I mean, I think
23 in all the letters that I continue to read in this
24 file, there was this feeling by a number of people in
25 the community that there was not transparency.

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1 And I know the Office of Planning very
2 well. And they work very hard at that. So my
3 comments are not to be critical of the Office of
4 Planning in their community outreach, but I think as a
5 Commission, we need to be very careful about what is
6 absolutely an emergency and what isn't because I think
7 we sort of leave the door open for some criticism
8 around process.

9 We might end up being in the same exact
10 place that we are today, but, at the very least, we
11 need to get that process correct. And so, Madam
12 Chair, I would agree with you that I think this would
13 be good to -- I didn't get all that Mr. Lindsley
14 Williams was saying, but there were a couple of things
15 that made sense to me.

16 And I think it would be good if we could
17 look at a time when we could really review this in
18 more totality, more comprehensively, and not under the
19 so-called rush of emergency.

20 So, anyway, thank you.

21 CHAIRPERSON MITTEN: Any comments, Mr.
22 Turnbull?

23 COMMISSIONER TURNBULL: Madam Chair, I
24 guess my only comment was I think Mr. Jeffries is
25 right. I think the emergency thrust upon us -- I

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1 think there was a lot of confusion in the community.
2 I think thee was a lot of misunderstanding of what was
3 really being read into. And I think we vetted a lot
4 of that.

5 I think, hopefully, we've vetted and went
6 through a lot of the issues for most people. And
7 maybe there still is some confusion, but I think we
8 have tried to discuss this. I think the Office of
9 Planning has tried to.

10 I mean, I think it has taken a while.
11 Maybe it hasn't been quite an emergency as it has
12 been, but I think the fact that when it came up as an
13 emergency I think people thought that things were
14 being sent through without really being thought about
15 more carefully.

16 And hopefully now that we have taken a
17 little bit of time and gone through it, we have vetted
18 a lot of the issues that the community had. I mean,
19 there still I think are going to be some issues out
20 there, but --

21 CHAIRPERSON MITTEN: Well, there's a
22 fundamental disconnect. There's people, --

23 COMMISSIONER TURNBULL: Yes.

24 CHAIRPERSON MITTEN: -- as I tried to say.

25 And we're never going to --

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1 COMMISSIONER TURNBULL: We're never going
2 to --

3 CHAIRPERSON MITTEN: -- get them together.

4 COMMISSIONER TURNBULL: Right.

5 CHAIRPERSON MITTEN: So, you know -- and
6 they both have merit.

7 COMMISSIONER TURNBULL: Right.

8 CHAIRPERSON MITTEN: So we struck a
9 balance.

10 COMMISSIONER TURNBULL: Right. And you're
11 right. And I think OP has tried to do exactly that.

12 CHAIRPERSON MITTEN: Yes. All right.
13 Well, if there is no further discussion, then all of
14 those in favor of the motion, which is to approve case
15 number 06-06 without the language in 401.11, please
16 say aye.

17 (Whereupon, there was a chorus of "Ayes.")

18 CHAIRPERSON MITTEN: Mrs. Schellin?

19 MS. SCHELLIN: Staff would record the vote
20 3 to zero to 2 to approve Zoning Commission case
21 number 06-06 without the language in 401.11,
22 Commissioner Mitten moving; Commissioner Jeffries
23 seconding; Commissioner Turnbull in favor;
24 Commissioner Hood not voting, having not
25 participating; and Commissioner Parsons not present,

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1 not voting.

2 CHAIRPERSON MITTEN: Thank you. That ends
3 our special public meeting. To allow the transition
4 of the crowd, we will take a five-minute break before
5 we go into session for the hearing tonight. Thank
6 you.

7 (Whereupon, the foregoing matter was
8 concluded at 6:45 p.m.)
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 06-06
Z.C. Case No. 06-06
(Text Amendments – 11 DCMR)
(Charter Schools Text Amendments)
September 25, 2006

The Zoning Commission for the District of Columbia (the "Commission"), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Official Code § 6-641.01); having held a public hearing as required by § 3 of the Act (D.C. Official Code § 6-641.03); and having referred the proposed amendments to the National Capital Planning Commission for a 30-day period of review pursuant to § 492 of the District of Columbia Charter; hereby gives notice of the adoption of amendments to § 199 (Definitions), § 201 (Uses as a Matter of Right (R-1)), § 206 (Public and Private Schools and Staff Residences), § 400 (Height of Buildings or Structures (R)), § 401 (Minimum Lot Dimensions (R)), § 403 (Percentage of Lot Occupancy (R)), § 501 (Uses as a Matter of Right (SP)), § 601 (Uses as a Matter of Right (CR)), § 771 (Floor Area Ratio (C)), § 901 (Uses as a Matter of Right (W)), Chapter 21 (Off-Street Parking Requirements), and Chapter 31 (Board of Zoning Adjustment Rules of Practice and Procedure) of the Zoning Regulations (Title 11 DCMR). The amendments change the definition of "Schools, public" in the Zoning Regulations to include charter schools; amend the building height, lot area, lot width, and lot occupancy requirements for public schools in Residence Districts; allow collocation of school uses with other uses and sharing of recreation facilities; permit schools in Residence Zones not meeting the requirements of Chapter 4 to be allowed as special exceptions; allow public schools in SP, CR, and W Zone Districts; amend density limits for public schools in Commercial Districts; and create parking standards for preschools. The Commission took final action to adopt the amendments at a public meeting held on September 25, 2006.

