

1 As to Section 401.1 the Section
2 does not speak to the use of the property. It
3 appears that the ZA infers that the
4 enlargement permitted by Section 401.1
5 anticipates no change in use. I appreciate
6 that the ZA was sensitive to the Zoning
7 Commission's concern regarding lot area and
8 lot width requirements as they applied to
9 public schools as expressed in the emergency
10 rulemaking.

11 However, the specialized condition
12 addressed in 401.1 was not discussed by the
13 Zoning Commission in approving either the
14 emergency or the subsequent permanent
15 rulemaking. To the extent that 401.1 is
16 ultimately inconsistent with the Commission's
17 intent but remains meaningful on its own
18 terms, then it is the flaw of the Commission
19 interacting the rulemaking, not an area of
20 interpretation for the ZA.

21 The third issue, the parking
22 issue, is the basis for my vote. The BZA

1 heard testimony as to the existing number of
2 parking spaces. The ZA testified that he
3 determined that six compliant parking spaces
4 could have been configured on the property for
5 purposes of establishing the existing number
6 of parking spaces.

7 It is appropriate to adopt this
8 number in the absence of facts to the
9 contrary, specifically an indication on the
10 prior C of O as to the number of existing
11 parking spaces. No such indication on the C
12 of O exist. The ZA consistent with his goal
13 of compliance first would appropriately
14 interpret the existing condition to achieve
15 the greatest degree of compliance for the
16 existing use, i.e., private club.

17 Further, we have testimony from
18 the neighbor, Mr. Foley, that the former user
19 did seek to maximize the amount of parking on
20 the lot using stacking. This reinforces Mr.
21 Crews' conclusion that the maximum number of
22 legal spaces should be assumed in the absence

1 of facts to the contrary.

2 Therefore, because the applicant
3 provided only three parking spaces thereby
4 reducing the number of existing parking
5 spaces, which is not permitted under Section
6 2100.5, whatever disagreements there may be as
7 to the interpretation of 2100.5 as it relates
8 to additions greater than 25 percent, there
9 has been no disagreement in my experience on
10 the BZA that the number of legal parking
11 spaces may be reduced from the existing
12 number."

13 CHAIRPERSON GRIFFIS: Excellent.
14 Thank you very much. I think that is well
15 stated. I noted that Mr. Crews actually
16 stated in his testimony, and I wrote the quote
17 in my own notes, that the property "never had
18 six or five spaces on the site but could." I
19 think that is what Ms. Mitten was actually
20 inferring also. There are two elements to
21 that to address that I see.

22 First, there was a permitted

1 construction of that fence which precludes
2 five or six as I see all the layouts and the
3 iterations. I don't disagree that Mr. Crews,
4 the Zoning Administrator, should have looked
5 at how many could have been provided or should
6 have been provided according to the
7 regulations.

8 The stackable, I'm not sure why we
9 are even talking about because unless there
10 was some sort of relief provided by this Board
11 for that, they never would have been able to
12 be counted as complying with the regulations.
13 Again, I go back to trying to establish
14 whether it was striped or wasn't. I find that
15 three seems to be the number -- not seems to
16 be.

17 Three is the logical number based
18 on the size of the surface area, the existence
19 of the egress stairs, the AC units, and the
20 gate most importantly which creates a drive
21 isle. When you have the dimensions that we
22 have, I don't see how you fit nine by 19

1 spaces in anymore than three.

2 Yes.

3 MS. MILLER: I also want to
4 comment that figure of five or six spaces,
5 whatever that was, that was determined after
6 Mr. Crews made his decision on the AppleTree
7 case. If you recall in his letter saying that
8 they needed parking, he said they needed 10
9 spaces in accordance, I think, with the 206.1
10 or whatever, you know, 10 spaces per use as a
11 public school.

12 He didn't say six and that was
13 part of our concern that the day before the
14 hearing when he looked at the property and
15 took pictures and we said, "How could your
16 decision have been based on that number since
17 you made your decision well earlier and you've
18 just taken these pictures."

19 CHAIRPERSON GRIFFIS: Right. I
20 think that is well said. I think it is a
21 difficult burden for the Zoning Administrator
22 to look at existing buildings and trying to

1 assess when it isn't clear on previous ruling,
2 previous permittings, or previous rulings,
3 previous permittings, or previous certificate
4 of occupancy so I agree.

5 MR. MANN: I also agree that three
6 is the correct number. I think that you laid
7 out the physical reasons why that is the
8 appropriate number. I also sort of disagree
9 with some of the comments we just heard on the
10 absentee ballot that implies we should be
11 working towards the maximum number.

12 I don't think that is the
13 direction that we should be heading. I think
14 that is why three in this case is more
15 supportable, particularly given the physical
16 evidence that you have outlined.

17 CHAIRPERSON GRIFFIS: Others?

18 MS. MILLER: I just want to
19 address the ANC report to give them their
20 great weight. I think where the ANC was going
21 was that the use of a charter school should be
22 considered a nonconforming use. I don't

1 believe it is a nonconforming use because use
2 of a public school is allowed in this
3 residential zone and, therefore, the arguments
4 that they made with respect to that failed.

5 It's sort of a nonconforming use
6 as a public school because it didn't meet the
7 lot and width requirements. The ANC has made
8 several arguments based on the fact that they
9 characterize the use in this case as
10 nonconforming because AppleTree didn't meet
11 the requirements set forth in 401.3.

12 CHAIRPERSON GRIFFIS: Right.
13 401.3 doesn't go to use.

14 MS. MILLER: It goes to area,
15 right.

16 CHAIRPERSON GRIFFIS: It goes to
17 the area of the lot and the width in that the
18 use is designated in order to establish what
19 is required for the lot width and the lot
20 area. A public school is a matter of right
21 use. It's an allowable use within the
22 residential zoned district so it's not as if

1 it's a -- the nonconformity of use is not
2 established based upon an area of compliance
3 or noncompliance.

4 If the building is five feet
5 higher than is allowed in the zoned district,
6 it doesn't make the use that fills it
7 conforming or not conforming. That use can be
8 conforming and the structure can be
9 nonconforming. Actually, it's incredible
10 articulated in our regulations as we look at
11 nonconforming structures with conforming uses
12 and nonconforming uses of conforming
13 structures and vice versa.

14 Okay. What else? Anything else?
15 Is there action proposed by the Board?

16 MS. MILLER: I just want to
17 clarify something. It doesn't take away from
18 what we were saying but they tied this
19 nonconforming use into 401.1 which talks about
20 meeting the requirements of Chapter 20.
21 Anyway --

22 CHAIRPERSON GRIFFIS: Correct.

1 MS. MILLER: Okay.

2 CHAIRPERSON GRIFFIS: I'm glad you
3 braised it and I think we have put it to rest.

4 MS. MILLER: Good.

5 CHAIRPERSON GRIFFIS: Anything
6 else then? Is there a motion?

7 MS. MILLER: I would move to grant
8 the appeal of AppleTree on grounds that it is
9 exempt from 206.1 pursuant to 401.1 and that
10 it is exempt from the additional parking
11 pursuant to 2100.5 and only three spaces are
12 required.

13 MR. MANN: Second.

14 CHAIRPERSON GRIFFIS: Excellent.
15 I'm prepared to support the motion. However,
16 I would have framed the motion a little bit
17 differently and found that it was -- the last
18 piece of it, it was in conformity with the
19 rest of the provisions of the regulations.
20 However, I don't think that is a critical
21 aspect that will be detrimental in terms of
22 the motion moving forward.

1 Speaking briefly to the motion, to
2 reiterate, I think all of this has been well
3 said and I look further in trying to figure
4 out the more current intent and the previous
5 intent of the zoning regulations is how we
6 look at this.

7 I also am looking at kind of
8 proposing the worse case scenarios because
9 that's what we have to do is kind of enlarge
10 what the impact is in many ways just to inform
11 ourselves and then we get to the specifics.
12 You look at it and you say, one, I wonder why
13 we deal with private schools and public
14 schools differently in our regulations but
15 that's a bigger discussion.

16 As we look at public schools we
17 also realize the fact that there are many,
18 many regulatory areas or agencies and elements
19 that go into opening a school and placing a
20 school. I think, one, our own building codes
21 will indicate how many students and teachers
22 will go into structures. That will be a

1 limiting factor.

2 We also have the health
3 requirements in terms of the age of students
4 and the like. Why do I say that? I have
5 great assurance that our zoning regulations
6 play only a small part in making sure that the
7 health and safety is ensured as we go forward.

8 However, the specifics of this, I
9 think, it has already been delivered and
10 directly stated that this, in fact, under
11 206.1 and 401.1 with the new text creations
12 was exempt from that lot or width area
13 requirements.

14 This is a matter of right use and
15 that it did comply with the other provisions
16 within the title. Others? Anything else?
17 Very well. We do have a motion before us. It
18 has been seconded. I would ask for all in
19 favor to signify by saying aye.

20 ALL: Aye.

21 CHAIRPERSON GRIFFIS: Opposed?

22 MR. MOY: Staff would record the

1 vote as four to zero to zero. This is on the
2 motion of Ms. Miller, the Vice Chair, to grant
3 the appeal. Seconded by Mr. Mann. Also in
4 support of the motion the Chair, Mr. Griffis,
5 and Mr. Etherly. As I said earlier, we do
6 have an absentee ballot from Carol Mitten and
7 her absentee vote is to deny the appeal. That
8 would give the resulting vote of four to one
9 to zero.

10 CHAIRPERSON GRIFFIS: Excellent.
11 Thank you very much, Mr. Moy. I believe it is
12 clear on the elements of what Ms. Mitten was
13 denying the appeal on. I appreciate you
14 reading that into the record for our own
15 information and deliberation. Very well. Is
16 there anything else on that case?

17 MR. MOY: That completes that
18 particular case, sir.

19 CHAIRPERSON GRIFFIS: Good. It's
20 my understanding that we have one more small
21 matter before us in our meeting. Is that
22 correct?

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D

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

ADVISORY NEIGHBORHOOD COMMISSION 6A,
Appellant,

v.

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

BZA APPEAL No. 17769

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

VOLUME 2 OF 2

DATED: May 20, 2008

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For Education Innovation, Inc.*

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17769

EXHIBIT NO. 12-D

Appeal No. 17769
Appendix Accompanying AppleTree Brief

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D TAB 1

GOVERNMENT

THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

+ + + + +

REGULAR MEETING

+ + + + +

MONDAY

APRIL 9, 2007

+ + + + +

The Regular 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 6:30 p.m., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

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

OFFICE OF ZONING STAFF PRESENT:

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

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WASHINGTON, D.C. 20005-3701

OFFICE OF PLANNING STAFF PRESENT:

JENNIFER STEINGASSER
JOEL LAWSON
STEVE COCHRAN
TRAVIS PARKER

The transcript constitutes the minutes
from the Regular meeting held on April 9,
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1 P-R-O-C-E-E-D-I-N-G-S

2 6:38 p.m.

3 CHAIRPERSON MITTEN: Good evening,
4 ladies and gentlemen.

5 This is a public meeting of the
6 Zoning Commission of the District of Columbia
7 for Monday, March 9th, 2007. My name is Carol
8 Mitten and joining me this evening are Vice
9 Chairman Anthony Hood and Commissioners Mike
10 Turnbull, John Parsons and Greg Jeffries.

11 Copies of our meeting agenda are
12 available to you and they are in the wall bin
13 by the door.

14 I'd just like to remind folks that
15 we don't take any public testimony at our
16 meetings unless someone has specifically
17 requested to come forward.

18 I'd like to advise you that the
19 proceeding is being recorded by the Court
20 Reporter and is also being webcast live so we
21 ask you to refrain from making any disruptive
22 noises in the hearing room and we also ask you

1 Mrs. Schellin.

2 SECRETARY SCHELLIN: Staff would
3 record the vote four to zero to one to approve
4 final action on Zoning Commission Case No. 04-
5 24A.

6 Commissioner Hood moving,
7 Commissioner Jeffries seconding.
8 Commissioners Mitten and Parsons in favor.
9 Commissioner Turnbull not voting, having not
10 participated.

11 CHAIRPERSON MITTEN: Thank you.

12 Now, there's just one or there's
13 two pieces of correspondence to address. I
14 can't seem to put my hand on it, but I
15 remember what it is.

16 The first one is some
17 correspondence that ANC-1C had submitted to
18 the Commission asking us to -- they were
19 trying to appeal a decision of the Public
20 Space Committee to the Zoning Commission. And
21 as much fun as that might be, we don't have
22 the authority for that. So, I just want to

1 make that clear. Although they should be able
2 to appeal somewhere I hope.

3 And then the second is an
4 extension of our hearing from the other night
5 in Case No. 07-03. And, if you remember, the
6 folks from ANC-6A requested that we take
7 emergency action on the text amendment for --
8 I'm sorry. Did I get the case wrong.

9 Oh, I'm sorry, I'm totally --
10 okay. Then I'm on the other one. It's still
11 ANC-6A. I'll get to this one in a second.

12 Let me just stick with what I
13 started to say.

14 The request, it might not have
15 been a piece of correspondence, but it was a
16 request from ANC-6A to take emergency action
17 in Case No. 07-03 regarding the text amendment
18 to Section 401.1. And I said that we would
19 take that up tonight.

20 And one of the things is that the
21 origin and we talked a little about this
22 during the hearing.

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1 The origin of that case was the
2 Appletree appeal of their building permit.
3 And since that decision and the order is not
4 yet written, although maybe Mr. Bergstein can
5 give me an update on the issuance -- timing of
6 the issuance?

7 MR. BERGSTEIN: I would imagine --
8 well, I'll have it to the Office of Zoning
9 this week. And then it's a matter of how long
10 it takes the Board to review the order.

11 CHAIRPERSON MITTEN: Okay.

12 MR. BERGSTEIN: I would imagine
13 two to three weeks.

14 CHAIRPERSON MITTEN: Okay. Thank
15 you.

16 Since I participated in that case,
17 I had intended to bring for sua sponte review
18 by the Commission one of the issues in the
19 case. And it ironically is not 401.1. But it
20 was the third item.

21 There were three bases on which
22 the Zoning Administrator made his decision.

1 And the third issue had related to parking.
2 And it turned on specifically the number of
3 existing parking spaces which is why I was
4 asking Mr. Parker earlier about guidance for
5 the historic -- the case regarding parking in
6 historic structures. And the BZA disagreed
7 with the Zoning Administrator. And I felt
8 that the issue in the case went far beyond --
9 for the Zoning Administrator went far beyond
10 that particular case because then in the
11 occasions which there will be occasions
12 because of these exemptions for historic
13 structures and for other reasons that the
14 Zoning Administrator has to opine about the
15 number of parking spaces. And I just thought
16 that the BZA was off base there.

17 So, I will be bringing that once
18 the order is written to the Commission and for
19 your consideration to take up a sua sponte
20 review of it. And when we do so, I will ask
21 to stay the order, the effect of the BZA order
22 which will then encompass the issues related

1 to 401.1 which would then move the need for
2 emergency action.

3 So, I just wanted to say all that.
4 It doesn't require any action on our part at
5 this point.

6 And then --

7 COMMISSIONER JEFFRIES: It's a
8 preview. Right?

9 CHAIRPERSON MITTEN: That was a
10 preview.

11 And then the final item under
12 correspondence is that we -- no, this is --
13 wait a minute. I lost it again. Okay.

14 Is a request for -- this is a
15 different request from ANC-6A for an emergency
16 text amendment in the H Street Northeast
17 Commercial Zone. And the -- I'm just going to
18 read this.

19 The mechanism that our Commission,
20 meaning their ANC, proffers to achieve its
21 goal which is to preserve the integrity and
22 goals of the H Street Overlay is an

1 instruction to the director of the Office of
2 Zoning to suspend and refuse acceptance of
3 applications for more permissive zoning for
4 any property which is governed by the H Street
5 Overlay.

6 It says, this emergency rule-
7 making is justified by the immediate danger
8 posed by the application for rezoning and a
9 PUD in Zoning Commission Case No. 05-37.

10 So, anyway they're basically
11 saying, don't consider these on a case-by-case
12 basis. Just have this blanket, I guess,
13 moratorium on accepting applications.

14 My concern is, they get to weigh
15 in on each application as it comes in. So, I
16 don't understand why we would instruct the
17 director of OZ not to take anymore
18 applications. I think the mechanism for them
19 addressing the Commission -- addressing their
20 concerns to the Commission is in a hearing as
21 these cases come forward.

22 COMMISSIONER PARSONS: How do we

1 get the authority to do something?