Only one substantive change was made to the text of the Corrected Revised Notice of Proposed Rulemaking published in the August 18, 2006 edition of the *D.C. Register*, namely the elimination of an exception from the lot dimension requirements for schools of sixteen (16) or fewer students. As discussed later in this Order, the change was made in response to public comment, and, therefore does not require publication of a new Notice of Proposed Rulemaking.

This final rulemaking is effective upon publication in the *D.C. Register*.

Existing Regulations

The existing regulations neither define charter schools nor provide standards for their development. The existing definition of public school defines public schools as being operated or maintained by the Board of Education. Charter schools do not fall within that description. Although charter schools may be similar to public schools, the District of Columbia Court of Appeals has ruled that the Zoning Administrator may not “interpret defined uses in the Zoning Regulations to encompass other uses that are functionally comparable ... if they are outside the definition,” *Chagnon v. District of Columbia Board of Zoning Adjustment*, 844 A.2d 345, 348 (D.C. 2004). Thus, without these amendments, charter schools would be disallowed in most zone districts.

Description of Text Amendment

The Commission initiated this rulemaking to respond to the Zoning Administrator’s concerns regarding charter schools. The amendments change the definition of “Schools, public” in the Zoning Regulations to include charter schools; amend the building height, lot area, lot width, and lot occupancy requirements for public schools in Residence Districts; allow collocation of school uses with other uses and sharing of recreation facilities; permit schools in Residence Zones not meeting the proposed requirements to be allowed as special exceptions; allow public schools in SP, CR, and W Zone Districts; amend density limits for public schools in Commercial Districts; and create parking standards for preschools.

Relationship to the Comprehensive Plan

The text amendments are not inconsistent with any of the Comprehensive Plan themes, goals, objectives, or 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 are not inconsistent with any specific areas of the Plan.

Set Down, Emergency Action, Public Hearing, and Proposed Action

At its regularly scheduled public meeting on February 13, 2006, the Commission decided to set down the proposed changes to the Zoning Regulations for a public hearing, to adopt a portion of the proposed text on an emergency basis, and to publish all of the amendments for public comment in a notice of proposed rulemaking. The combined Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on March 17, 2006 at 53 DCR 2017 along with a notice of the public hearing.

The Commission held a public hearing on the case May 11, 2006. At the hearing, more than a dozen persons and organizations testified, both in favor and against the proposed rule. Those in favor stressed the compromise between educational opportunities and the protection of existing neighborhoods. Witnesses testifying in opposition fell into two categories, those who thought the proposed action was too restrictive on schools and those who thought it was not restrictive enough. Several charter school proponents and groups testified that they were concerned that the regulations would make the siting and development of charter schools much more difficult than at present. Other opponents, including representatives of ANC 3C, expressed concern that the new regulations would allow matter-of-right schools in established neighborhoods with no community input. The chair of the D.C. Public Charter School Board testified to the role of his Board and their willingness to work with the Commission on communication and addressing community concerns regarding new schools. No representative of the District of Columbia Board of Education or District of Columbia Public Schools testified.

The Office of Planning, through testimony and a written report, suggested that the Commission:

- Add a new § 401.9 to clarify the lot width requirement for public schools on corner and through lots;
- Add a new § 401.10 to clarify that public schools locating on existing split-zoned lots can use the lot area and width standards of the less restrictive zone;
- Remove the lot area requirements for public schools in R-5-C, R-5-D, and R-5-E Zone Districts;
- Reduce the minimum lot width requirement for public schools to 80 feet in all R-5 Zone Districts; and
- Treat public schools as residential uses for purposes of calculating density in Commercial Zone Districts.

After the hearing, the Office of Planning filed a supplemental report suggesting that the Commission add a new § 401.11 to exempt public schools with 16 or fewer students from the residential lot requirements.

The Commission took proposed action on July 10, 2006 to approve the proposed text with the modifications suggested by the Office of Planning at the hearing and in its supplemental report.

Because the text of the proposed rule differed in several respects from that published in March 2006, a Revised Notice of Proposed Rulemaking was published in the *D.C. Register* on July 21, 2006 at 53 DCR 5888, for a 30-day notice and comment period. A Corrected Revised Notice of Proposed Rulemaking was published on August 18, 2006 at 53 DCR 6860.

The majority of the comments received expressed opposition to the proposed exception from residential lot requirements for schools of 16 or fewer students, believing that the exemption would destabilize existing residential neighborhoods due to the potential negative impacts of very small schools.