2 CHAIRPERSON MITTEN: I don't even
3 know. I mean, I don't even know.

4 COMMISSIONER PARSONS: It sounds
5 illegal to me.

6 CHAIRPERSON MITTEN: See everybody
7 thinks we can do everything.

8 COMMISSIONER PARSONS: Yes. But
9 why would you tell people they can't exercise
10 their property rights. Come on.

11 CHAIRPERSON MITTEN: Yes. I know.

12 COMMISSIONER PARSONS: I
13 understand their plight, but I don't think
14 that's the sledge hammer to use.

15 CHAIRPERSON MITTEN: Right. I
16 think we can just address these concerns on a
17 case-by-case basis and ANC-6A is a regular and
18 active participant before the Zoning
19 Commission and so we look forward to their
20 voicing their concerns as cases come before
21 us.

22 So, if there's nothing else for

1 the Commission tonight, I think we're ready to
2 adjourn.

3 Thank you.

4 (Whereupon, the above matter was
5 concluded at 8:51 p.m.)
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22

D TAB 2

AppleTree Institute for Education Innovation
415 Michigan Ave., NE
McCormick Pavilion, 3rd Floor
Tel: 202.488.3990 | Fax: 202.488.3991

April 19, 2007

RECEIVED
D.C. OFFICE OF ZONING
2007 APR 19 PM 1:11

Sharon Schellin
Acting Secretary
Zoning Commission
441 4th Street, N.W., Suite 200
Washington, D.C. 20001

Re: Z.C. Case No. 07-03: Text Amendment to Minimum Lot Dimensions in Residential Districts

Dear Ms. Schellin:

At the Zoning Commission's April 5 public hearing about Case No. 07-03, Chairperson Mitten explained that this potential amendment to section 401.1 of the Zoning Regulations grows out of the appeal to the Board of Zoning Adjustment by AppleTree Institute for Education Innovation (BZA Case No. 17532), in which the BZA has voted to apply section 401.1 in a situation involving a change in use, but in which no written decision has yet issued. A few days later, at the Commission's April 9 public meeting, Chairperson Mitten indicated that she would be asking the Commission to exercise *sua sponte* review of a completely separate aspect of that BZA decision (involving parking spaces) once the ruling is formally released. I have already written to urge the Commission not to approve the proposed text amendment in Case No. 07-03.

I now write to advise the Commission that, if it is going to propose and adopt a rulemaking in this matter, it should modify the text amendment slightly in order to prevent the underlying BZA appeal from being mooted or nullified.

AppleTree's BZA appeal has its roots in last year's emergency rulemaking involving public schools (Z.C. Case No. 06-06). AppleTree filed an application for a building permit on February 9, 2006. A few days later, the Commission adopted an emergency text amendment that significantly increased the minimum lot area and lot width generally required for public schools in R-4 and other residential areas. When the Commission considered the emergency text amendment, Mr. Bergstein, from the Attorney General's office, raised "the procedural question as to whether or not [the Commission] would want this emergency [amendment] to apply or not apply to persons which have applied for building permits before DCRA, absent some saving language." 02/13/06 Z.C. Tr. 18:13-17. That question was well posed, but never answered.

Several months later, the Zoning Administrator denied AppleTree's building-permit application, rejecting AppleTree's argument that section 401.1 exempted it from the lot-width and lot-area requirements in the emergency text amendment. The BZA's impending ruling is expected to reject that reading of section 401.1. (Although Chairperson Mitten dissented from

the BZA's decision, she dissented on a separate issue involving parking spaces; in the statement delivered at the BZA's January 9, 2007 meeting, she did not dissent from this reading of section 401.1, on the basis of its current text. *See* 01/9/07 B.Z.A. Tr. 60:21-22.)

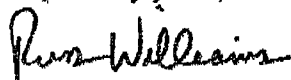
Depending on the outcome of the Commission's expected *sua sponte* review and any subsequent appeal of that decision, AppleTree may or may not ultimately prevail in its appeal. But, if the Commission is going to amend the text of section 401.1, it should also act to protect the ultimate result of AppleTree's appeal for the parties themselves (and help ensure that they have the incentive to pursue the case to a logical conclusion). The Commission may achieve that laudable end by doing what Mr. Bergstein suggested more than a year ago in the predecessor rulemaking: adopting a savings clause that would exempt certain pending applications from the operation of Case No. 07-03. The Commission could, for example, add an additional sentence to the end of revised section 401.1 reading as follows:

The second sentence of this subsection does not apply to any project for which an application for a building permit was pending before the Zoning Administrator or on appeal before the Board of Zoning Adjustment on [DATE X].

In this instance, "DATE X" could be the date of last year's original emergency rulemaking about public schools (February 13, 2006), or the date the final rule in that proceeding was adopted (September 25, 2006), or the date it became effective (December 1, 2006), or the date that the BZA voted on AppleTree's appeal (January 9, 2007), or the date that Case No. 07-03 was set down by the Commission (February 12, 2007).

Any of those dates would ensure that no party was able to take unfair advantage of the BZA's decision about section 401.1, and would still establish the common-sense proposition that AppleTree — a non-profit organization that has spent more than a year diligently pursuing a building permit — will be able to receive whatever benefit flows from the ultimate outcome of its appeal.

Respectfully yours,



Russ Williams
Deputy Director
AppleTree Institute for Education Innovation

cc: Neil Albert, Deputy Mayor for Planning and Economic Development
Peter Nickles, Office of the General Counsel

D TAB 3

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

+ + + + +

REGULAR MEETING

+ + + + +

MONDAY

MAY 14, 2007

+ + + + +

The Regular 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 6:30 p.m., Carol J. Mitten,
Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

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

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN	Secretary
DONNA HANOUSEK	Zoning Specialist

NEAL R. GROSS

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1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

OFFICE OF PLANNING STAFF PRESENT:

JENNIFFER STEINGASSER
STEVE COCHRAN
TRAVIS PARKER
MAXINE BROWN-ROBERTS
ARTHUR ROGERS
MATT JESICK

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALAN BERGSTEIN, ESQ.

The transcript constitutes the
minutes from the Regular meeting held on May
14, 2007.

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1 triggered by the case that we had regarding
2 public schools. And we have the same issue
3 with the late filing of the AOBA letter here
4 and I would move that we reopen the record to
5 receive their letter. I would ask for a
6 second.

7 COMMISSIONER TURNBULL: Second.

8 CHAIRPERSON MITTEN: Thank you,
9 Mr. Turnbull.

10 Any discussion? All those in
11 favor please say aye.

12 (Chorus of ayes.)

13 CHAIRPERSON MITTEN: Any opposed?

14 Ms. Schellin?

15 MS. SCHELLIN: The staff would
16 record the vote 5 to 0 to 0 to reopen the
17 record in Zoning Commission Case No. 07-03 to
18 accept the old vote letter. Commissioner
19 Mitten moving; Commissioner Turnbull
20 seconding; Commissioners Hood, Jeffries, and
21 Parsons in favor.

22 CHAIRPERSON MITTEN: Okay. In

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1 this case we have a letter from Apple Tree
2 Institute for Education Innovation regarding
3 a request for basically a savings clause to
4 exempt their application, the application
5 that they had made to DCRA for a building
6 permit that was appealed and because they
7 don't want the -- if this amendment is
8 passed, they don't want this amendment to be
9 applied to their application.

10 And Mr. Bergstein, I always had
11 understood that whatever was in place, text
12 and map was at the time of an application was
13 what the application would be judged based
14 on. Is that not correct?

15 MR. BERGSTEIN: I don't believe
16 that is correct. There's no vesting at the
17 time an application is filed. What 3202.4
18 says is that a building that's authorized by
19 a building permit may be constructed in
20 accordance with the zoning regulations as of
21 the date the building permit is issued.

22 So if at any time while a building

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1 permit is being processed, there is a change
2 to zoning regulations whether it's by
3 emergency rulemaking or if there is a permit
4 rule that becomes effective through the
5 publication of an order, that does become the
6 zoning regulations and that a building permit
7 cannot be issued until the application, its
8 plans and its uses is in accordance with the
9 zoning regulations as in effect on the date
10 it is to be issued.

11 CHAIRPERSON MITTEN: Okay. Thanks
12 for the clarification. I'll certainly make
13 note of that for the future.

14 So in this case, this request to
15 basically be exempted from the application of
16 this rule, should it pass, to me, in sitting
17 on the appeal case, I had taken
18 responsibility as a Zoning Commissioner for
19 the fact that there had been an oversight and
20 it was in attempting to remedy the oversight
21 that this case was brought forward by the
22 Office of Planning.

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1 And so if in the -- at the end of
2 the day, if the Commission's intent is met,
3 then that is what I'm most interested in, not
4 in sort of preserving a loophole that was --
5 that existed because of an oversight. So I'm
6 not inclined to provide the savings clause.
7 And I'm ready to move forward on the text
8 amendment, but I'll hear from my colleagues
9 if there are any different opinions.

10 (No response.)

11 All right, then I move approval of
12 Case No. 07-03 and ask for a second.

13 COMMISSIONER PARSONS: Second.

14 CHAIRPERSON MITTEN: Thank you,
15 Mr. Parsons. Any discussion? All those in
16 favor, please say aye.

17 (Chorus of ayes.)

18 Those opposed, please say no.

19 Ms. Schellin?

20 MS. SCHELLIN: Staff would record
21 the vote 5 to 0 to 0 to approve proposed
22 action in Zoning Commission Case No. 07-03.

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1 Commissioner Mitten moving; Commissioner
2 Parsons seconding; Commissioners Hood,
3 Jeffries, and Turnbull, in favor.

4 CHAIRPERSON MITTEN: Thank you,
5 Ms. Schellin.

6 And then the next case I did not
7 participate in and Mr. Hood will take over.

8 VICE CHAIR HOOD: Thank you, Madam
9 Chair. This is Zoning Commission Case No.
10 06-35, the CSC 1229 through 1231 TRS, Inc.
11 consolidated PUD at 1227 through 1231 25th
12 Street, N.W.

13 Ms. Schellin?

14 MS. SCHELLIN: We do have a
15 request to accept a late filing at Exhibit 41
16 that was filed by the Friends of Francis
17 Fields.

18 VICE CHAIR HOOD: Okay. You know,
19 I think basically, I don't know -- we had
20 specific things that we had asked for and I
21 don't want to impugn the integrity of process
22 and do that. While I understand that it's

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D TAB 4

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June 25, 2007

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Client No.
C 04753-00001

VIA FACSIMILE (202 727 6072) AND U.S. MAIL

Sharon Schellin
Secretary to the Zoning Commission
Office of Zoning
441 4th Street, N.W., Suite 200
Washington, D.C. 20001

Re: *Z.C. Case No. 07-03: Text Amendment to Minimum Lot Dimensions in
Residential Districts*

Dear Ms. Schellin:

I write to comment on the Zoning Commission's proposed rulemaking in Case No. 07-03, 54 D.C. Reg. 5331 (May 25, 2007). I represented AppleTree Institute for Education Innovation in the BZA appeal that — according to Chairperson Mitten's explanation at the Commission's April 5, 2007 public hearing — led to this rulemaking (BZA Appeal No. 17532).

If adopted, the proposed rule would effectively overturn the construction of section 401.1 of the Zoning Regulations that *the BZA unanimously adopted* at its January 9, 2007 meeting. (Chairperson Mitten dissented on a different ground, related to the number of parking spaces, *see* BZA Transcript at 60-61 (Jan. 9, 2007), and has publicly indicated her intention to seek *sua sponte* review by the Commission of the parking question.)

At its May 14 public meeting, the Commission considered AppleTree's request to add a savings clause specifically tailored to establish the common-sense proposition that AppleTree —

GIBSON, DUNN & CRUTCHER LLP

Sharon Schellin

June 25, 2007

Page 2

a non-profit organization that has spent more than a year diligently pursuing a building permit — will be able to receive whatever benefit flows from the ultimate outcome of its appeal, while still ensuring that no party is able to take unfair advantage of the BZA's decision about section 401.1.

Chairperson Mitten initially indicated that there is no need for such a savings clause, because she “always had understood” that an application would be judged based on the “text and map” that were in place at the time of the application. Z.C. Transcript (May 14, 2007). In other words, she assumed as a matter of course that the rulemaking would apply on a general basis, but not to AppleTree's long-pending proceeding. She did not, however, account for the technicality that, in AppleTree's case, the original permit application was denied by then-Zoning Administrator Bill Crews, and, although the application is now more than 16 months old, it has still not been granted.

When informed of this, Chairperson Mitten indicated that she did not think that AppleTree should be able to rely on a “loophole” that “existed because of an oversight” by the Zoning Commission. It is not accurate, however, to characterize the current form of section 401.1 as an “oversight.” The relevant portion of section 401.1 is essentially unchanged since the 1958 Zoning Regulations. Like countless other prior applicants, AppleTree relied on section 401.1, and cited it, in its February 2006 application.

More importantly, the Zoning Commission and the Office of Planning have long known about AppleTree's straightforward reading of section 401.1. As AppleTree explained in a March 6, 2006 letter:

Although AppleTree's lot . . . would not appear to satisfy [the new minimum lot size requirements in the emergency rulemaking in Case No. 06-06], it is exempted from them by the operation of § 401.1. . . . ***The emergency rulemaking did not purport to alter § 401.1.*** As the Board of Zoning Adjustment explained in one of its 2002 decisions, that provision “means that a replacement for a pre-1958 building on a nonconforming lot is permitted so long as it meets all zoning requirements ‘other’ than lot width.”

Z.C. Case No. 06-06, Exh. No. 5 at 2 (March 6, 2006) (emphasis altered; citation omitted); *see also* Z.C. Case No. 06-06, Exh. No. 18 at 3 n.1 (May 10, 2006) (“as [AppleTree] will explain to the BZA, in light of sections 401.1 and 2100.5 of the Zoning Regulations, its permit application does not fail to meet the terms of the Zoning Regulations, even with the emergency text amendments in effect”).

Because AppleTree fully explained its reading of section 401.1 to the Commission more than 15 months ago, and because the BZA has now unanimously agreed with that reading, I urge the Commission not to penalize AppleTree due to the fact that the Zoning Administrator originally denied rather than granted AppleTree's permit.

GIBSON, DUNN & CRUTCHER LLP

Sharon Schellin

June 25, 2007

Page 3

To avoid that pernicious effect — and also reduce the threat that the Commission itself might be deprived of the ability to conduct a *sua sponte* review of the important parking issue in AppleTree's appeal — I suggest that the Commission should postpone its final decision in Case No. 07-03, to allow time for a permit to be granted, *or* should adopt the minor amendment proposed in the comment letter filed by Russ Williams on April 19, 2007. In short, the Commission could add an additional sentence to the end of revised section 401.1 reading as follows:

The second sentence of this subsection does not apply to any project for which an application for a building permit was pending before the Zoning Administrator or on appeal before the Board of Zoning Adjustment on [DATE X].

In this instance, "DATE X" could be any date that would protect the final outcome of AppleTree's long-pending appeal: for example, the date of last year's original emergency rulemaking about public schools (February 13, 2006), or the date it became effective (December 1, 2006), or the date that the BZA voted on AppleTree's appeal (January 9, 2007), or the date that Case No. 07-03 was set down by the Commission (February 12, 2007).

The Commission routinely acts to prevent rule changes from having drastic effects on pending projects, and it should do so in this instance as well.

Very truly yours,



Curtis E. Gannon

D TAB 5

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

+ + + + +

REGULAR MEETING
12233rd MEETING SESSION (13th OF 2007)

+ + + + +

MONDAY

JULY 9, 2007

+ + + + +

The Regular 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 6:30 p.m., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

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

OFFICE OF ZONING STAFF PRESENT:

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

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WASHINGTON, D.C. 20005-3701

D.C. OFFICE OF THE ATTORNEY GENERAL:

ALAN BERGSTEIN, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

JENNIFER STEINGASSER

JOEL LAWSON

MATT JESICK

TRAVIS PARKER

ART RODGERS

KAREN THOMAS

MAXINE BROWN-ROBERTS

This transcript constitutes the
minutes from the Regular Meeting held on July
9, 2007.

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1 specific things only.

2 MS. SCHELLIN: Right. If they
3 could file those items by 3:00 o'clock July
4 23rd at the latest.

5 VICE CHAIR HOOD: And what I've
6 asked for sound bites would be greatly
7 appreciated.

8 Okay. Anything else on this?

9 Thank you. Thank you, Madam
10 Chair.

11 CHAIR MITTEN: Thank you, Mr.
12 Hood.

13 Now we're ready to move to Final
14 Action. And the first case under Final Action
15 is Case No. 06-33. And this is the text
16 amendment for parking in historic buildings.
17 And we got a couple of letters after we
18 advertised our proposed rulemaking.

19 And I just have to ask this one
20 question because it's repeated twice. Well,
21 it's repeated in these two letters. And I
22 just have to ask because I just want to be

1 sure I'm not missing something.

2 They say that the proposed change
3 would waive the parking requirements only for
4 the smallest of projects. But that's the
5 smallest of additions. Right? Not anybody
6 can renovate an historic structure, and if
7 they don't --

8 MR. PARKER: Agreed. The historic
9 structure itself is always exempt.

10 CHAIR MITTEN: Okay. That's what
11 I thought. That's what I thought. It just
12 seemed quite extreme. And I just wanted to
13 make sure I understood.

14 So, myself, am not moved to make
15 any changes in what we had advertised other
16 than I think there's a little technical thing
17 about a reference that has been suggested by
18 the OAG. But other than that, I would move
19 approval of Case No. 06-33, and ask for a
20 second.

21 COMMISSIONER TURNBULL: Second.

22 CHAIR MITTEN: Thank you, Mr.

1 Turnbull.

2 Any discussion?

3 (No audible response.)

4 CHAIR MITTEN: All those in favor,
5 please say aye.

6 (A CHORUS OF AYES.)

7 CHAIR MITTEN: Those opposed,
8 please say no.

9 (No audible response.)

10 CHAIR MITTEN: Ms. Schellin?

11 MS. SCHELLIN: I'm sorry. We need
12 to maybe redo the vote. Mr. Turnbull didn't
13 participate.

14 CHAIR MITTEN: We need another
15 second.

16 MS. SCHELLIN: Yes.

17 VICE CHAIR HOOD: Second.

18 CHAIR MITTEN: Thank you, Mr.
19 Hood.

20 Okay. Let's try that one more
21 time.

22 All those in favor, please say

1 aye.

2 (A CHORUS OF AYES.)

3 CHAIR MITTEN: Those opposed,
4 please say no.

5 (No audible response.)

6 CHAIR MITTEN: And we have Mr.
7 Turnbull not participating.

8 MS. SCHELLIN: Actually Mr.
9 Turnbull and Mr. Jeffries.

10 Staff records a vote 3 to 0 to 2
11 to approve Final Action Zoning Commission Case
12 No. 06-33. Commissioner Mitten moving;
13 Commissioner Hood seconding; Commissioner
14 Parsons in favor; Commissioners Jeffries and
15 Turnbull not voting, having not participated.

16 CHAIR MITTEN: Okay.

17 Okay. The next case is 03-12C/03-
18 13C. And this is the office building at 250
19 M Street, S.E., which you'll remember we asked
20 the applicant to step -- how did you put it in
21 the last -- step up the architecture? We got
22 them to step it up.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
Z.C. ORDER NO. 06-33
Z.C. Case No. 06-33
(Text Amendments – 11 DCMR)
(Parking for Historic Resources)
July 9, 2007

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 and referred the proposed amendments to the National Capital Planning Commission (“NCPC”) 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 Chapter 21 of the Zoning Regulations (Title 11 DCMR). The proposed amendments clarify parking requirements for historic landmarks and buildings found to be contributing to an historic district (“historic resources”). The Commission took final action to adopt the amendments at a public meeting held on July 9, 2007.

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

Existing Regulations

Although the current regulations clearly exempt historic resources from having to provide additional on-site parking due to a change of use for which more parking is required, it is unclear whether this exemption also applies when more parking is required as a result of the physical expansion of the structure. The text amendments are necessary to remove this ambiguity.

Description of Text Amendments

This rulemaking was initiated by the Office of Planning (“OP”). The text amendments set clear standards for when parking requirements apply to additions to historic resources and when they do not. The amendments only require additional parking when an increase in gross floor area would require the provision of four or more parking spaces. Even when that is the case, the amendments provide for special exception relief.

Relationship to the Comprehensive Plan

The amendments are not inconsistent with the goals of the District Elements of the Comprehensive Plan for the National Capital and are consistent with §§ HP-2.4.1 through 2.4.5, which advocate appropriate adaptation and rehabilitation of historic structures through compatible development. The text amendments promote these goals of historically-sensitive rehabilitation by providing clear relief from aspects of the parking regulations.

Public Hearing and Proposed Action

The Commission held a public hearing on November 27, 2006 and took proposed action on April 9, 2007 to approve the advertised text, except for some minor changes in language and numbering suggested by the Office of the Attorney General (“OAG”). A Notice of Proposed Rulemaking was published in the *D.C. Register* on May 11, 2007, at 54 *DCR* 4508, for a 30-day notice and comment period. Two comment letters were received, one from the law firm of Pillsbury, Winthrop, Shaw, Pittman and the other from the law firm of Holland & Knight.

Both comment letters suggested that the proposed changes are not necessary and should not be adopted. Both went on to provide alternative language for the Commission to consider if the text amendments were pursued. Both strongly recommended allowing mechanical parking structures to meet parking requirements for historic resources. They suggested expanding the conditions under which parking requirements are waived to include lack of access to curb cuts and vertical-only additions. They also recommended raising the minimum threshold number of parking spaces to greater than four.

The proposed rulemaking was also referred to the National Capital Planning Commission (“NCPC”) pursuant to § 492 of the District of Columbia Charter. NCPC, by report dated May 31, 2007, found that the proposed text amendments would not adversely affect the federal interests nor be inconsistent with the Federal Elements of the Comprehensive Plan.

OAG has 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 July 9, 2007, including one non-substantive change made to the wording of new § 2120.3. The change was made at the suggestion of OAG to improve the clarity of the provision. In response to the two comments received, the Commission continues to believe that the current regulations are not sufficiently clear and that the proposed text provides needed protection of historic resources and sufficient relief for extenuating circumstances. The Commission notes that OP intends to examine the use of mechanized parking structures and, if appropriate, will address the subject in a future text amendment.

Z.C. NOTICE OF FINAL RULEMAKING AND ORDER NO. 06-33
Z.C. CASE NO. 06-33
PAGE 3

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 Chapter 21 of the Zoning Regulations, Title 11 DCMR. Added wording is in **bold** and underline, and deleted wording is shown in ~~strike~~through lettering, except for Part D, which is all new text and therefore not annotated:

A. Amend § 2100.4 as follows:

2100.4 ~~Except as provided in § 2100.5,~~ **for historic resources as defined in § 2120.2,** when the use of a building or structure is changed to another use that requires more parking spaces than required for the use existing immediately prior to the change or, if the building or structure is vacant, the use that existed immediately prior to the vacancy, parking spaces shall be provided for that additional requirement in the amount necessary to conform to § 2101.

B. Delete § 2100.5.

C. Amend § 2100.6 as follows:

2100.6 **Except as provided in § 2120.3,** ~~W~~when the intensity of a building or structure existing before May 12, 1958, is increased by an addition of employees, dwelling units, gross floor area, seating capacity, or other unit of measurement specified in § 2101, parking spaces shall be provided for the addition, subject to §§ 2100.7 through 2100.9.

D. Add a new § 2120, "Parking for Historic Buildings," as follows:

2120.1 This section sets forth the circumstances under which existing and new uses in historic resources and additions thereto are exempt from providing parking and shall not apply to new unattached structures constructed on the same lot as a historic resource.

2120.2 For the purposes of this section, a historic resource is a building or structure listed in the District of Columbia Inventory of Historic Sites or a building or structure certified in writing by the State Historic Preservation Officer as contributing to the character of the historic district in which it is located.

2120.3 A historic resource and any additions thereto are exempt from the requirement of § 2100.4 to provide additional parking as a result of a change of use and

from the requirement of § 2100.6 to provide additional parking as a result of an increase of intensity of use, except that parking shall be required for any addition where:

- (a) The gross floor area of the historic resource is being increased by 50% or more, and
- (b) The parking requirement attributable to the increase in gross floor area is at least four (4) spaces.

2120.4 Any parking provided for a historic resource in excess of that which existed at the time the historic resource was listed in the District of Columbia Inventory of Historic Sites or the historic district was created shall be exempt from § 2115, and §§ 2117.5 and 2117.6.

2120.5 Parking spaces provided for a historic resource shall be a minimum of eight feet (8 ft.) in width and sixteen feet (16 ft.) in length exclusive of access drives, aisles, ramps, columns, and office and work areas. All required parking spaces shall be clearly striped and lined. Durable all-weather materials shall be used. Striping shall be maintained for as long as the parking spaces requiring the striping are in existence.

2120.6 The Board of Zoning Adjustment may grant relief from all or part of the parking requirements of this section if the owner of the property demonstrates that, as a result of the nature or location of the historic resource, providing the required parking will result in significant architectural or structural difficulty in maintaining the historic integrity and appearance of the historic resource. The Board shall grant only the amount of relief needed to alleviate the difficulty proved. The applicant shall also demonstrate compliance with the general special exception standard set forth in § 3104 and shall address each of the following criteria as part of its presentation to the Board:

- (a) Maximum number of students, employees, guests, customers, or clients who can reasonably be expected to use the proposed building or structure at one time;
- (b) Amount of traffic congestion existing and/or that the redevelopment of the historic resource can reasonably be expected to add to the neighborhood;
- (c) Quantity of existing public, commercial, or private parking, other than curb parking, on the property or in the neighborhood that can reasonably be expected to be available when the redevelopment is complete; and

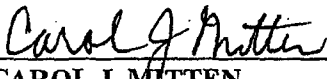
- (d) Proximity to public transportation, particularly Metrorail stations, and availability of either public transportation service in the area, or a ride sharing program approved by the District of Columbia Department of Transportation.

2120.7 Prior to taking final action on an application, the Board shall refer the application to the D.C. Department of Transportation for review and report.

Vote of the Zoning Commission taken at its public meeting on April 9, 2007, to **APPROVE** the proposed rulemaking: **5-0-0** (Carol Mitten, John G. Parsons, Anthony J. Hood, Michael G. Turnbull, and Gregory Jefferies to approve).

This Order was **ADOPTED** by the Zoning Commission at its public meeting on July 9, 2007, by a vote of **3-0-2** (Carol Mitten, Anthony J. Hood, and John G. Parsons to adopt; Michael G. Turnbull and Gregory Jefferies, 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 SEP 14 2007.



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

ORDER NO. 06-33

Z.C. Case No. 06-33

(Text Amendments – 11 DCMR)

(Parking for Historic Resources)

July 9, 2007

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



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
CORRECTED* NOTICE OF FINAL RULEMAKING
and
Z.C. ORDER NO. 07-03
Z.C. Case No. 07-03
(Text Amendments – 11 DCMR)
(Minimum lot dimensions in the R (Residential Districts))
July 9, 2007

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 and referred the proposed amendments to the National Capital Planning Commission ("NCPC") for a 30-day period of review pursuant to § 492 of the District of Columbia Charter; hereby gives notice of the adoption of an amendment to § 401. of the Zoning Regulations (Title 11 DCMR). The amendment clarifies that a building on a lot with less lot area or width than became permitted as of May 12, 1958 may not be expanded or replaced to house a new use, if that use requires more lot area or width than exists on the lot.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on May 25, 2007, at 54 DCR 5331, for a 30-day notice and comment period.

The Commission took final action to adopt the amendment at a public meeting held on July 9, 2007.

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

Existing Regulations

On May 12, 1958, the Zoning Commission adopted the current version of the Zoning Regulations. Among the new provisions were regulations establishing minimum lot area and width requirements in residence zones. The Commission also adopted what is now § 401.3, which permits the construction of new buildings and the enlargement of existing buildings on lots that did not conform with these new requirements, as long as all other provisions of the Zoning Regulations were met. The Board of Zoning Adjustment recently held that § 401.3 not only permits the expansion and replacements of buildings on lots that did not comply with a specific lot or area requirement adopted in 1958, but also permits such construction to disregard

* The first paragraph on p. 3 of this Order was corrected by inserting the underlined words that were previously omitted.

all lot and area requirement, whenever adopted. The BZA's interpretation thus recognizes a wholesale exemption from lot control for the nonconforming lots, while conforming lots must continue to abide by such limitations. The amendment adopted in this order is intended to remove the ambiguity that led to this result.

Description of Text Amendment

This rulemaking was initiated by the Office of Planning. The text amendment limits the exemption from complying with the lot area and width requirements of § 401.3 to just the nonconforming aspect of the lot that made it substandard in 1958. Thus, although a building existing as of May 1, 1958 may still be expanded or replaced by a new building, even though its lot is smaller or narrower than required as of that date, the new text provides that this may not occur if there will also be a change to a use that requires more lot area or width than the lot currently possesses.

Relationship to the Comprehensive Plan

The amendment is not inconsistent with the goals of the District Elements of the Comprehensive Plan. No Comprehensive Plan sections deal specifically with residential lot size, but the change is consistent with the general themes of the Plan including the protection of residential character and the encouragement of compatible land uses. This text amendment would promote these goals of by confirming the existing lot size requirements for all types of structures and uses.

Public Hearing and Proposed Action

The Commission held a public hearing on April 5, 2007 and took proposed action on May 14, 2007 to approve the advertised text. A Notice of Proposed Rulemaking was published in the *D.C. Register* on May 25, 2007 at 54 DCR 5331, for a 30-day notice and comment period.

At the time of it took final action, the Commission noted a letter received from the AppleTree Institute for Education Innovation requesting an exemption from the rule. Just days before the Zoning Commission took emergency action to establish new lot area and width requirements for charter schools, AppleTree filed an application for a building permit to expand a building to house that use. The application was denied because the lot did not meet the new requirements. AppleTree successfully appealed to the Board of Zoning Adjustment, arguing that the new requirements did not apply because its building was on a substandard lot and therefore could be expanded pursuant to the lot area exception granted under § 401.3. As this rulemaking makes clear, it was not the Commission's intent to apply the new lot area requirement only to schools on conforming lots. And though the issuance of this order might negate AppleTree's successful appeal, it does not preclude it from establishing the use. Rather, a charter school that cannot meet the lot or other area requirements in residence zones may seek a special exception. The BZA, through its public hearing process, is in a far better position to decide the affect of permitting AppleTree to establish a charter school on this lot than the Commission.

AppleTree submitted a second letter during the comment period contending that it should not be “penalize” because the Zoning Administrator denied the building permit. The Commission decision to permit special exemption relief for properties with noncompliant lots was made not to penalize such lot owners, but rather to offer a means to obtain a building permit without having to meet the stricter standards of a variance. Since the special exception option existed for AppleTree since the day the Commission took emergency action, so that any injury to AppleTree resulting from the need to now begin such proceedings is entirely self-inflicted.

The proposed rulemaking was also referred to NCPC pursuant to § 492 of the District of Columbia Charter. NCPC, by report dated May 31, 2007, found that the proposed text amendment would not adversely affect the federal interests or be inconsistent with the Federal Elements of the Comprehensive Plan.

The Office of the Attorney General determined that this rulemaking meets its standards of legal sufficiency; however it recommended adding a reference to the replacement of an existing building since the § 401.1 exemption includes both the expansion *and* replacement of a building on a substandard lot.

Final Action

The Commission took final action to adopt the rulemaking at its regularly scheduled public meeting on July 9, 2007. No substantive changes were made to the advertised prepared text, except for the additional language suggested by the Office of the Attorney General. The Commission found that the proposed text amendment was in conformance with the original intent of § 401.1 and the lot size requirements of the regulations.

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 Chapter 21 of the Zoning Regulations, Title 11 DCMR. Added wording is in **bold** and underlined lettering:

1. Amend § 401.1 to read as follows:

401.1 Except as provided in chapters 20 through 25 of this title **and in the second sentence of this subsection**, in the case of a building located, on May 12, 1958, on a lot with a lot area or lot width, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.

Notwithstanding the above, the lot area requirements of § 401.3 must be met when the building is being converted to a use or replaced by a building intended to house a use that would require more lot area or lot width than is on the building's lot.

Vote of the Zoning Commission taken at its public meeting on May 14, 2007 to **APPROVE** the proposed rulemaking: **5-0-0** (Carol J. Mitten, John G. Parsons, Anthony J. Hood, Gregory N. Jefferies, and Michael G. Turnbull to approve).

This order was **ADOPTED** by the Zoning Commission at its public meeting on July 9, 2005 by a vote of **5-0-0** (Carol J. Mitten, Michael G. Turnbull, Anthony J. Hood, Gregory N. Jefferies, and John G. Parsons to approve).

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 **SEP 14 2007**.


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. 07-03
Z.C. Case No. 07-03
(Text Amendments – 11 DCMR)
(Minimum lot dimensions in the R (Residential Districts))**

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

D TAB 6

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17532 of AppleTree Institute for Education Innovation, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to require BZA special exception approval for a proposed addition to an existing building to accommodate a public charter school use¹. Appellant alleges that the Zoning Administrator erroneously relied upon the Zoning Commission's February 13, 2006 emergency rulemaking to require additional on-site parking spaces. The subject property is located in the R-4 District at premises 138 12th Street, N.E. (Square 998, Lot 820).