ANC 3C submitted a resolution dated August 22, 2006 in opposition to the text amendment. The resolution recommended that all charter schools require special exception approval in order to assure full participation by affected residents. It further listed nine reasons for the ANC's opposition to the proposed regulation, including the potential destabilization of residential areas, lack of limits on the number of schools in a neighborhood, lack of community input in the existing chartering process, and the lack of a citywide plan for educational institution location.

An August 24, 2006 letter from Mr. Lindsley Williams described three areas that he believes need further clarification. Two of the issues concerned text already in the Zoning Regulations. First, he suggested that the extent to which a public school may allow community uses should be more clearly defined. Second, he questioned why the current regulation (and three provisions in the proposed text) refers to compliance with Chapter 21 (Off-Street Parking Requirements) but not Chapter 22 (Off-Street Loading Facility Requirements). As to the proposed text, he recommended clarifying the definition of "employees" for the purposes of calculating the parking standards for pre-elementary and pre-kindergarten schools, given the extent to which contractors and other third parties service such facilities.

The proposed rulemaking was also referred to the National Capital Planning Commission ("NCPC") pursuant to § 492 of the District of Columbia Charter. The NCPC Executive Director, by delegated action dated August 8, 2006, found the proposed text amendments would not affect the identified federal interests in the National Capital nor be inconsistent with the Comprehensive Plan for the National Capital.

The Office of the Attorney General determined that this rulemaking meets its standards of legal sufficiency.

Final Action

The Commission took final action to adopt the rulemaking at its regularly scheduled public meeting on September 25, 2006.

The Commission decided to remove the proposed new § 401.11 that created an exception from the lot dimension requirements in Residence Districts for public schools with no more than sixteen students. The Commission believes that ANC 3C offered persuasive advice regarding the potential negative impacts the exemption would have on residential neighborhoods. Moreover, after the Commission added this provision, it learned that no existing public school (including any charter school) was small enough to qualify for the exception and it is unlikely that any future school of that size would be established. The Commission concluded that the combination of these factors warranted the elimination of the proposed exception. The remaining concerns of the ANC pertain to actions of District agencies that are not under the control of the Zoning Commission. The District government has decided to allow Charter Schools. The Commission began this case because that use was undefined. The Commission cannot wait for other

processes to occur before allowing these schools in the areas they are intended to serve, under conditions that will mitigate any potential adverse impact.

The Commission also noted that while Mr. Williams' comments were meritorious, further study was needed before they could be implemented. Rather than delaying the permanent implementation of this rule, the Commission requested that the Office of Planning study the issues raised by Mr. Williams' comments and report the results to the Commission.

Based on the above, the Commission finds that the proposed amendments to the Zoning Regulations are in the best interests of the District of Columbia, consistent with the purpose of the Zoning Regulations and Zoning Act, and not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission hereby **APPROVES** the following amendments to Chapters 1, 2, 4, 5, 6, 7, 9, and 21 of the Zoning Regulations, Title 11 DCMR. Added wording is underlined, and deleted wording is shown in strike-through lettering:

A. Chapter 1, THE ZONING REGULATIONS, § 199.1, is amended as follows:

School, public - 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.

B. Chapter 2, R-1 RESIDENCE DISTRICT USE REGULATIONS, is amended as follows,

1. By amending § 201.1(k) to read 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 provided that the school is adjacent to the shared recreation space; on-site office use must be ancillary and necessary to the operation of the particular school.

2. By amending § 206 to read 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 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.

C. Chapter 4, RESIDENCE DISTRICTS: HEIGHT, AREA, AND DENSITY REGULATIONS, is amended as follows:

1. By amending §§ 400.10 and 400.11 to read as follows:

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).

2. By amending the table in § 401.3 to read as follows:

ZONE DISTRICT AND STRUCTURE	MINIMUM LOT AREA (square feet)	MINIMUM WIDTH OF LOT (feet)
<u>R-1-A</u> <u>Public School</u>	<u>15,000</u>	<u>120</u>
R-1-A All <u>other</u> structures	7,500	75
<u>R-1-B</u> <u>Public School</u>	<u>15,000</u>	<u>120</u>
R-1-B All <u>other</u> structures	5,000	50
<u>R-2</u> <u>Public School</u>	<u>9,000</u>	<u>120</u>

R-2 One-family semi-detached dwelling	3,000	30
R-2 All other structures	4,000	40
<u>R-3</u> <u>Public School</u>	<u>9,000</u>	<u>120</u>
R-3 Row dwelling	2,000	20
R-3 One-family semi-detached dwelling	3,000	30
R-3 All other structures	4,000	40
<u>R-4</u> <u>Public School</u>	<u>9,000</u>	<u>120</u>
R-4 Row dwelling and flat	1,800	18
R-4 One-family semi-detached dwelling	3,000	30
R-4 Conversion to apartment house	900/apartment or bachelor apartment	None prescribed
R-4 All other structures	4,000	40
<u>R-5-A</u> <u>Public School</u>	<u>9,000</u>	<u>80</u>

R-5-A All other structures	As prescribed by the Board pursuant to § 3104	As prescribed by the Board pursuant to § 3104
<u>R-5-B</u> <u>Public School</u>	<u>9,000</u>	<u>80</u>
<u>R-5-C, R-5-D, R-5-E</u> <u>Public School</u>	<u>None prescribed</u>	<u>80</u>
R-5-B, R-5-C, R-5-D, R-5-E All other structures	None prescribed	None prescribed

3. By adding new §§ 401.8 through 401.10 to read as follows:

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

401.9 For public schools on a corner lot or through lot, minimum lot width may include the measurement of all street frontages.