HEARING DATE: November 21, 2006
DECISION DATE: January 9, 2007

ORDER

PRELIMINARY MATTERS

This appeal was filed on June 27, 2006, by the AppleTree Institute for Education Innovation, Inc., ("Appellant"), which owns the property that is the subject of the appeal, 138 12th Street, N.E., Square 988, Lot 820, ("subject property"). The Appellant alleges that the Zoning Administrator ("ZA") erred in his decision to deny its February 9, 2006 application for a building permit. According to the April 28, 2006 letter communicating the Zoning Administrator's decision to the Appellant, he based his denial on the determination that the Appellant's proposed use of the property as a public school failed to meet the minimum requirements in an R-4 zone district for lot area, lot width, and number of parking spaces.

The Board held a public hearing on the appeal on November 21, 2006, at which the Appellant presented its case through counsel and the Zoning Administrator's decision was defended by the Zoning Administrator himself. Travis Parker, who was involved in reviewing this project with the Zoning Administrator, testified in support of the Zoning Administrator's decision, as did a representative of Advisory Neighborhood Commission ("ANC") 6A, the ANC within which the subject property is situated. The ANC also submitted a report in support of the Zoning Administrator's decision. A group of neighboring property owners, the "Northeast Neighbors for Responsible Growth" ("NNRG"), was granted opposition party status by the Board. At the end of the hearing, the Board set a decision date for January 9, 2007.

¹ The caption has been changed to delete the reference to "an addition to an existing public charter school". Based upon the record, the subject property was not being used as a public charter school at the time Appellant filed its application for a building permit.

BZA APPEAL NO. 17532

PAGE NO. 2

After its deliberations at the January 9, 2007 public decision meeting, the Board voted 4-1-0 to grant the appeal and reverse the Zoning Administrator's decision to deny the building permit. An explanation of the facts and law that justify the Board's conclusion follows.

FINDINGS OF FACT

1. The Property. The subject property is located at 138 12th Street, N.E in the R-4 zone district and is improved with a building constructed prior to May 12, 1958, the date on which the modern version of the Zoning Regulations became effective ("1958 Regulations").
2. The subject property has been certified by the State Historic Preservation Officer as contributing to the character of the Capitol Hill Historic District.
3. The subject property is situated between rowhouses on a primarily residential street, but has been used for non-residential purposes at least since the enactment of the Zoning Regulations.
4. On the effective date of the Zoning Regulations, the building was used as an office facility for a heating-oil company.
5. The subject property was used as an office facility for a hospice in the mid- to late-1960s and as a private club by the Knights of St. John and Women's Auxiliary from 1969 until 2005, when the Appellant acquired the property.
6. The building includes 4,296 square feet of gross floor area, as well as a cellar area.
7. The lot underlying the building is a rectangle with a lot width of 36 feet and a lot area of 4,230 square feet.
8. The area of the lot behind the building is paved with asphalt. The paved area is somewhat less than 36 feet wide (due to encroachments by the immediate neighbors on both sides), and somewhat less than 77 feet deep (due to the space behind the building taken up by a fire escape descending from the second floor, an exterior staircase into the cellar, and two large air-conditioning units).
9. The paved area is separated from a 30-foot-wide public alley at the rear property line by a chain-link fence, which includes a pair of gates that open to allow access from the alley through a 12-foot gap.
10. The chain-link fence was erected in 1970 by the Knights of St. John, along the rear property line, pursuant to a building permit certifying that "this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia." Exhibit No. 32, Attachment 4.
11. No legal, striped parking spaces are marked on the paved area, and there is no evidence that any such spaces have ever been marked on the paved area.
12. Between 1958 and 1969, a large portion of the current paved area was occupied by a storage shed that was 15 feet wide and 49 feet long and provided no parking. In 1969,

- the Knights of St. John razed that structure, pursuant to a permit that indicated that the previous use of the building was “Storage Garages No Parking.”
13. The prior owner, Knights of St. John, would periodically use the paved area at the rear of the lot for stacked parking of up to approximately ten vehicles. Transcript of Nov. 21, 2006 Public Hearing at 399, lines 14-19 (“Transcript”).
 14. On February 9, 2006, the Appellant applied for a building permit to expand the existing building on the subject property by adding an addition on the back, which would increase the total gross floor and cellar floor area to 8,975 square feet and would occupy a portion of the paved area at the rear of the lot.
 15. Under the Appellant’s plans, the remainder of what is now the paved area would be occupied by a grassy area, a sidewalk, and three marked parking spaces roughly perpendicular to the rear property line and directly accessible from the public alley.
 16. The Appellant also proposed changing the use of the property from a private club to a public charter school for approximately 50 pre-school and pre-kindergarten students and up to 15 teachers and staff members.
 17. On February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools. *See* 53 DCR 2017 (Mar. 17, 2006). It re-adopted the emergency rule on June 12, 2006, *see* 53 DCR 5898 (July 21, 2006), and adopted a permanent version on September 25, 2006. *See* 53 DCR 9580 (Dec. 1, 2006).²
 18. The new rule: (a) expanded the definition of “public school” contained in 11 DCMR § 199.1 to include schools “chartered by the District of Columbia Board of Education or the District of Columbia Public Charter School Board,” (b) increased the minimum lot area for a public school in an R-4 zone district from 4,000 to 9,000 square feet, and the minimum lot width from 40 feet to 120 feet; and (c) established a parking formula for pre-elementary and pre-kindergarten schools or facilities of two spaces for every three teachers or staff members.
 19. Pursuant to the new rule, a school employing 15 teachers would have to provide ten parking spaces ($15 \div 3 = 5$; $5 \times 2 = 10$).

²The Appellant contends that aspects of that rulemaking “exceeded [the Zoning Commission’s legal] authorities in multiple ways,” but the Appellant also contends that the Board may hear this appeal without addressing those contentions. The Zoning Administrator contends that “the validity of the Zoning Commission’s action on adopting the emergency text amendment is not within the [Board’s] jurisdiction.” Transcript at 324, lines 12-14. The written report of the ANC does not directly address the question of jurisdiction, but the NNRG also contends that the Board lacks jurisdiction to address the validity of the emergency rule. *See*, Exhibit No. 23, ANC Report, and Exhibit No. 28, Reply Brief of Intervenor NNRG at 1–2. In this order, the Board assumes *arguendo* that the emergency rule is legally valid, without intending any prejudice to the Appellant’s ability to press its arguments to the contrary elsewhere.

20. On April 28, 2006, the Zoning Administrator denied the Appellant's building permit application on grounds that the Appellant's proposed use failed to meet the minimum-lot-area requirement of "9,000 square feet," the minimum-lot-width requirement of "120 feet," and the minimum-parking-spaces requirement of "10 spaces." Exhibit No. 13.
21. Appellant asserted to the Zoning Administrator and asserts in this appeal that the property is exempt from the minimum lot area and lot width requirements pursuant to 11 DCMR § 401.1. That provision states:

Except as provided in chapters 20-25 of this title, in the case of a building located on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.
22. Appellant asserted to the Zoning Administrator and asserts in this appeal that no more than three parking spaces are required.
23. Appellant relies on 11 DCMR 2100.5 as the legal authority for its parking space calculations.
24. Section 2100.5 exempts buildings certified as contributing to a historic district from providing additional parking.
25. At the hearing, the Zoning Administrator changed his position to assert that 7 parking spaces were required based on the theory that the previous club use required 7 spaces.
26. Neither the regulations in effect when the property changed from an office use to a private club use in 1969 nor the current regulations specify a parking space requirement for a private club.
27. In 1969, the Zoning Regulations contained a provision specifying that if the parking schedule contained no requirement for a particular structure, that structure was to provide the number of "parking spaces . . . required for a warehouse located in a C-M-1 District," Zoning Regulations of the District of Columbia §§ 7202.1, 7207.17 (1973 reprint) ("1973 Zoning Regulations"). In 1969, the parking requirement for a warehouse located in a C-M-1 District was one space "for each 2,400 square feet of gross floor area."
28. The private club use would therefore have required two parking spaces ($4,296 \div 2400 = 1.79$).³
29. DCRA computed the parking requirement for the private club use with the current catch-all requirement of one space for every 600 square feet of GFA, set forth in 11 DCMR

³The rules of interpretation for Chapter 21 provide that "whenever calculations based on the schedule set forth in § 2101 result in a fractional space, any fraction under one-half shall be disregarded and any fraction of one-half or over shall require one (1) parking space", 11 DCMR § 2118.6.

§2101, rather than with the catch-all requirement that was in effect when the private club use began.

30. The parties in Opposition claimed that ten spaces were required, based on observations that the private club periodically stacked ten cars in the lot. (See Finding of Fact (“FOF”) 13.)
31. DCRA changed its position again in its Proposed Findings of Fact, No. 24, asserting that only five spaces were required on the theory that when the use changed, the parking requirement changed.
32. DCRA then based the five spaces requirement upon 11 DCMR § 2101.10, which reads as follows:

In the case of a building or structure for which the Zoning Regulations now require more parking spaces than were required when the building or structure was built, the following shall be required:

- (a) If the existing number of parking spaces *now provided* is less than or equal to the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced; and
 - (b) If the existing number of parking spaces *now provided* is more than the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced below the minimum number of parking spaces required by this chapter.
33. Although there are currently no parking spaces marked in the paved area in the rear of the building (as would be required by 11 DCMR § 2117.3), up to three angled spaces could be placed there while still allowing sufficient space for a 17-foot aisle and screens from contiguous residential properties (as required by 11 DCMR §§ 2117.5 and 2117.12).
 34. The Zoning Administrator claimed that six legal parking spaces could fit in the paved area. He conceded, however, that one of those supposed spaces was impermissibly placed in the midst of a fixed fire-escape staircase from the second floor. Transcript at 347, lines 12-14; 350, lines 7-9; and 368–69, lines 21-22 and 1. He also conceded that two of the remaining five spaces — located perpendicular to and immediately adjacent to the alley — would not actually be accessible without changing the existing chain-link fence. Transcript at 361, lines 4-9.
 35. The Appellant is planning to provide three parking spaces in the rear paved area and has secured a long-term lease in a nearby parking lot for a minimum of another ten parking spaces.

CONCLUSIONS OF LAW AND OPINION

The Board has jurisdiction to hear an appeal from any administrative decision of a District official “based in whole or in part on any zoning regulation.” D.C. Official Code § 6-641.07(f) (2001). It may “reverse or affirm, wholly or partly, or may modify the order . . . , decision, determination, or refusal appealed from, . . . and to that end shall have all the powers of the officer or body from whom the appeal is taken.” *Id.* § 6-641.07(g)(4); *see also* 11 DCMR § 3100.4.

This appeal was timely under 11 DCMR § 3112.2(a), because it was filed within 60 days of the date the Appellant had notice or knowledge of the decision being appealed.

There are two principal issues on appeal:

- (1) Whether the building on Appellant’s lot may be enlarged for the purpose of accommodating a public school use without regard to the lot area limitations applicable to that use; and
- (2) Whether a change in the building’s use to a public school requires the provision of any parking spaces on site.

For the reasons stated below, the Board concludes that the proposed change in use does not require adherence to either the lot size or parking requirements for the new use.

As set forth in the findings of facts above, on February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools. This rule was readopted as an emergency rule on June 12, 2006, and then adopted as a permanent rule on December 1, 2006. The new rule, in relevant part, amended the definition of public schools in § 199.1 to include charter schools, amended Chapter 4 of the Zoning Regulations to increase minimum lot area and width requirements in Residence Districts, and amended Chapter 21 of the Zoning Regulations to require parking for pre-elementary schools and pre-kindergarten schools or facilities. This appeal arises from the Zoning Administrator’s denial of Appellant’s application for a building permit on April 28, 2006 on grounds that the proposed use as a public charter school did not meet the requirements set forth in the new regulation. Specifically, the Zoning Administrator determined that the proposed use did not meet the minimum lot area and width requirements, nor the parking requirements.

1. Compliance with the Lot Requirements for a Public School.

Appellant argues that the subject property is exempt from the requirements of the new area restrictions by reason of 11 DCMR § 401.1. That section states as follows:

Except as provided in chapters 20-25 of this title, in the case of a building located on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the

building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.

The Board interprets this section to mean simply, that a building that was located on a lot on May 12, 1958, that does not meet the lot area or width of lot requirements prescribed in § 401.3 may be enlarged or replaced, provided it complies with all other provisions of the Zoning Regulations.

The new public school regulations added public school to the chart set forth in § 401.3. There is no factual dispute that the subject building was located on the lot on May 12, 1958 and that the lot does not meet the lot area or width of lot requirements prescribed in § 401.3 for use as a public school.

Accordingly, the only issues before the Board with respect to the lot requirements are whether the subject property is exempt from the public school lot requirements set forth in § 401.3 and whether the property complies with all other provisions of the Zoning Regulations. The new public school regulations, while amending several regulations in Chapter 4, including § 401.3, in particular, leave § 401.1 intact. The Zoning Administrator and the parties in opposition ask this Board to treat the omission to amend this regulation as an “oversight” on the part of the Zoning Commission and to read the inapplicability of § 401.1 to buildings used for public schools as consistent with the Zoning Commission’s intent with respect to the new public school regulations. The Board notes that the Zoning Commission specifically reviewed the regulations in Chapter 4 when adopting the new regulations, and that § 401.1 was a part of the regulatory scheme it was reviewing. Further, there is evidence in the record that this specific issue was brought to the attention of the Office of Planning prior to final action, (Exhibit 33, Attachment. N). Accordingly, the Board finds that it is beyond its purview to assume that the omission to amend § 401.1 was an oversight on the part of the Zoning Commission.

As stated by the Chair of the Zoning Commission, who participated in this decision:

To the extent that 401.1 is ultimately inconsistent with the Commission's intent but remains meaningful on its own terms, then it is the flaw of the Commission interacting (sic) [in enacting] the rulemaking, not an area of interpretation for the ZA.

The Board further recognizes that any such flaws of rulemaking are not for the Board to fix, in an appeal case, but rather within the authority of the Zoning Commission to correct in a rulemaking proceeding.

The Board therefore reverses the determination of the Zoning Administrator that the building on the Appellant’s lot may not be expanded because its lot has less area and width than is required for a public school.

2. Compliance with all other Provisions of the Zoning Regulations

To be successfully invoked, § 401.1 requires not only that the building have been on the lot as of May 12, 1958, but that the property comply with all other provisions of the Zoning Regulations (other than the lot area and width of lot requirements.) The Zoning Administrator and the parties in opposition allege that Appellant is not in compliance with the parking regulations. The Zoning Administrator argues ultimately that five parking spaces are required. Appellant will only be providing three, which Appellant argues is in compliance with the parking regulations. Appellant relies on 11 D CMR § 2100.5 for this conclusion, which the Board finds is controlling. § 2100.5 provides as follows:

No additional parking spaces shall be required for a historic landmark or a building or structure located in a historic district that is certified by the State Historic Preservation Officer as contributing to the character of that historic district.

There is no dispute that the building has been certified by the State Historic Preservation Officer as contributing to the character of the historic district. Accordingly, the issue in the first instance is whether “additional parking” refers to additional to the number of spaces required for the previous use or additional to what currently exists on the lot. As set forth below, the Board finds that the Applicant is compliant under either scenario and will be providing the maximum number of legal spaces that can fit on the lot, which is the greater number of the two scenarios.

The previous use of the building was that of a private club. The property changed to a private club use in 1969. Under the parking regulations in effect at that time, the parking requirement for the private club on this lot would have been two spaces. (See FOFs 27 and 28.) Accordingly, pursuant to § 2100.5, appellant’s parking requirement would be two spaces.⁴

The Board finds unpersuasive the opposition parties’ argument that the required parking for the previous use was ten spaces based on the neighbors periodically seeing ten cars stacked on the lot. The Board’s task is to determine the number of legally required parking spaces on the lot, not how many could be packed onto the lot.

Finally, the Board finds that only three lawful spaces can be accommodated on this lot. Of the potential five spaces identified by the Zoning Administrator, two would not actually be accessible without changing the existing chain-link fence. (That chain link fence was erected in 1970 pursuant to a building permit certifying that **“this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia.”**)

⁴ Because the Appellant has agreed to provide three spaces, one more space than is required, the Board need not determine whether any parking spaces were credited or grandfathered from the original 1958 use.

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The Board finds that based on the size of the surface area, the existence of the egress stairs, the air conditioning units and the gate which creates the drive aisle, no more than three regulation size parking spaces will fit on the lot.

As “§ 2100.5 provides that no additional parking shall be required, Appellant is meeting this requirement by providing three spaces on the lot.