401.10 For public schools on split-zoned lots, the minimum lot width and minimum lot area requirements if any, of the less restrictive zone shall apply to the entire lot as long as the lot was in existence as of February 13, 2006.

4. By amending § 403.1 to read as follows:

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 shall not exceed 70 percent.

- D. Chapter 5, SPECIAL PURPOSE DISTRICTS, is amended by adding a new §501.1(i) to read as follows:

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

- E. Chapter 6, MIXED USE (COMMERCIAL RESIDENTIAL) DISTRICTS, is amended by adding a new §601.1(u) to read as follows:

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

- F. Chapter 7, COMMERCIAL DISTRICTS, is amended as follows:

1. By amending the heading of the table in § 771.2 to read as follows:

ZONE DISTRICT	APARTMENT HOUSE OR OTHER RESIDENTIAL USE <u>OR PUBLIC SCHOOL</u>	OTHER PERMITTED USE	MAXIMUM PERMITTED (FAR)
---------------	--	------------------------	----------------------------

2. By adding a new § 771.10 to read as follows:

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.

- G. Chapter 9, WATERFRONT DISTRICTS, is amended by adding a new § 901.1(v) to read as follows:

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

- H. Chapter 21, OFF STREET PARKING REQUIREMENTS, is amended by adding the following to the chart found in § 2101.1:

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

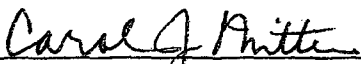
- I. Chapter 31, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, is amended by adding to the table of special exceptions in §3104.1, in the proper alphabetical order, the following new entry:

TYPE OF SPECIAL EXCEPTION	ZONE DISTRICT	SECTIONS IN WHICH CONDITIONS ARE SPECIFIED
Public school (not meeting the Requirements of Chapter 4).	Any R District	206

Vote of the Zoning Commission taken at its public meeting on July 10, 2006, to **APPROVE** the proposed rulemaking by a vote of **4-0-1** (Carol J. Mitten, Gregory N. Jeffries, John G. Parsons, and Michael G. Turnbull to approve; Anthony J. Hood, not participating, not voting).

This Order was **ADOPTED** by the Zoning Commission at its public meeting on September 25, 2006, by a vote of **3-0-2** (Carol J. Mitten, Gregory N. Jeffries, and Michael G. Turnbull in to adopt; John G. Parsons, not present, not voting; Anthony J. Hood, not participating, not voting).

In accordance with the provisions of 11 DCMR § 3028.9, this Order shall become effective upon publication in the *D.C. Register*; that is, on DEC - 1 2006.



CAROL J. MITTEN

CHAIRMAN
ZONING COMMISSION



JERRILY R. KRESS, FAIA
DIRECTOR
OFFICE OF ZONING

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 06-06
Z.C. Case No. 06-06
(Text Amendments – 11 DCMR)
(Charter Schools Text Amendments)
September 25, 2006**

The full text of this Zoning Commission order is published in the “Final Rulemaking” section of this edition of the *D.C. Register*.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



Z.C. CASE NO.: 06-06

DEC 05 2006

As Director of the Office of Zoning, I hereby certify that on _____ copies of this Z.C. Notice of Final Rulemaking & Order No. 06-06 were mailed first class, postage prepaid or sent by inter-office government mail to the following:

- | | |
|--|---|
| 1. D.C. Register | 7. Zoning Administrator (Bill Crews) |
| 2. All ANC Chairs (see attached list) | 8. Office of the Attorney General (Alan Bergstein) |
| 3. Gottlieb Simon
ANC
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004 | 9. Jill Stern, Esq.
General Counsel - DCRA
941 North Capitol Street, N.E.
Suite 9400
Washington, D.C. 20002 |
| 4. All Councilmembers (see attached list) | |
| 5. Office of Planning (Ellen McCarthy) | |
| 6. Ken Laden, DOT | |

ATTESTED BY:

Sharon S. Schellin
Secretary to the Zoning Commission
Office of Zoning

C-TAB 21

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

NOVEMBER 21, 2006

+ + + + +

The Public Hearing convened in
Room 220 South, 441 4th Street, N.W.,
Washington, D.C., 20001, pursuant to notice
at 9:30 a.m., Geoffrey H. Griffis,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice-Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

CAROL MITTEN	Chairperson
MICHAEL TURNBULL	Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Specialist
JOHN NYARKU	Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

MATTHEW JESSICK
JOHN MOORE
TRAVIS PARKER

The transcript constitutes the
minutes from the Public Hearing held on
November 21, 2006

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1 storming the table right away. I'm going to
2 ask that then everyone who is going to address
3 the Board this afternoon, if you would please
4 stand and give your attention to Ms. Bailey.
5 She's going to swear you in.