The Zoning Administrator relied on 11 DCMR § 2101.10 for his final determination that five spaces are required. That regulation provides that whenever the use of a property changes to a use that requires more parking than was previously required, additional parking spaces must be required to make up the difference.

The Board finds that this provision is not applicable to the property because § 2100.5 is controlling for properties that have been certified by the State Historic Preservation Officer. No additional spaces are required regardless of whether the additional spaces would be triggered by a structural addition or by a change in use. Any other interpretation would negate the protection to historic properties afforded by this provision. *See BZA Order No. 17459 of DC Hampton LLC*, (2006) (self-certified application for a parking variance dismissed because “§ 2100.5 operates to waive the requirement for additional parking spaces for new construction” in such instances); *See also, BZA Order No. 16307 of National Child Research Center* (1998) (parking variance not needed because § 2100.5 exempts such historic structures from providing additional parking when the use is changed.); and *BZA Order No. 16071 of the Washington International School* (1995) (pursuant to § 2100.5 no parking spaces required for the change of use of a school building to an apartment building.)

Great Weight to the ANC

The Board is required to give “great weight” to issues and concerns raised by the affected ANC and to the recommendations of the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.

The ANC submitted a report in support of the Zoning Administrator’s decision in which it also argued that the Appellant did not meet the parking regulations. The ANC offered two bases for that assessment: First, it alleged that the property previously accommodated ten cars. The Board has already addressed that issue, finding that stacking ten cars does not equate with the provision of lawfully required parking spaces. Second, the ANC argues that the Appellant’s proposal to place a charter school in the existing structure is prohibited by 11 DCMR § 2002.3 and § 2002.5. These provisions regulate the expansion of nonconforming uses. In essence, the ANC argues that the charter school is a nonconforming use for that building because the building does not meet the lot area or lot of width requirements of §401.3. However, those nonconformities are structural. They are not nonconformities as to use. The use as a public charter school is a matter of right use in the R-4 zone. Accordingly, the ANC’s arguments with respect to nonconforming use are misplaced.

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The Board therefore concludes that the Zoning Administrator erred in determining that the Appellant needed to provide any more than three parking spaces for its contributing building.

For the reasons stated above, the Board concludes that the Appellant has met its burden of proving that the Zoning Administrator erred in denying the Appellant's building permit application. The Board has carefully considered the issues and concerns stated in the written report of the ANC and, for the reasons stated above, finds them unpersuasive.

It is hereby **ORDERED** that the Zoning Administrator's decision is **REVERSED**, and it is further **ORDERED** that this appeal is **GRANTED**.

VOTE: **4-1-0** (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr. to grant; Carol J. Mitten to deny.)

Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning 

FINAL DATE OF ORDER: **JUL 25 2007**

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17532

As Director of the Office of Zoning, I hereby certify and attest that on **JULY 25, 2007**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Curtis E. Gannon, Esq.
Gibson, Dunn & Crutcher, LLP
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Washington, D.C. 20036-5306

Mr. Russ Williams
Managing Director
AppleTree Institute for Education Innovation
400 7th Street, S.E.
Washington, D.C. 20003

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Jordan & Keys, LLP
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Washington, D.C. 20036

Chairperson
Advisory Neighborhood Commission 6A
P.O. Box 75115
Washington, D.C. 20013

Single Member District Commissioner 6A04
Advisory Neighborhood Commission 6A
P.O. Box 75115
Washington, D.C. 20013

Matthew LeGrant, Acting Zoning Administrator

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Matthew LeGrant, Acting Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
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Washington, D.C. 20002

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441 4th Street, N.W., 7th Floor
Washington, D.C. 20001

Jill Stern, Esquire
General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

ATTESTED BY:


JERRILY R. KRESS, FAIA 
Director, Office of Zoning

TWR

D TAB 7



District of Columbia Government
Advisory Neighborhood Commission 6A
Box 75115
Washington, DC 20013



August 2, 2007

Mr. Clifford Moy
Secretary of the Board of Zoning Adjustments
Office of Zoning
441 4th St. NW, Suite 210S
Washington DC 20001

Re: ANC 6A requests reconsideration of BZA Order #17532

Board of Zoning Adjustment Members:

On February 8, 2007, Advisory Neighborhood Commission (ANC) 6A, at its regularly scheduled and properly noticed meeting and with a quorum present, voted unanimously to authorize support of the Department of Consumer and Regulatory Affairs Zoning Administrator's administrative decision to deny an application for a building permit for AppleTree Institute for Education and Innovation, Inc. to construct a charter school at 138 12th Street, NE, Square 988, Lot 820. On July 25, 2007, BZA ordered the Zoning Administrator's decision be reversed and that the appeal is granted (see enclosure #1).

Pursuant to our initial authorization, we request that the BZA reconsider its order in BZA Appeal #17532 on the following grounds:

- (1) BZA failed to consider the clear intent of Zoning Commission (ZC) Order #06-06 (see enclosure #2). The BZA failed to reconcile statutes it felt to be in conflict, rendering a more recently adopted regulation meaningless (see enclosure #3).
- (2) The Findings of Fact introduced were not presented before or at the public hearing, nor was the "fact" discussed at the hearing (see enclosure #4).
- (3) Subsequent ZC Case #07-03 (see attachment #5) has rendered this decision moot, and the BZA should set this order aside (see attachment #6).
- (4) A new fact was made known to ANC 6A by a letter from Thomas Nida, Chair of the Public Charter School Board (see attachment #7). Mr. Nida states that no school has been authorized at 138 12th Street, NE (see attachment #8).
- (5) Two members of the BZA failed to declare conflicts of interest (see attachment #9).

Based on the above, we formally request BZA reconsider Order #17532. If there are any questions on this matter, please contact Commissioner David Holmes (e-mail holmes.anc6a03@gmail.com and 202-252-7079) or Commissioner Nick Alberti (e-mail alberti6a04@yahoo.com and 202-543-3512).

On behalf of the Commission,

Joseph Fengler

Chair, Advisory Neighborhood Commission 6A

Cc:

Councilmember Tommy Wells
Councilmember Phil Mendelson
Zoning Commission Board Members via Ms. Sharon S. Schellin, Secretary to the Zoning Commission
Mr. Matthew Le Grant, Acting Zoning Administrator, Department of Consumer and Regulatory Affairs

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17532 of AppleTree Institute for Education Innovation, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to require BZA special exception approval for a proposed addition to an existing building to accommodate a public charter school use¹. Appellant alleges that the Zoning Administrator erroneously relied upon the Zoning Commission's February 13, 2006 emergency rulemaking to require additional on-site parking spaces. The subject property is located in the R-4 District at premises 138 12th Street, N.E. (Square 998, Lot 820).

HEARING DATE: November 21, 2006
DECISION DATE: January 9, 2007

ORDER

PRELIMINARY MATTERS

This appeal was filed on June 27, 2006, by the AppleTree Institute for Education Innovation, Inc., ("Appellant"), which owns the property that is the subject of the appeal, 138 12th Street, N.E., Square 988, Lot 820, ("subject property"). The Appellant alleges that the Zoning Administrator ("ZA") erred in his decision to deny its February 9, 2006 application for a building permit. According to the April 28, 2006 letter communicating the Zoning Administrator's decision to the Appellant, he based his denial on the determination that the Appellant's proposed use of the property as a public school failed to meet the minimum requirements in an R-4 zone district for lot area, lot width, and number of parking spaces.

The Board held a public hearing on the appeal on November 21, 2006, at which the Appellant presented its case through counsel and the Zoning Administrator's decision was defended by the Zoning Administrator himself. Travis Parker, who was involved in reviewing this project with the Zoning Administrator, testified in support of the Zoning Administrator's decision, as did a representative of Advisory Neighborhood Commission ("ANC") 6A, the ANC within which the subject property is situated. The ANC also submitted a report in support of the Zoning Administrator's decision. A group of neighboring property owners, the "Northeast Neighbors for Responsible Growth" ("NNRG"), was granted opposition party status by the Board. At the end of the hearing, the Board set a decision date for January 9, 2007.

¹ The caption has been changed to delete the reference to "an addition to an existing public charter school". Based upon the record, the subject property was not being used as a public charter school at the time Appellant filed its application for a building permit.

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After its deliberations at the January 9, 2007 public decision meeting, the Board voted 4-1-0 to grant the appeal and reverse the Zoning Administrator's decision to deny the building permit. An explanation of the facts and law that justify the Board's conclusion follows.

FINDINGS OF FACT

1. The Property. The subject property is located at 138 12th Street, N.E in the R-4 zone district and is improved with a building constructed prior to May 12, 1958, the date on which the modern version of the Zoning Regulations became effective ("1958 Regulations").
2. The subject property has been certified by the State Historic Preservation Officer as contributing to the character of the Capitol Hill Historic District.
3. The subject property is situated between rowhouses on a primarily residential street, but has been used for non-residential purposes at least since the enactment of the Zoning Regulations.
4. On the effective date of the Zoning Regulations, the building was used as an office facility for a heating-oil company.
5. The subject property was used as an office facility for a hospice in the mid- to late-1960s and as a private club by the Knights of St. John and Women's Auxiliary from 1969 until 2005, when the Appellant acquired the property.
6. The building includes 4,296 square feet of gross floor area, as well as a cellar area.
7. The lot underlying the building is a rectangle with a lot width of 36 feet and a lot area of 4,230 square feet.
8. The area of the lot behind the building is paved with asphalt. The paved area is somewhat less than 36 feet wide (due to encroachments by the immediate neighbors on both sides), and somewhat less than 77 feet deep (due to the space behind the building taken up by a fire escape descending from the second floor, an exterior staircase into the cellar, and two large air-conditioning units).
9. The paved area is separated from a 30-foot-wide public alley at the rear property line by a chain-link fence, which includes a pair of gates that open to allow access from the alley through a 12-foot gap.
10. The chain-link fence was erected in 1970 by the Knights of St. John, along the rear property line, pursuant to a building permit certifying that "this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia." Exhibit No. 32, Attachment 4.
11. No legal, striped parking spaces are marked on the paved area, and there is no evidence that any such spaces have ever been marked on the paved area.
12. Between 1958 and 1969, a large portion of the current paved area was occupied by a storage shed that was 15 feet wide and 49 feet long and provided no parking. In 1969,

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the Knights of St. John razed that structure, pursuant to a permit that indicated that the previous use of the building was "Storage Garages No Parking."

13. The prior owner, Knights of St. John, would periodically use the paved area at the rear of the lot for stacked parking of up to approximately ten vehicles. Transcript of Nov. 21, 2006 Public Hearing at 399, lines 14-19 ("Transcript").
14. On February 9, 2006, the Appellant applied for a building permit to expand the existing building on the subject property by adding an addition on the back, which would increase the total gross floor and cellar floor area to 8,975 square feet and would occupy a portion of the paved area at the rear of the lot.
15. Under the Appellant's plans, the remainder of what is now the paved area would be occupied by a grassy area, a sidewalk, and three marked parking spaces roughly perpendicular to the rear property line and directly accessible from the public alley.
16. The Appellant also proposed changing the use of the property from a private club to a public charter school for approximately 50 pre-school and pre-kindergarten students and up to 15 teachers and staff members.
17. On February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools. See 53 DCR 2017 (Mar. 17, 2006). It re-adopted the emergency rule on June 12, 2006, see 53 DCR 5898 (July 21, 2006), and adopted a permanent version on September 25, 2006. See 53 DCR 9580 (Dec. 1, 2006).²
18. The new rule: (a) expanded the definition of "public school" contained in 11 DCMR § 199.1 to include schools "chartered by the District of Columbia Board of Education or the District of Columbia Public Charter School Board," (b) increased the minimum lot area for a public school in an R-4 zone district from 4,000 to 9,000 square feet, and the minimum lot width from 40 feet to 120 feet; and (c) established a parking formula for pre-elementary and pre-kindergarten schools or facilities of two spaces for every three teachers or staff members.
19. Pursuant to the new rule, a school employing 15 teachers would have to provide ten parking spaces ($15 \div 3 = 5$; $5 \times 2 = 10$).

²The Appellant contends that aspects of that rulemaking "exceeded [the Zoning Commission's legal] authorities in multiple ways," but the Appellant also contends that the Board may hear this appeal without addressing those contentions. The Zoning Administrator contends that "the validity of the Zoning Commission's action on adopting the emergency text amendment is not within the [Board's] jurisdiction." Transcript at 324, lines 12-14. The written report of the ANC does not directly address the question of jurisdiction, but the NNRG also contends that the Board lacks jurisdiction to address the validity of the emergency rule. See, Exhibit No. 23, ANC Report, and Exhibit No. 28, Reply Brief of Intervenor NNRG at 1-2. In this order, the Board assumes *arguendo* that the emergency rule is legally valid, without intending any prejudice to the Appellant's ability to press its arguments to the contrary elsewhere.

20. On April 28, 2006, the Zoning Administrator denied the Appellant's building permit application on grounds that the Appellant's proposed use failed to meet the minimum-lot-area requirement of "9,000 square feet," the minimum-lot-width requirement of "120 feet," and the minimum-parking-spaces requirement of "10 spaces." Exhibit No. 13.
21. Appellant asserted to the Zoning Administrator and asserts in this appeal that the property is exempt from the minimum lot area and lot width requirements pursuant to 11 DCMR § 401.1. That provision states:

Except as provided in chapters 20-25 of this title, in the case of a building located on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.
22. Appellant asserted to the Zoning Administrator and asserts in this appeal that no more than three parking spaces are required.
23. Appellant relies on 11 DCMR 2100.5 as the legal authority for its parking space calculations.
24. Section 2100.5 exempts buildings certified as contributing to a historic district from providing additional parking.
25. At the hearing, the Zoning Administrator changed his position to assert that 7 parking spaces were required based on the theory that the previous club use required 7 spaces.
26. Neither the regulations in effect when the property changed from an office use to a private club use in 1969 nor the current regulations specify a parking space requirement for a private club.
27. In 1969, the Zoning Regulations contained a provision specifying that if the parking schedule contained no requirement for a particular structure, that structure was to provide the number of "parking spaces . . . required for a warehouse located in a C-M-1 District," Zoning Regulations of the District of Columbia §§ 7202.1, 7207.17 (1973 reprint) ("1973 Zoning Regulations"). In 1969, the parking requirement for a warehouse located in a C-M-1 District was one space "for each 2,400 square feet of gross floor area."
28. The private club use would therefore have required two parking spaces ($4,296 \div 2400 = 1.79$).¹
29. DCRA computed the parking requirement for the private club use with the current catch-all requirement of one space for every 600 square feet of GFA, set forth in 11 DCMR

¹The rules of interpretation for Chapter 21 provide that "whenever calculations based on the schedule set forth in § 2101 result in a fractional space, any fraction under one-half shall be disregarded and any fraction of one-half or over shall require one (1) parking space", 11 DCMR § 2118.6.

§2101. rather than with the catch-all requirement that was in effect when the private club use began.

30. The parties in Opposition claimed that ten spaces were required, based on observations that the private club periodically stacked ten cars in the lot. (See Finding of Fact ("FOF") 13.)
31. DCRA changed its position again in its Proposed Findings of Fact, No. 24, asserting that only five spaces were required on the theory that when the use changed, the parking requirement changed.
32. DCRA then based the five spaces requirement upon 11 DCMR § 2101.10, which reads as follows:

In the case of a building or structure for which the Zoning Regulations now require more parking spaces than were required when the building or structure was built, the following shall be required:

 - (a) If the existing number of parking spaces *now provided* is less than or equal to the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced; and
 - (b) If the existing number of parking spaces *now provided* is more than the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced below the minimum number of parking spaces required by this chapter.
33. Although there are currently no parking spaces marked in the paved area in the rear of the building (as would be required by 11 DCMR § 2117.3), up to three angled spaces could be placed there while still allowing sufficient space for a 17-foot aisle and screens from contiguous residential properties (as required by 11 DCMR §§ 2117.5 and 2117.12).
34. The Zoning Administrator claimed that six legal parking spaces could fit in the paved area. He conceded, however, that one of those supposed spaces was impermissibly placed in the midst of a fixed fire-escape staircase from the second floor. Transcript at 347, lines 12-14; 350, lines 7-9; and 368-69, lines 21-22 and 1. He also conceded that two of the remaining five spaces — located perpendicular to and immediately adjacent to the alley — would not actually be accessible without changing the existing chain-link fence. Transcript at 361, lines 4-9.
35. The Appellant is planning to provide three parking spaces in the rear paved area and has secured a long-term lease in a nearby parking lot for a minimum of another ten parking spaces.