6 If you are at all going to address
7 or talk to the Board today.

8 MS. BAILEY: Please raise your
9 right hand.

10 Do you solemnly swear or affirm
11 that the testimony that you will be giving
12 this afternoon will be the truth, the whole
13 truth and nothing but the truth?

14 CHAIRPERSON GRIFFIS: Thank you.
15 Excellent. Thank you all very much.

16 With that, Ms. Bailey, when you're
17 ready, I believe we can call the case for the
18 afternoon.

19 MS. BAILEY: Thank you, Mr.
20 Chairman.

21 The application, it's an appeal
22 and the number is 17532 of Appletree Institute

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1 for Education Innovation, pursuant to 11 DCMR
2 3100 and 3101 from the Administrative Decision
3 of the Zoning Administrator, Department of
4 Consumer and Regulatory Affairs to require BZA
5 Special Exception approval for proposed
6 addition to an existing public charter school.

7 Appellant alleges in part that the
8 Zoning Administrator erroneously relied upon
9 Zoning Commission order dated February 13th,
10 2006, Emergency Rule-Making to require
11 additional on-site parking spaces.

12 The property is located in the R-4
13 District at premises 138 12th Street, N.E.,
14 Square 988, Lot 820.

15 CHAIRPERSON GRIFFIS: Let's go to
16 it.

17 MEMBER ETHERLY: Mr. Chair?

18 CHAIRPERSON GRIFFIS: Yes, sir.

19 MEMBER ETHERLY: Perhaps, before
20 we jump into the heart of this particular
21 appeal, I think it would be appropriate to
22 make a number of disclosures and invite any

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1 comment from any of our parties in the appeal.

2 First of all and foremost, I do
3 currently sit on the board of a charter school
4 which is not affiliated with Appletree
5 Institute and I was the former Chair of the
6 Board of Trustees for this charter school,
7 which is Washington Math and Science. WMST in
8 its early history did have a relationship with
9 Appletree that has long since been concluded.

10 That's number one.

11 Number two, as many of the
12 participants in the room may know, as my
13 colleagues most certainly know, due to a
14 political endeavor earlier this year, there
15 were a number of instances during which I had
16 an opportunity to -- if I so chose, to comment
17 on the potentiality of this case coming before
18 the Board.

19 To the best of my recollection, I
20 am not aware of any specific statements that
21 I've made regarding any particular outcome
22 that I would desire in this particular case.

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1 But I want to be sure that information is on
2 the record. And, again, by any of our
3 parties, any of our interveners, to comment on
4 any concerns they may have about my ability to
5 remain impartial in this case.

6 I do not think or feel that a
7 recusal is necessary in this instance because
8 I don't have any interest, number one, in
9 Appletree itself, nor have I ever served as a
10 board member on Appletree. I think it's
11 important to note that during that earlier
12 endeavor that I alluded to, there was an
13 erroneous newspaper report that suggested at
14 one point I was a board member of Appletree.
15 A correction was printed in that particular
16 instance to clarify that situation.

17 So, I simply want to be sure again
18 that all of our parties, all of our
19 interveners and all of our other interested
20 persons are aware of those relationships and
21 be given the opportunity to express any
22 concerns about my remaining on the case.

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1 Again, I have no concerns about
2 being able to sit impartially and fairly and
3 adjudicate this case completely and entirely
4 on the record. But I simply want to make sure
5 that there's an opportunity for public comment
6 if there are any concerns, Mr. Chair.

7 CHAIRPERSON GRIFFIS: Excellent.
8 I appreciate that.

9 Is there anybody here present that
10 would like to address Mr. Etherly or the Board
11 Members any questions?

12 COMMISSIONER MITTEN: Could I ask
13 just a question?

14 Mr. Etherly, in your attendance at
15 community meetings, did you find that this was
16 a topic for discussion and have you gained
17 knowledge of any information about this case
18 that is outside the record?

19 MEMBER ETHERLY: I would say that
20 during the course of this past election
21 season, yes. I had occasion to attend a
22 number of meetings where this was a

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1 substantial portion of the discussion, be they
2 assorted ANC meetings or other broad community
3 meetings. They were not meetings that I
4 participated in directly, but in terms of
5 hearing discussion and discourse, especially
6 as it related to community concerns, I would
7 have to say, Mrs. Mitten, that, yes. There
8 were a number of those instances.

9 Could you refresh my recollection
10 on the second part of your question?

11 COMMISSIONER MITTEN: Well, I
12 guess, did you gain knowledge of information
13 that was outside of the record? And it sounds
14 like you may have.