CONCLUSIONS OF LAW AND OPINION

The Board has jurisdiction to hear an appeal from any administrative decision of a District official "based in whole or in part on any zoning regulation." D.C. Official Code § 6-641.07(f) (2001). It may "reverse or affirm, wholly or partly, or may modify the order . . . , decision, determination, or refusal appealed from, . . . and to that end shall have all the powers of the officer or body from whom the appeal is taken." *Id.* § 6-641.07(g)(4); *see also* 11 DCMR § 3100.4.

This appeal was timely under 11 DCMR § 3112.2(a), because it was filed within 60 days of the date the Appellant had notice or knowledge of the decision being appealed.

There are two principal issues on appeal:

(1) Whether the building on Appellant's lot may be enlarged for the purpose of accommodating a public school use without regard to the lot area limitations applicable to that use; and

(2) Whether a change in the building's use to a public school requires the provision of any parking spaces on site.

For the reasons stated below, the Board concludes that the proposed change in use does not require adherence to either the lot size or parking requirements for the new use.

As set forth in the findings of facts above, on February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools. This rule was readopted as an emergency rule on June 12, 2006, and then adopted as a permanent rule on December 1, 2006. The new rule, in relevant part, amended the definition of public schools in § 199.1 to include charter schools, amended Chapter 4 of the Zoning Regulations to increase minimum lot area and width requirements in Residence Districts, and amended Chapter 21 of the Zoning Regulations to require parking for pre-elementary schools and pre-kindergarten schools or facilities. This appeal arises from the Zoning Administrator's denial of Appellant's application for a building permit on April 28, 2006 on grounds that the proposed use as a public charter school did not meet the requirements set forth in the new regulation. Specifically, the Zoning Administrator determined that the proposed use did not meet the minimum lot area and width requirements, nor the parking requirements.

1. Compliance with the Lot Requirements for a Public School.

Appellant argues that the subject property is exempt from the requirements of the new area restrictions by reason of 11 DCMR § 401.1. That section states as follows:

Except as provided in chapters 20-25 of this title, in the case of a building located on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the

building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.

The Board interprets this section to mean simply, that a building that was located on a lot on May 12, 1958, that does not meet the lot area or width of lot requirements prescribed in § 401.3 may be enlarged or replaced, provided it complies with all other provisions of the Zoning Regulations.

The new public school regulations added public school to the chart set forth in § 401.3. There is no factual dispute that the subject building was located on the lot on May 12, 1958 and that the lot does not meet the lot area or width of lot requirements prescribed in § 401.3 for use as a public school.

Accordingly, the only issues before the Board with respect to the lot requirements are whether the subject property is exempt from the public school lot requirements set forth in § 401.3 and whether the property complies with all other provisions of the Zoning Regulations. The new public school regulations, while amending several regulations in Chapter 4, including § 401.3, in particular, leave § 401.1 intact. The Zoning Administrator and the parties in opposition ask this Board to treat the omission to amend this regulation as an "oversight" on the part of the Zoning Commission and to read the inapplicability of § 401.1 to buildings used for public schools as consistent with the Zoning Commission's intent with respect to the new public school regulations. The Board notes that the Zoning Commission specifically reviewed the regulations in Chapter 4 when adopting the new regulations, and that § 401.1 was a part of the regulatory scheme it was reviewing. Further, there is evidence in the record that this specific issue was brought to the attention of the Office of Planning prior to final action, (Exhibit 33, Attachment. N). Accordingly, the Board finds that it is beyond its purview to assume that the omission to amend § 401.1 was an oversight on the part of the Zoning Commission.

As stated by the Chair of the Zoning Commission, who participated in this decision:

To the extent that 401.1 is ultimately inconsistent with the Commission's intent but remains meaningful on its own terms, then it is the flaw of the Commission interacting (sic) [in enacting] the rulemaking, not an area of interpretation for the ZA.

The Board further recognizes that any such flaws of rulemaking are not for the Board to fix, in an appeal case, but rather within the authority of the Zoning Commission to correct in a rulemaking proceeding.

The Board therefore reverses the determination of the Zoning Administrator that the building on the Appellant's lot may not be expanded because its lot has less area and width than is required for a public school.

2. Compliance with all other Provisions of the Zoning Regulations

To be successfully invoked, § 401.1 requires not only that the building have been on the lot as of May 12, 1958, but that the property comply with all other provisions of the Zoning Regulations (other than the lot area and width of lot requirements.) The Zoning Administrator and the parties in opposition allege that Appellant is not in compliance with the parking regulations. The Zoning Administrator argues ultimately that five parking spaces are required. Appellant will only be providing three, which Appellant argues is in compliance with the parking regulations. Appellant relies on 11 D CMR § 2100.5 for this conclusion, which the Board finds is controlling. § 2100.5 provides as follows:

No additional parking spaces shall be required for a historic landmark or a building or structure located in a historic district that is certified by the State Historic Preservation Officer as contributing to the character of that historic district.

There is no dispute that the building has been certified by the State Historic Preservation Officer as contributing to the character of the historic district. Accordingly, the issue in the first instance is whether “additional parking” refers to additional to the number of spaces required for the previous use or additional to what currently exists on the lot. As set forth below, the Board finds that the Applicant is compliant under either scenario and will be providing the maximum number of legal spaces that can fit on the lot, which is the greater number of the two scenarios.

The previous use of the building was that of a private club. The property changed to a private club use in 1969. Under the parking regulations in effect at that time, the parking requirement for the private club on this lot would have been two spaces. (See FOFs 27 and 28.) Accordingly, pursuant to § 2100.5, appellant’s parking requirement would be two spaces.⁴

The Board finds unpersuasive the opposition parties’ argument that the required parking for the previous use was ten spaces based on the neighbors periodically seeing ten cars stacked on the lot. The Board’s task is to determine the number of legally required parking spaces on the lot, not how many could be packed onto the lot.

Finally, the Board finds that only three lawful spaces can be accommodated on this lot. Of the potential five spaces identified by the Zoning Administrator, two would not actually be accessible without changing the existing chain-link fence. (That chain link fence was erected in 1970 pursuant to a building permit certifying that “**this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia.**”)

⁴ Because the Appellant has agreed to provide three spaces, one more space than is required, the Board need not determine whether any parking spaces were credited or grandfathered from the original 1958 use.

The Board finds that based on the size of the surface area, the existence of the egress stairs, the air conditioning units and the gate which creates the drive aisle, no more than three regulation size parking spaces will fit on the lot.

As “§ 2100.5 provides that no additional parking shall be required, Appellant is meeting this requirement by providing three spaces on the lot.

The Zoning Administrator relied on 11 DCMR § 2101.10 for his final determination that five spaces are required. That regulation provides that whenever the use of a property changes to a use that requires more parking than was previously required, additional parking spaces must be required to make up the difference.

The Board finds that this provision is not applicable to the property because § 2100.5 is controlling for properties that have been certified by the State Historic Preservation Officer. No additional spaces are required regardless of whether the additional spaces would be triggered by a structural addition or by a change in use. Any other interpretation would negate the protection to historic properties afforded by this provision. See *BZA Order No. 17459 of DC Hampton LLC*, (2006) (self-certified application for a parking variance dismissed because “§ 2100.5 operates to waive the requirement for additional parking spaces for new construction” in such instances); See also, *BZA Order No. 16307 of National Child Research Center* (1998) (parking variance not needed because § 2100.5 exempts such historic structures from providing additional parking when the use is changed.); and *BZA Order No. 16071 of the Washington International School* (1995) (pursuant to § 2100.5 no parking spaces required for the change of use of a school building to an apartment building.)

Great Weight to the ANC

The Board is required to give “great weight” to issues and concerns raised by the affected ANC and to the recommendations of the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.

The ANC submitted a report in support of the Zoning Administrator’s decision in which it also argued that the Appellant did not meet the parking regulations. The ANC offered two bases for that assessment: First, it alleged that the property previously accommodated ten cars. The Board has already addressed that issue, finding that stacking ten cars does not equate with the provision of lawfully required parking spaces. Second, the ANC argues that the Appellant’s proposal to place a charter school in the existing structure is prohibited by 11 DCMR § 2002.3 and § 2002.5. These provisions regulate the expansion of nonconforming uses. In essence, the ANC argues that the charter school is a nonconforming use for that building because the building does not meet the lot area or lot of width requirements of §401.3. ~~However, those nonconformities are structural. They are not nonconformities as to use. The use as a public charter school is a matter of right use in the R-4 zone. Accordingly, the ANC’s arguments with respect to nonconforming use are misplaced.~~

BZA APPEAL NO. 17532
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The Board therefore concludes that the Zoning Administrator erred in determining that the Appellant needed to provide any more than three parking spaces for its contributing building.

For the reasons stated above, the Board concludes that the Appellant has met its burden of proving that the Zoning Administrator erred in denying the Appellant's building permit application. The Board has carefully considered the issues and concerns stated in the written report of the ANC and, for the reasons stated above, finds them unpersuasive.

It is hereby **ORDERED** that the Zoning Administrator's decision is **REVERSED**, and it is further **ORDERED** that this appeal is **GRANTED**.

VOTE: 4-1-0 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II,
and Curtis L. Etherly, Jr. to grant; Carol J. Mitten to deny.)

Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

FINAL DATE OF ORDER: JUL 25 2007

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17532

As Director of the Office of Zoning, I hereby certify and attest that on JUL 25 2007, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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Chairperson
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P.O. Box 75115
Washington, D.C. 20013

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BZA APPEAL NO. 17532

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ATTESTED BY:



JERRILY R. KRESS, FAIA 
Director, Office of Zoning

TWR

**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>

Z.C. NOTICE OF FINAL RULEMAKING AND ORDER NO. 06-06

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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
R-5-A <u>Public School</u>	9,000	<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 OR PUBLIC SCHOOL	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>

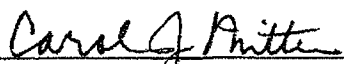
- I. Chapter 31, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, is amended by adding to the table of special exceptions in §3104.1, in the proper alphabetical order, the following new entry:

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:

A handwritten signature in dark ink, appearing to read "Sharon S. Schellin", is written over a horizontal line.

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

ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #3

***Point #1.** BZA failed to consider the clear intent of Zoning Commission (ZC) Order #06-06 (see enclosure #2). The BZA failed to attempt to reconcile statutes it felt to be in conflict, rendering a more recently adopted regulation meaningless.*

We assert that the BZA failed to consider the clear intent of the Zoning Commission in Zoning Commission (ZC) Order #06-06. **It sought to avoid the language and intent of the Emergency Regulations by a reliance not on §206.1, but instead on only the superseded language of §401.1.** Even if the BZA refused to countenance the more recent regulation as the governing rule in this proceeding, the Board should have attempted to reconcile §206.1 and §401.1, rather than ignore §206.1. To quote a letter we have received from the DC Office of the Attorney General, "...the rule of statutory interpretation (is) that every effort must be made to reconcile allegedly conflicting statutes and to give effect to the language and intent of both." The BZA ignored this rule in their decision.

The Zoning Commission amended §206.1 to provide:

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.
(emphasis added to show amended text)

The Emergency Rule also promulgates further amendments to chapter 4 and created the new requirements for public schools applicable to the R-4 zone district: 120 feet minimum width of the lot (§ 401.3), 9,000 square foot minimum lot area (§ 401.3), and a maximum of 70% lot occupancy (§ 403.1).

The Zoning Commission by adopting the Emergency Rules subjected public schools, not meeting the minimum requirements, to a special exception process. The Commissioners found that emergency rulemaking was required, especially for R-2, R-3 and R-4 zones because they have the smallest lots, minimal areas and street frontage, and the greatest potential for adverse impacts (see February 13, 2006 transcript, p. 33-34).

The intention of the Commission was unambiguous. To hold otherwise is to believe that the Commission sought to accomplish (by any failure to amend 401.1) the direct opposite of the lucid language of #06-06. Moreover, the Board's action should have been based upon the latest regulation. By setting aside §206.1, the Board interposed itself over the appropriate administrative body that determines the regulations that the BZA is charged to interpret.

To quote then Board Member, Ruthanne G. Miller, at the BZA hearing of May 4, 2004, (page 9, appeal of Advisory Neighborhood Commission 5B: Application #16998)

"And I also believe that this Board has erred as a matter of law and this wasn't raised by the parties in their motions, but I believe that the Board has erred in relying on a narrow reading of the legislative history of the regulation instead of the plain words of the regulation. And by doing so, they have rendered a regulation meaningless, which adjutory (sic) boards are not supposed to do if can be avoided at all."

Continuing on the same topic on page 12, Ms. Miller said: "There is a large body of case law that says that the plain meaning of the statute prevails and the statute may not be interpreted to render it meaningless. The most recent Court of Appeals case was Chagnon, which is March, it came out in March of 2004, which reverts the Board on another case in which they were reading into the statute words that weren't there. In this case, I think they want us to try to read the plain meanings of the words and I think that this Board has gone too far to ignore

ANC 6A requests reconsideration of BZA Order #17532
August 2, 2007
Enclosure #3

them and look at a situation that existed 30 years ago. The law is intended to apply many years ahead of time, unless it can't have any meaning whatsoever, I think we need to apply the plain meaning. So for that reason, I would move to -- I mean, I vote against this motion and would support the motion for reconsideration."

Ms. Miller's words in 2004 are directly apt to the BZA's decision in this case.

In despite of the purpose of the Emergency Rules, the Board ruled that §401.1 grandfathers any pre-1958 structure even if located on a lot whose dimensions are inadequate under the new Rules, from any restrictions preventing its expansion or rebuilding. Our community is thus prevented from raising the many issues of safety, transportation, noise, and appropriateness – issues that led to the adoption of the Emergency Rules.

If a traditional public school were to be sited in our community, it would be subject to public hearings, and to the scrutiny of our elected school board member and our Councilmember. A process of community examination and input over a course of several months will have sifted out the community's concerns, and the school board will have, through community consultation, reached a consensus about the choice of the site.

Public charter schools have not been subject to the same scrutiny. There has been no opportunity for community input; charter schools suddenly appear, often in dangerous and very inappropriate locations. The instant case is a prime example. Located on a narrow residential street with no room for pick-up or drop-off; surrounded, at the time of purchase, by three one-way commuter streets; with no playground; sharing common walls with residential neighbors; and minimal on-site parking available, AppleTree at 138 12th Street NE is the perfect illustration of shortsighted and inappropriate zoning, grandfathered despite a change of use. The ZC addressed the reality of unsuitable charter school location in residential neighborhoods in §206.1; the BZA undercuts the stated purpose of the ZC by relying only on §401.1.

This lack of oversight and of appropriate standards led the Zoning Commission to utilize the special exception process. This BZA decision removes the public scrutiny that was at the core of §206.1. Recent statements by the Chair of the Public Charter School Board suggesting to a charter school that a residential location would be an appropriate expansion site show the need for the regulation that the BZA vitiates.

We believe this case to have been wrongly decided by its defiance of, to use Ms. Miller's words, "the plain meaning" of the Zoning Commission's Emergency Rulemaking.

Chairman Griffis stated at the BZA meeting of January 9, 2007, "I obviously can't get into the head of the Zoning Commissioners but in many respects their decisions need to live beyond the persons that talked about it and have to be deliberate, or rather have to be usable in their written form. I think that we are left with 401.1 for today as it is written."

We aver that there was no need for the Chair or the Board to "get into the head" of members of the ZC, the matter could and should have been set aside pending a request for clarification by the ZC. These are not intended to be hostile, uncommunicative bodies. The ZC is the superior body with respect to issuance and clarification of regulations. Where the Rule is new, and the BZA feels it to be insufficiently clear, why should the Board act in ways that accomplish the very result the Zoning Commission sought to prevent. Surely the sensible, collegial action is to set the matter aside briefly while clarity is sought from the ZC. And, just as clearly, the BZA, where the choices are difficult and unclear, should follow the intent expressed in the language of, and the debate prior, to the adoption of the most recent relevant regulation.

ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #3

We believe the BZA has misinterpreted the intent of the statutes that "grandfather" uses/properties existing prior to 1958. These statutes were written to allow a person with uses/properties, made nonconforming by the 1958 regulations, the ability to take the same actions, with respect to their properties, that are allowed to persons with conforming uses/properties. This ruling (#17532) turns the grandfather statutes on their head, by allowing persons with nonconforming uses/properties privileges that are not allowed persons with conforming uses/properties. We believe that "grandfathering" is intended to protect only a continuation of current use through a change of ownership.

Grandfathering through a change of use is always egregious; grandfathering by use of superseded §401.1 defies clearly expressed language by the ZC's Emergency Rules in §206.1.

ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #4

Point #2. The Findings of Fact introduce material not presented to us before or at the public hearing, nor was the "fact" discussed at the hearing. We had no opportunity to dispute this Finding or those Findings which are based upon it.