15 MEMBER ETHERLY: Based on what has
16 been submitted as part of this application
17 before the Board, I would say that I have not
18 gleaned any additional information outside of
19 the four corners of what we have here. But I
20 will acknowledge that that is probably
21 somewhat of a subjective response as best as
22 I can give it.

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1 I don't think that I've been privy
2 to any information on the part of the
3 Appellant or the Appellee that would
4 compromise my ability to sit impartially.
5 But, again, definitely a number of meetings
6 just during the course of this year's past
7 election season, ANC, other community meetings
8 where this was one of many topics, and often
9 times did arise.

10 CHAIRPERSON GRIFFIS: Was it
11 different that that which is covered in the
12 public domain of periodicals, newspapers or
13 reports?

14 MEMBER ETHERLY: I would say, no,
15 sir, Mr. Chair. That the information
16 discussed at these meetings were not in any
17 way materially different from what was
18 otherwise put into the public domain.

19 CHAIRPERSON GRIFFIS: Any other
20 questions from the Board?

21 VICE CHAIRPERSON MILLER: Was what
22 was discussed at the meeting specific in any

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1 way to this appeal?

2 MEMBER ETHERLY: As an example, it
3 would be fairly routine in the context of this
4 past summer to attend ANC meetings, not
5 necessarily planning and zoning committee
6 meetings, subcommittee meetings of ANCs, but
7 ANC general meetings where a particular ANC
8 position, again in a public form, after being
9 duly noticed would be discussed on this issue.

10 In a number of instances, I would
11 endeavor to step out of the room, to not
12 necessarily hear all that discussion. But I
13 cannot say that that happened in every single
14 case.

15 So, from the standpoint of having
16 been an ANC meetings where community input was
17 taken where ANC commissioners discussed
18 concerns about this and other similar
19 situation, I would have to say that, yes. I
20 did hear those discussions.

21 CHAIRPERSON GRIFFIS: Is there
22 anything else from the Board at this time?

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1 Let's return then and give an
2 opportunity to anyone here present.

3 Mr. Etherly has graciously opened
4 himself up to any questions, not only with
5 those withstanding on the appeal, but anyone
6 here that is present.

7 Questions? Comments? Anyone has
8 anything to address? Now would be your only
9 time.

10 Indeed. Continue questions to the
11 Board?

12 Is there any opinion now. To
13 start with my opinion, first of all, Mr.
14 Etherly, I appreciate you bringing that to our
15 attention on the record. I don't have
16 personally in my review of your comments, have
17 any concern with you continuing on this. In
18 fact, I have even less concern with you
19 continuing on this case knowing that past
20 operations and your due-diligence and judicial
21 review of cases, I believe that you could be
22 fully impartial in hearing this case as it

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1 moves forward.

2 Others?

3 VICE CHAIRPERSON MILLER: I would
4 concur, especially since this case is in the
5 nature of an appeal that deals with very
6 specific legal interpretations that I don't
7 think that would have been addressed in the
8 ANC meeting that you would have gone to. I
9 think that these are very specific and that
10 which you would have heard would not influence
11 your decision on these issues.

12 CHAIRPERSON GRIFFIS: Excellent.
13 Any other opinions? Concerns? Comments?

14 Very well. Then all efforts for
15 Mr. Etherly have failed. We'll continue with
16 this case then.

17 And let me ask. Mr. Alberti is
18 present. Is that correct?

19 You're representing 6A. That is
20 my understanding. You have a request for
21 party status in this. And I believe we can
22 affirmatively say that you will be an

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1 intervener in this as the property is located
2 within your ANC. Unless that can be
3 corrected, that is my understanding. So, we'll
4 move forward with that.

5 We have the Northeast Neighbors
6 for Responsible Growth that have also asked to
7 have intervener status in this. And they're
8 represented. Is that correct? Mr. Keys is
9 representing?

10 And just for everyone's
11 understanding and I know all of you obviously
12 do, but there may be others that read this
13 later or are watching. 3112.15 is the
14 provision of which we look at in terms of
15 establishing interveners for appeals. Appeals
16 obviously are totally difference that
17 variances or special exception hearings. And
18 the intervener provision says and I'll read.
19 "At the time of the hearing ion the appeal,
20 the Board in its discretion and for good cause
21 shown may permit persons who have a specific
22 right or interest that will be affected by

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1 action on the appeal to intervene in the
2 appeal, for such general or limited purposes,
3 as the Board may specify."

4 With that, Mr. Keys, I think it's
5 opportune to go right to you to ask you if you
6 would just briefly address the good cause
7 shown for our understanding in terms of our
8 deliberation on establishing intervener
9 status.

10 MR. KEYS: Good afternoon, Mr.
11 Chairman, Members of the Board.

12 My name is George Keys. I'm with
13 the firm of Jordan and Keys and I'm
14 representing Northeast Neighbors for
15 Responsible Growth.