Point 27 in the Findings of Fact appears to introduce new material not presented to us for response at the time of the hearing nor was it raised in the public hearing. The BZA states as settled fact a conclusion evidently taken from an AppleTree document not available to us for counterargument. As a matter of equity, the proceedings should be reopened to allow us an opportunity to dispute this crucial Finding and the Findings of Fact that proceed from it.

ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #5

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF PROPOSED RULEMAKING
Z.C. Case No. 07-03
(Text Amendment – 11 DCMR)
(Minimum lot dimensions in Residential Districts)

The Zoning Commission for the District of Columbia, 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 (2001 ed.)), hereby gives notice of its intent to amend § 401 of the Zoning Regulations (Title 11 DCMR). The proposed amendment clarifies § 401 by stating explicitly that a building on a lot made substandard by the enactment of the 1958 Regulations may not be converted to a use requiring a greater lot area or width than is on the building's lot.

Final rulemaking action shall be taken in not less than thirty (30) days from the date of publication of this notice in the D.C. Register

The following rulemaking action is proposed:

Title 11 DCMR is amended as follows. Added wording is shown **bolded** and underlined:

1. Chapter 4, RESIDENCE DISTRICTS: HEIGHT, AREA AND DENSITY REGULATIONS, § 401.1 is amended to read as follows:

401.1 Except as provided in chapters 20 through 25 of this title and in the second sentence of this subsection, in the case of a building located, on May 12, 1958, on a lot with a lot area or lot width, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title. Notwithstanding the above, the lot area requirements of § 401.3 must be met when the building is being converted to a use that would require more lot area or lot width than is on the building's lot.

All persons desiring to comment on the subject matter of this proposed rulemaking action should file comments in writing no later than thirty (30) days after the date of publication of this notice in the D.C. Register. Comments should be filed with Sharon Schellin, Secretary to the Zoning Commission, Office of Zoning, 441 4th Street, N.W., Suite 210-S, Washington, D.C. 20001. Copies of this proposed rulemaking action may be obtained at cost by writing to the above address. **FOR FURTHER INFORMATION, YOU MAY CONTACT THE OFFICE OF ZONING AT (202) 727-6311.**

ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #6

Point #3. Subsequent ZC Case #07-03 (see attachment #5) has rendered this decision moot, and the BZA should set it aside.

ANC 6A asks that the Board of Zoning Adjustment find the decision in #17532 moot and set it aside. AppleTree Institute, if given authorization to do so by the Public Charter School Board (PCSB), should now begin fresh and pursue a special exception process under the new regulations adopted by the ZC. The action of the ZC in #07-03 and related rulings will prohibit the Department of Consumer and Regulatory Affairs from issuing a permit for the construction of a school at 138 12th Street, NE, in the absence of a special exception. **There is no savings clause that would exempt the AppleTree request for a permit from subsequent actions that have been taken by the Zoning Commission** clarifying #06-06. To make this previous sentence clear, here is a passage from the ZC proceeding on May 14, 2007 at page 93 and following:

CHAIRPERSON MITTEN:

Okay.

In this case we have a letter from Apple Tree Institute for Education Innovation regarding a request for basically a savings clause to exempt their application, the application that they had made to DCRA for a building permit that was appealed and because they don't want the -- if this amendment is passed, they don't want this amendment to be applied to their application. And Mr. Bergstein, I always had understood that whatever was in place, text and map was at the time of an application was what the application would be judged based on. Is that not correct?

MR. BERGSTEIN: I don't believe that is correct. There's no vesting at the time an application is filed. What 3202.4 says is that a building that's authorized by a building permit may be constructed in accordance with the zoning regulations as of the date the building permit is issued. So if at any time while a building permit is being processed, there is a change to zoning regulations whether it's by emergency rulemaking or if there is a permit rule that becomes effective through the publication of an order, that does become the zoning regulations and that **a building permit cannot be issued until the application, its plans and its uses is in accordance with the zoning regulations as in effect on the date it is to be issued** (emphasis added).

CHAIRPERSON MITTEN: Okay. Thanks for the clarification. I'll certainly make note of that for the future.

So in this case, this request to basically be exempted from the application of this rule, should it pass, to me, in sitting on the appeal case, I had taken responsibility as a Zoning Commissioner for the fact that there had been an oversight and it was in attempting to remedy the oversight that this case was brought forward by the Office of Planning.

And so if in the -- at the end of the day, if the Commission's intent is met, then that is what I'm most interested in, not in sort of preserving a loophole that was -- that existed because of an oversight. So I'm not inclined to provide the savings clause. And I'm ready to move forward on the text amendment, but I'll hear from my colleagues if there are any different opinions. (No response.)

All right, then I move approval of Case No. 07-03 and ask for a second.

COMMISSIONER PARSONS: Second.

ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #6

CHAIRPERSON MITTEN:

Thank you, Mr. Parsons. Any discussion? All those in favor, please say aye.

(Chorus of ayes.)

Those opposed, please say no.

Ms. Schellin?

MS. SCHELLIN: Staff would record the vote 5 to 0 to 0 to approve proposed action in Zoning Commission Case No. 07-03.

ANC 6A requests reconsideration of BZA Order #17532
August 2, 2007
Enclosure #7



District of Columbia Public Charter School Board

March 2, 2007

Councilmember Tommy Wells
The John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Councilmember Wells:

The D.C. Public Charter School Board (the "Board") received your letter dated February 26, 2007. In response, I am drafting this letter on behalf of the Board to (1) state that the Board has no jurisdiction over the AppleTree Institute for Education Innovation; (2) clarify the role of the Board regarding the selection and location of facilities of the charter schools it authorizes; and (3) invite you to discuss with the Board the general charter school facility selection issues you raise in your letter.

First, please be advised that the AppleTree Institute for Education Innovation (the "Institute") is a D.C. non-profit organization and is not a public charter school. The Board has issued a charter to AppleTree Early Learning Public Charter School (the "Charter School"), a separate legal entity. The Charter School is located at 680 I Street, SW.

The Board recognizes that the commercial property in question, 138-140 12th Street, NE, has been the subject of an ongoing controversy between the Institute and some residents of the neighborhood, and that the site was acquired by the Institute with the plan to complete renovations and to lease the facility to the Charter School. However, to date the Board has received no petition from the Charter School to modify its charter agreement to approve an additional campus at this site.

At our last monthly meeting, on February 26, 2007, the Board did approve a request from the Charter School for an enrollment increase. For your information, I have enclosed copies of our Decision Memorandum for the approval of the recent enrollment increase request by the Charter School. In addition, the Charter School provided us with preliminary information on two additional sites under negotiation -- in a new building under construction in Columbia Heights, and in a potential co-location with St. Thomas More Catholic School in Washington Highlands. In order to operate at either or both of these prospective new sites, the Charter School must receive Board approval.

Because we have had no request from the Charter School to add a new campus located at 138-140 12th Street, NE, this Board has no jurisdiction to intervene in the matter. As mentioned above, the Institute is not a charter school, and the Board has no jurisdiction over the operations of the organization, including where it chooses to locate.

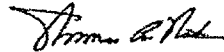
ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #7

Finally, the Board shares your concerns for the safety and welfare of D.C. school children, and considers the location of charter school facilities to be an important one. Since you raise other general issues regarding the availability of space for charter school facilities, the Board welcomes the opportunity to meet with you, to discuss these issues further, and to establish a direct line of communication between us.

Sincerely,



Thomas Nida
Chair

Enclosure

cc: Victor Reinoso
Advisory Neighborhood Commission 6A
Appletree Early Learning Public Charter School

ANC 6A requests reconsideration of BZA Order #17532
August 2, 2007
Enclosure #7

DISTRICT OF COLUMBIA PUBLIC CHARTER SCHOOL BOARD

DECISION MEMORANDUM

PREPARED BY : Corey Carter

SUBJECT : Enrollment Increase Request – Appletree Early Learning Public Charter School

DATE : February 15, 2007

BACKGROUND

As a part of their charter, schools under the authority of the PCSB establish enrollment ceilings for years 1-5 of their charters. During the course of a school's first five years, it may be desirable to increase the school's enrollment to exceed the approved ceiling to accommodate the demand for a school or in order to obtain a facility. Additionally, schools in their fifth year may want to establish a higher sixth year enrollment ceiling, and would have to do so in their fifth year prior to establishing new five-year enrollment projections.

The PCSB grants increases in enrollment ceilings based on the following criteria:

1. access to a facility to accommodate the projected enrollment;
2. a history of meeting enrollment projections;
3. demand for the school, as indicated by a waiting list;
4. in good standing; and
5. submission of timely audits.

PROPOSAL

Appletree Early Learning Public Charter School is a second year school that serves students in grades PS-PK. The School was granted an enrollment increase to ninety students for the 2006-07 school year, but did not meet the enrollment due to their inability to secure a facility to accommodate the increase. The school proposes to increase its enrollment from 36 students at its location on 680 I Street SW, to 180 students who will be housed at a location on 14th and Girard Streets NW, and at 4265 4th Street SE in addition to the I street location.

	2006-07	2007-08
Current	36	
Proposed	90	180

The school's current facility cannot accommodate the projected enrollment. However, the school has executed a Memorandum of Understanding subject to PCSB approval for the site on 4th Street SE and has signed a Letter of Intent for the location on The Lofts of Columbia Heights on the corner of 14th and Girard NW. The school currently has a waiting list and indicates demand as evidenced by market research but has not elaborated on recruitment plans for the proposed increase. The school is currently in good standing and they have submitted timely financial statements to the PCSB, per their charter.

RECOMMENDATIONS OF STAFF

Based on the established criteria, staff recommends conditional approval of Appletree Early Learning PCS's request pending clarification of recruitment plans, and acquisition of facilities on a timeline suitable for a seamless transition to accommodate the enrollment increase.

ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #8

Point #4. A new fact was made known to ANC 6A by a letter from Thomas Nida, Chair of the Public Charter School Board (see attachment #7). Mr. Nida states that no school has been authorized at 138 12th Street.

A public charter school requires the issuance of a charter or explicit permission to modify a charter, and is linked to a specific address. Since no charter, either then or now, has been issued to AppleTree Public Charter School or the AppleTree Institute for Education Innovation, Inc. for 138 12th Street, NE, AppleTree Institute can not claim a “by-right” ability to build or modify any structure at that address. As Mr. Nida states in his letter, “...the Institute is not a charter school...”

In that letter, Mr. Nida states that no school has been authorized at 138 12th Street, NE. We assert that no permit for a school may be granted in the absence of authority from the PCSB to locate a school at a specific address. A mere claim that a school is to be located at a particular site should not be used to allow modifications to take place that would be in defiance of the Regulations.

A charter school cannot be located without the explicit permission of the PCSB, the chartering authority. No such permission has yet been given. There is not even a showing that there is a contract, either lease or purchase, for the transfer of this property to the AppleTree Public Charter School, a separate entity from the applicant. Since no charter, either then or now, has been issued to AppleTree Public Charter School or the AppleTree Institute for Education Innovation, Inc. for 138 12th Street, NE, AppleTree Institute can not claim a “by-right” ability to build or modify any structure at that address.

A developer could, under the guise of by-right school construction, over-mass, expand lot coverage, and increase FAR. Should the PCSB decide not to issue a charter or expansion authority, the property would remain modified and inappropriate for its neighborhood. .

ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #9

Point #5. Two members of the BZA failed to declare conflicts of interest. Since only four members of the Board were physically present when the vote was taken, and since only two, Ms. Miller and Mr. Mann, would then have been left eligible to vote, a quorum was not present.

It is a fundamental principle of adjudicatory proceeding that those who sit in judgment inform all parties of potential conflicts, and that they recuse themselves where reasonable persons would judge them to have such a conflict. ANC 6A asks that the Board rehear #17532, first because there was not a valid quorum at the January 9, 2007 meeting where the vote was taken and, second, because neither we nor Northeast Neighbors for Responsible Growth heard from two BZA members about possibly disqualifying conflicts of interest.

The Chair, Geoffrey Griffis, should have disclosed that he was a member of Young American Works Public Charter School board, and also a member of the board of the Capitol City Public Charter School of Washington. While Mr. Curtis Etherly, Jr. disclosed his membership on the board of the Washington Mathematics Science and Technology Public Charter High School, Mr. Griffis sat silent.

The lack of disclosure by the Chair taints the Board, the proceedings of that day, and any subsequent vote. The parties had the right to hear of his relationship and either object or agree to his continued presence. **His failure to declare while holding the gavel and giving shape to the BZA's discussions, both in the hearing rooms and during the Board's preliminary discussions, irrevocably taints the process.**

Mr. Etherly, as mentioned, appropriately disclosed his charter school board position, but he failed to disclose that he is a board member of DC Action for Children (DCAC), also known as "DC Kids". DCAC has taken positions and has sought action against the ZC's proposed charter school regulation while it was under consideration by that Commission. **Had we known this at the time, we would certainly have objected to Mr. Etherly's participation in the BZA hearing or vote.** His service as a volunteer on this board is laudatory, nor do we know of any reason to believe DCAC is not a worthwhile organization. But for the organization on which he serves as a board member to take a position in opposition to pending action upon which he subsequently adjudicates again taints the hearing and the decision.

As an example of the conflict of interest, the following is an email sent by Susan Cambria, a staff person for DC Action for Children to the DC Kids listserv:

From: Susie Cambria [mailto:scambria@dckids.org]

Sent: Thursday, July 06, 2006 6:11 PM

To: 'Susie Cambria'

Subject: Stop the Zoning commission from making public policy for kids!

Stop the Zoning commission from making public policy for kids!

On July 10, the Zoning Commission plans on making permanent the decision to outlaw virtually all neighborhood schools, in particular public charter preschools and small early childhood education programs.

DC Action for Children and others have sent a letter to Deputy Mayor Stan Jackson urging him to delay the implementation of this backward-thinking plan. You, too, can take action on this important issue – read more about the issue and what you can do in the July 6, 2006 edition of "Calling All Child Advocates."

ANC 6A requests reconsideration of BZA Order #17532

August 2, 2007

Enclosure #8

This failure to disclose by the Chair and by a member of the BZA leads us to conclude that the BZA decision in #17532 is irrevocably flawed and invalid.

The failure to fully disclose and allow us, as a party, the opportunity to object to their participation leads to a second inevitable conclusion. **At the BZA meeting where the vote was taken, two of four members of the Board were ripe for disqualification, leaving only two members fully eligible to vote.** Ms. Mitten was not physically present. This number is insufficient for a quorum, and no valid action can have taken place at that meeting.

D TAB 8

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

In re AppleTree Institute for
Education Innovation, Inc.

Appeal No. 17532

APPELLANT'S RESPONSE TO REQUEST FOR RECONSIDERATION

Appellant AppleTree Institute for Education Innovation, Inc. ("AppleTree") hereby responds to the request for reconsideration that was apparently filed on August 2, 2007 by ANC 6A ("ANC Request"). Neither AppleTree nor its counsel has yet received a service copy of that request, but AppleTree has reviewed the version of the request and its enclosures that is posted on the ANC's website (at <http://www.anc6a.org/ATtoOZreconsiderationRqst.pdf>) and wants to assure the Board expeditiously that none of the five grounds mentioned by the ANC warrants reconsideration of the Board's July 25 order in this appeal.

I. The Board Has Already Considered The Effect Of The Zoning Commission's Prior Rulemaking

First, the ANC claims that the Board "failed to consider the clear intent" of Zoning Commission Case No. 06-06 and that the Board's interpretation of section 401.1 of the Zoning Regulations has rendered "a more recently adopted regulation meaningless." (ANC Request at 1.) In Enclosure 3 to its request, the ANC further argues that the Board should rely on "the plain words" of a regulation rather than its legislative history.

This question was squarely confronted by the Board in its opinion, which actually followed the methodology that the ANC supports. The Board correctly determined that the plain words of section 401.1 trump any implicit attempt the Zoning Commission may have made to

supersede them in the case of public schools with ZC Case No. 06-06. Indeed, as the Board's opinion notes (at page 7), Chairperson Mitten herself recognized that the reading advanced by the ANC was beyond the Board's legitimate powers of interpretation.

II. No Error Or Prejudice Occurred In The Recitation Of Parking Standards In The 1973 Edition Of The Zoning Regulations

Second, the ANC claims that paragraph 27 in the Board's findings of fact was not made available before the public hearing in this case in November 2006. The "fact" in question became relevant in light of questions that Board members asked at the public hearing about grandfathering of parking spaces from prior uses (*see, e.g.*, BZA Transcript at 318 (Nov. 21, 2006)), and it was included in the proposed findings of fact and conclusions of law that were submitted to the Board by AppleTree—and served on all parties, including the ANC—on January 3, 2007.