16 It's a nonprofit corporation that
17 was organized last year in response to the
18 proposal for regulations for the charter
19 schools, to have charter schools. It's
20 composed of a wide segment of neighbors on
21 Capitol Hill, but this petition, this
22 application for party status, is filed in the

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1 name of Northeast Neighbors, but if you
2 notice, it's signed by people who live in the
3 immediate vicinity of the subject property.
4 And they have alleged or claimed specific
5 impacts because of the Zoning Administrator's
6 reversal of the Zoning Administrator's
7 decision in this case, if a school is to be
8 located here.

9 And I think if you can look at the
10 rear. Many of those people are here in the
11 audience. We thought that it would be simpler
12 if Mr. Falink who is sitting to my right, the
13 President of Northeast Neighbors, addressed
14 the Board on behalf of all of those who have
15 signed the statement that's attached.

16 CHAIRPERSON GRIFFIS: But help me
17 understand what the actual specific writer
18 interests would be affected by determining
19 whether there was an error in the
20 interpretation and review of this permit.

21 MR. KEYS: Well, if Mr. Crews'
22 decision, the Zoning Administrator's decision

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1 is reversed and a permit is issued, and the
2 structure of the building is built as a matter
3 of right in this location, these individuals
4 will have direct impacts on their homes and
5 their property.

6 CHAIRPERSON GRIFFIS: It sounds
7 like you're setting up to argue a special
8 exception case. You're arguing impact if this
9 is. But we're not going to be stepping in.
10 In fact, I'm not -- I think I could say at
11 this point I haven't seen how we will be
12 measuring impact in stepping in the shoes of
13 the Zoning Administrator to see whether there
14 was an error in his review or not in his
15 review and in the outcome of his decision.

16 Do you understand?

17 MR. KEYS: We wish to support the
18 Zoning Administrator's decision and to do so
19 on the basis of, if his decision is not
20 upheld, we will be affected thereby.

21 CHAIRPERSON GRIFFIS: Right. All
22 right. I understand.

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1 Comments? Questions?

2 COMMISSIONER MITTEN: Mr.

3 Chairman, I don't have any questions, but I
4 think I concur with what you articulated which
5 is the consequence then whether it's a
6 negative consequence or not which I know that
7 you want to establish, isn't germane to the
8 matter before us. That is not part of the
9 test as we examine the appeal. It is part of
10 the special exemption they're receiving if
11 Appletree were ever to make such an
12 application.

13 So, I just don't find how that
14 testimony would be relevant for the Board.

15 CHAIRPERSON GRIFFIS: Good.

16 Ms. Miller.

17 VICE CHAIRPERSON MILLER: Well,
18 this is a little test from the special
19 exception. But I think that what Mr. Keys was
20 addressing is the part that says -- that
21 persons who have a specific right or interest
22 that will be affected by action on the appeal.

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1 I think that's what he was addressing. And I
2 guess I would just ask Mr. Keys. Maybe you
3 can articulate just a little bit more about
4 what the good cause would be? That's the
5 first part of the test. In its discretion and
6 for good cause make the persons who have a
7 specific right or interest that will be
8 affected by action on the appeal.

9 I think you clearly made the case
10 that the individuals you represent have a
11 right and interest that will be impacted.

12 Did you also say that the group
13 was involved with the --

14 MR. KEYS: Yes.

15 VICE CHAIRPERSON MILLER: --
16 promulgation of the text amendment?

17 MR. KEYS: I think Mr. Phelan can
18 probably explain what the purposes of the
19 group are. That may --

20 VICE CHAIRPERSON MILLER: No. I
21 think what we were looking for is what you
22 would contribute to this proceeding in order

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1 for us to make the correct determination of
2 whether the Zoning Administrator erred.

3 MR. KEYS: I think we can add
4 facts to the proceeding that are derived from
5 the observations of the members of the facts
6 that are material to the Zoning
7 Administrator's decision. They are based on
8 what they know about the property and its
9 uses. Those facts, I think, are essential to
10 understand the context of the Zoning
11 Administrator's decision.

12 CHAIRPERSON GRIFFIS: It's your
13 question.

14 VICE CHAIRPERSON MILLER: Okay. I
15 didn't totally follow you there. But I
16 thought that you had said that you were -- the
17 group was involved originally when their text
18 amendment was being promulgated and,
19 therefore, you might have some expertise I
20 thought in our interpreting the regulation.

21 MR. KEYS: I don't think we can
22 claim expertise. I think we can claim the

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1 benefits of experience in the community. And
2 the group has involved itself generally in the
3 discussion about the policy of locating
4 charter schools in the Capitol Hill area.

5 VICE CHAIRPERSON MILLER: And I
6 would just to that. It's not up to us to
7 decide what the policy is. It's really us to
8 decide the legal issues that are before us on
9 appeal, whether the Zoning Administrator
10 erred. So, we're not re-examining whether
11 there should be a special exception for our
12 schools.

13 CHAIRPERSON GRIFFIS: Right. Let
14 me add to that. Nor do I see at this point
15 how we would step into weighing the impact of
16 the introduction of a school for young
17 children, it's location and how it might cause
18 major traffic problems based on narrow
19 confines of 12th Street. And I'm reading just
20 that part of the petition. Because that --
21 and that's perfectly appropriate in a special
22 exception if we were weighing the impacts.

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1 And there would be recitals of what we would
2 have to address and see whether that would be.
3 But at this point, I don't see how that
4 actually is germane to whether the actions of
5 the Zoning Administrator was correct or not
6 from the adjacent street to alley streets
7 during drop off and pick up times.

8 MEMBER ETHERLY: Perhaps, as we
9 move forward, Mr. Chair, I'll note kind of as
10 I heard you initial conversations. I think
11 the intervener applicant understands perhaps
12 where the Board is heading with this.

13 What is before us, I think we're
14 all in fair agreement is a fairly narrow legal
15 question that focuses on the Zoning
16 Administrator and his decision-making as part
17 of this. There is no ground at this stage and
18 in this venue for going into the special
19 exception inquiry.

20 As my colleague, Mrs. Miller said,
21 clearly your clients have an interest in that
22 regard and have an interest in may or may not

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1 be some impacts. But I am, perhaps, willing
2 to -- and I say this more to my colleagues as
3 opposed to inviting a comment from you. I'm
4 more than willing to, perhaps, err on the side
5 of getting the benefit of your legal
6 expertise, perhaps with a little bit of
7 shaping from your client's perspective. But
8 I think my inclination would be to keep that
9 very focused and make sure your eyes remain
10 firmly on the prize here, which is the Zoning
11 Administrator's decision here. Not all the
12 attendant impacts.

13 MR. KEYS: I should say, Mr.
14 Chairman, we're not here to testify about
15 impacts on streets or houses. What we're here
16 to do is to address specific facts that are
17 material and germane to the Administrator's
18 decision.

19 For example, in this case, issues
20 of parking spaces on the subject property will
21 be relevant because one of the findings by the
22 Zoning Administrator was that this application

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1 lacked sufficient parking. We think in that
2 regard the prior history of the subject
3 property is relevant and we can testify. And
4 it's the only way we can find to get the facts
5 into the record as to what occurred on the
6 subject property.

7 Secondly, I think that without
8 that status, we think we have an argument that
9 might assist the Board in analyzing or
10 assessing the regulations and we'd like to
11 have that argument which we've reduced to a
12 brief response to the Appellant's brief that
13 we recognize.

14 I understand the Board's concern.
15 We don't intend to have elaborate testimony.
16 In fact, it will essentially be a brief legal
17 argument from me on two points. And perhaps
18 two minutes of direct testimony from Mr.
19 Phelan on what he has observed with respect to
20 the property itself.

21 CHAIRPERSON GRIFFIS: Okay.
22 That's much more direct, I think, than going

1 into it.

2 And our concern is not is this
3 going to take too much time or whatever it is.
4 In fact, there's two concerns and I think
5 they're similar, but I'll say them
6 differently.

7 One, is not to raise the
8 expectations of people and what we process in
9 an appeal.

10 And, two, to make sure that all
11 participants and interveners are on point so
12 that we don't have the record exploding beyond
13 which we need and actually can
14 jurisdictionally review.

15 So, that being said, that helps, I
16 think, to refine exactly what the position
17 would be and I think it would go to great
18 length in helping to understand the Board in
19 advising whether we would grant intervener
20 status or not.

21 However, before I ask the Board
22 their opinion of direction, I would like to

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1 ask the Appellant if they have a position on
2 the request for intervenor status by the group
3 and have you introduce yourself for the
4 record.

5 MR. GANNON: Thank you, Mr. Chair.
6 My name is Curtis Gannon and I'm with Gibson,
7 Dunn and Crutcher representing Appellant
8 Appletree. And I think that we share the
9 concerns that many of the Board members have
10 addressed about exactly what the specific
11 writer interest is here. I mean, if you read
12 the statement submitted by the NNRG, things
13 that they talk about are about whether things
14 are compatible with the uses in the area and
15 whether it would adversely affect the use and
16 enjoyment of abutting properties. And
17 depending on how capaciously you interpret the
18 phrase, "writer interest" perhaps you could
19 conclude that that's a specific interest. I'm
20 not sure there's a specific right to
21 completely -- adjoinment of abutting
22 properties. But I do think that it is

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1 important to keep your eye on what we agree,
2 that this is a very narrow case involving two
3 specific legal questions, essentially. And if
4 Mr. Keys is going to talk about legal
5 arguments related to those two questions and
6 the Board thinks that there's good cause that
7 Mr. Crews and the Zoning Administrator and the
8 Council's office to the extent that he has
9 their assistance, aren't enough to defend the
10 Zoning Administrator's decisions on those
11 points.

12 Then obviously I would understand
13 why you would appreciate the benefit of Mr.
14 Key's experience. I think that in terms of
15 Mr. Phelan's factual testimony, there really
16 I think is going to be one fact at issue in
17 the proceeding today and that is about the
18 parking.

19 I think that it is unlikely that
20 the historic uses of parking in the lots are
21 really going to be the right way to approach
22 that question. And so I'm skeptical that the

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