More importantly, the "fact" in question is merely a recitation of the catch-all parking-space requirement under the 1973 edition of the Zoning Regulations, which was applicable in 1969. That fact is of course a public one, available to anyone who peruses the prior edition of the Zoning Regulations, and the ANC can hardly claim to have been prejudiced in not having attention called to it before the public hearing.

Finally, although the ANC claims it deserves an "opportunity to dispute this crucial Finding" (ANC Request at Enclosure 4), it has not suggested any way in which it could effectively dispute what the 1973 Zoning Regulations said about parking. The ANC has thus failed to satisfy the requirement in section 3126.4 of the Zoning Regulations that it "state specifically" the respect in which the Board's decision "is claimed to be erroneous." AppleTree does not believe that there is any plausible argument that the Board has misrepresented the parking standards for "a warehouse located in the C-M-1 District" under the 1973 Zoning Regulations.

III. A Recent Rulemaking Has Not Rendered This Case Moot Because It Has Not Yet Become Effective

Third, the ANC argues that the Board's decision has been rendered moot by Zoning Commission Case No. 07-03. But the final rule adopted in that case—in *response* to the Board's decision in this appeal—has not yet been published in the *D.C. Register*. Thus, that rule is not yet effective and was irrelevant to the Board's July 25 opinion. *See* 11 D.C. Mun. Reg. § 3028.9 (“A written order setting forth a final action [of the Zoning Commission] shall become final and effective upon publication in the *D.C. Register*, unless the Commission specifies a later effective date.”).

IV. Zoning Approval Need Not Come After Separate Approval By Another Governmental Entity (Here, The D.C. Public Charter School Board)

Fourth, the ANC claims that it has learned a “new fact”: that AppleTree has not yet been authorized by the D.C. Public Charter School Board to operate a public charter school at the subject property.

AppleTree's building-permit application and its appeal were based upon its *proposed* use of the subject property as a public charter school. Whether it obtains separate regulatory approval that might be necessary to operate such a school is irrelevant to the legal question whether the Zoning Administrator should have concluded that its building-permit application satisfied the requirements of the Zoning Regulations.

Indeed, the ANC has already brought this issue to the attention of the Zoning Commission, where the Chair correctly explained that “there are numerous occasions where there are multiple layers of licensing,” and that the approval or lack of approval by the D.C. Charter School Board “isn't germane to either the Board's or the Commission's consideration” of AppleTree's appeal. Z.C. Transcript at 132–33 (May 14, 2007).

V. Newly Alleged Conflicts Of Interest Indicate No Error In This Case

Finally, the ANC alleges that two Board members “failed to declare conflicts of interest.” (ANC Request at 1.) There is no reason to believe that the alleged conflicts would have warranted recusal, provided those members with relevant information outside the record, or in any way prejudiced their ability to be impartial in this case.

With regard to Mr. Etherly, the ANC claims he has a conflict arising from his association with an organization that had opposed the Zoning Commission’s rulemaking in Case No. 06-06. Of course, even assuming that position could be imputed to Mr. Etherly himself, a prior position on the merits of that rulemaking by the Commission does not reveal a conflict about the legal issues raised in this appeal before the Board. If it did, Ms. Mitten—who had personally and repeatedly taken positions on Case No. 06-06—would have had to reveal a potential conflict of interest. Her participation in the rulemaking was well known to all the parties in this case, and the fact that she sat on the appeal without question or objection demonstrates that Mr. Etherly’s alleged conflict is non-existent.

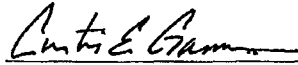
With regard to Mr. Griffis, the ANC objects that he failed to disclose his memberships on two public-charter-school boards who were not parties to this proceeding. The ANC does not suggest that either of those schools would be affected in any way by the result in this proceeding. In light of that, and the fact that Mr. Etherly sat on the case despite his membership on other charter-school boards, any suggestion of a conflict at the hearing would have been fruitless.

CONCLUSION

For the foregoing reasons, the Board should deny the ANC’s request for reconsideration.

Respectfully Submitted,

Dated: August 6, 2007



Mark A. Perry

Curtis E. Gannon

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036-5306

Telephone: (202) 955-8500

Facsimile: (202) 467-0539

*Attorneys for Appellant AppleTree Institute for
Education Innovation, Inc.*

PROOF OF SERVICE

On August 6, 2007, I sent a copy of the foregoing Appellant's Response to Request for Reconsideration, by first-class mail, to the following:

Mr. Matthew LeGrant
Acting Zoning Administrator
Department of Consumer and Regulatory Affairs
941 N. Capitol St., N.E., 2nd Floor
Washington, D.C. 20002

Mr. Nicholas Alberti
c/o Advisory Neighborhood Commission 6A
P.O. Box 75115
Washington, D.C. 20013

George R. Keys, Jr., Esq.
Jordan & Keys, LLP
1400 16th Street, N.W., Suite 520
Washington, D.C. 20036


Curtis E. Gannon

D TAB 9

(21)

From: David Holmes [holmes.anc6a03@gmail.com]
Thursday, August 09, 2007 2:46 PM
To: matt.legrant@dc.gov
Cc: Tommy Wells@DCCouncil
Subject: 138 12 th St. NE, AppleTree Institute

Mr. LeGrant,

I've just learned that DCRA has today issued a permit for construction at 138 12th Street, NE.

This site has been the focus of two Zoning Commission regulations (06-06 and 07-03) issued specifically to stop this construction. The BZA Order is the focus of a reconsideration request from ANC 6A, which is still pending. Issuance of the permit will establish a precedent that will confuse similar permitting from this point forward.

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

David Holmes
Vice Chair, ANC 6A

3/12/2008

D TAB 10

Enclosure #1

Building Plan Review Status

Project Information

- Bottom of Form Tracking number: 3758 A 2006
- Date filed: 2/9/2006
- Address: 138 12TH ST NE
- Agent: MIKE WILSON (301) 731-4767

Application Status

Pending. Review of your application has not been completed yet. DCRA will make all efforts to complete the review of your application on or before 3/11/2006 . Please contact us only after 3/11/2006 .

To view comments from the plan review team, select from the links in the left column below. On the page that follows, enter your DC.Gov username and password. If you don't have a username and password, please register.

Discipline	Review Status	Status date
Department of Environment	Approved. We approved this discipline of your application.	8/10/2007
Electrical	Approved. We approved this discipline of your application.	8/23/2007
Elevator	Approved. We approved this discipline of your application.	3/30/2006
Fire	Approved. We approved this discipline of your application.	8/23/2007
Mechanical/Plumbing	Approved. We approved this discipline of your application.	8/23/2007
Structural	Hold for correction. This application requires correction. Please contact the Permits Division staff to address the requirement.	7/13/2006
Zoning	Approved. We approved this discipline of your application.	8/23/2007
Historic	Pending. We are currently reviewing your application.	2/9/2006

Building permit application status data current as of: 8/30/2007, 7:00:48 AM

D TAB 11

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

SPECIAL PUBLIC MEETING

+ + + + +

FRIDAY
AUGUST 17, 2007

+ + + + +

The Special Public Meeting
convened in Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 10:00 a.m., Ruthanne G. Miller,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER Chair
CURTIS ETHERLY, JR. Vice Chair
JOHN A. MANN, II Board Member (NCPC)

OFFICE OF ZONING ADJUSTMENT STAFF PRESENT:

CLIFFORD MOY Secretary

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALAN BERGSTEIN, ESQ.
SHERRY GLAZER, ESQ.

The transcript constitutes the
minutes from the Special Public Meeting held
on August 17, 2007.

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Adjourn	105
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P R O C E E D I N G S

10:22 A.M.

CHAIRPERSON MILLER: This meeting
will please come to order.

Good morning, ladies and
gentlemen. This is the August 17th Special
Public Meeting of the Board of Zoning
Adjustment of the District of Columbia. My
name is Ruthanne Miller. I'm the Chair of the
BZA. Joining me today to my right is the Vice
Chair, Mr. Curtis Etherly and to my left is
Mr. John Mann representing NCPC. Mr. Clifford
Moy is also here from the Office of Zoning and
Alan Bergstein from the Office of Attorney
General.

Copies of today's meeting agenda
are available to you and are located to my
left in the wall bin near the door. We will
not take any public testimony at our meeting
unless the Board asks someone to come forward.

Please be advised that this
proceeding is being recorded by a court
reporter and is also webcast live.

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1 Accordingly, we must ask you to refrain from
2 any disruptive noises or actions in the
3 hearing room. Please turn off all beepers and
4 cell phones.

5 I just want to make a few
6 preliminary statements. This Board has come
7 out of recess which is very unusual for a
8 meeting and I just want to let the public know
9 the reason for that and that is because Mr.
10 John Mann who is representing NCPC will be
11 rotating off the Board, unfortunately. And
12 today is his last day to participate in the
13 deliberations and he is an integral Member of
14 the Board on two cases that are ripe for
15 decisionmaking. So I want to take a moment to
16 thank him for his service on the Board. He
17 has been an incredible asset with his
18 knowledge and astuteness and dedication.
19 Anyway, I just want to wish him luck. And
20 that's the way it works on the Board of Zoning
21 Adjustment, people come and go. And NCPC, in
22 particular, rotates its representative.

23 Second, I want to just address a

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1 little bit the question of the notice of this
2 meeting. It was properly noticed, publicly
3 noticed, August 9th, but it was noticed for
4 yesterday when we were planning to have this
5 meeting and the agenda was posted at that
6 time.

7 I had a death in the family and
8 the funeral was yesterday, so for that reason
9 we postponed the decision meeting to today, so
10 I'm not sure that we even need to waive our
11 rules in that 3105.7 goes to posting the
12 agenda at least seven days in advance of the
13 meeting and the agenda was posted even further
14 in advance of the meeting. But in the event
15 that we do need to waive it, I would say that
16 a funeral is of good cause and there's been no
17 prejudice to the parties which is the standard
18 for waiver. I see that my Board Members are
19 concurring.

20 I think that covers the
21 preliminary matters.

22 Mr. Moy, do you want to call the
23 first case?

1 MR. MOY: Yes, good morning, Madam
2 Chair person and other Members of the Board.
3 I believe the first of two cases the Board
4 will be making a decision on is the Georgetown
5 College case. This is the second remand from
6 the District of Columbia Court of Appeals
7 which goes to Application No. 16566-H, as in
8 hotel, of the President and Directors of
9 Georgetown College. The Board will recall
10 this application was pursuant to 11 DCMR
11 3104.1, for a special exception for the review
12 and approval of the University Campus Plan,
13 years 2000 to 2010 under Section 210 in the R-
14 3 and C-1 Districts at premises bounded by
15 Glover Archbold Parkway to the west, the
16 National Park Service property along the
17 Chesapeake and Ohio Canal and Canal Road to
18 the south, 35th Street, N Street to 36th
19 Street, and 36th Street to P Street to the
20 east and Reservoir Road to the north. I'm not
21 going to read all the squares and lots.
22 That's in our record file.

23 Staff will say that on June 7,

1 2007, the District of Columbia Court of
2 Appeals issued its decision on the Board's
3 April 5, 2005 decision which is reflected in
4 the BZA order number 15566-F, F as in foxtrot.
5 This was issued on June 7, 2005. An order
6 certifying the Applicant's campus plan, as
7 revised to reflect the conditions of the
8 approval in order number 16566-F was issued
9 February 3, 2006. And that was order number
10 16566-G, g as in golf.

11 Essentially, the Board is to act
12 on the second remand and to provide "an
13 explanation as to why several uncontested
14 provisions included in the original campus
15 plan were not included in the revised campus
16 plan." And a copy of the Court's decision is
17 in your case folder, record folder, and that's
18 case number 05-AA-688. That will complete the
19 staff's briefing.

20 CHAIRPERSON MILLER: Thank you,
21 Mr. Moy. I'd just like to say to my Board
22 that this unusual for us in that we have
23 before us an order that we're being asked to

1 adopt that reflects our deliberations a while
2 back. Normally, I don't believe there's much
3 deliberations due on the record at this point
4 because this order reflects the previous
5 deliberations and our view of it. Basically,
6 the Court did ask us for an explanation of why
7 five uncontested provisions included in the
8 campus plan originally approved by the Board
9 in the original campus plan order were not
10 included in the revised campus plan approved
11 by the 2005 order. And the order that went to
12 the Court did not include an explanation of
13 conditions that we had chosen not to accept,
14 which had been accepted previously and which
15 were uncontested.

16 This order addresses why those
17 conditions were included by the Board and in
18 essence, I think that the rationale which goes
19 through it is that we were very mindful of
20 what the Court said in Georgetown 1, that we
21 should adopt only conditions necessary to
22 mitigate and identify potential adverse
23 impacts related to the university use of

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1 property in a residence district and not to
2 intrude to an impermissible degree into the
3 management prerogatives of the university.

4 And I also just want to comment
5 that I came on the Board when this case was
6 originally being considered and the Court's
7 order in Georgetown in this case had a great
8 impact on me and I think it had a great impact
9 on the Board in general when we considered
10 conditions not even just related to schools,
11 but related to all sorts of cases. So this
12 was an opportunity, actually, for us to fully
13 explain to the Court how we applied it in this
14 case and how we understood their order.

15 So I would like to ask or at least
16 have everyone confirm that we, in fact, did
17 read the transcript and that this does reflect
18 our deliberations.

19 MEMBER MANN: Madam Chair, yes, I
20 did review the transcript and I believe that
21 this new order does accurately reflect what it
22 is that we discussed in our deliberations
23 which we -- when we discussed those conditions

1 we very thoroughly gave explanations as to why
2 we adopted or didn't adopt certain conditions.

3 CHAIRPERSON MILLER: Thank you.

4 VICE CHAIRPERSON ETHLERLY: I'd
5 also like to echo the comments of my
6 colleague, Mr. Mann, in the same respect.

7 Thank you, Madam Chair.

8 CHAIRPERSON MILLER: Thank you.

9 If there are no further comments then, then I
10 would move that we adopt this order on second
11 remand.

12 MEMBER MANN: Second.

13 CHAIRPERSON MILLER: All those in
14 favor say aye. Aye.

15 (Chorus of ayes.)

16 All those opposed? All those
17 abstaining?

18 Would you call the vote, please?

19 MR. MOY: Yes. The staff would
20 record the vote as three to zero to two. This
21 is on the motion of Ms. Miller, the Chair, to
22 adopt the draft order. Who seconded it? Mr.
23 Mann. I'm sorry, thank you. Mr. Mann

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1 seconded it; in support of the motion, Mr.
2 Etherly. We have a Zoning Commission Member
3 not participating on this case and another
4 Board Member not participating also. So at
5 any rate the final vote is three to zero to
6 two.

7 CHAIRPERSON MILLER: I just want
8 to make one correction, if I could. I
9 wouldn't say that it's a draft order. I would
10 say that this is the order and that it will be
11 issued today.
12 Thank you.

13 MR. MOY: The next action of the
14 Board is a motion for reconsideration to
15 appeal No. 17532 of Apple Tree Institute for
16 Education Innovation, Incorporated pursuant to
17 Section 3126 of the Zoning regulations. The
18 motion is to the original appeal which was
19 pursuant to 11 DCMR 3100 and 3101 from the
20 administrative decision of the Zoning
21 Administrator, Department of Consumer and
22 Regulatory Affairs, to require BZA special
23 exception approval for a proposed addition to

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1 an existing building to accommodate a public
2 charter school use. The appellant alleged
3 that the Zoning Administrator erroneously
4 relied on the Zoning Commission's February 13,
5 2006 emergency rulemaking to require
6 additional on-site parking spaces.

7 The subject property is located in
8 the R-4 District at premises 138 12th Street,
9 N.E., that's in Square 998, Lot 820. On
10 August 2, 2007, ANC 6A filed a timely motion
11 for reconsideration. This is in your case
12 folders identified as Exhibit 45. On August
13 6, 2007, the Appellant filed an opposition to
14 the request for reconsideration. That is
15 identified in your case folders as Exhibit 48.
16 Both filings were timely filed pursuant to
17 Sections 3126.2 and 3126.5.

18 The Board is to act on the merits
19 of the request for reconsideration pursuant to
20 the requirements under Section 3126 and that
21 completes the status briefing, Madam Chair.

22 CHAIRPERSON MILLER: As a
23 preliminary matter, I just want to address the

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1 two filings that came in. After the record
2 was closed and before the motion for
3 reconsideration came in, Exhibits 43 and 44.
4 One is -- Exhibit 43 is a letter to
5 Chairperson Mitten, and requesting I believe
6 this may be the sua sponte letter, that they
7 sua sponte this case. And the second is a
8 letter from Council Member Tommy Wells
9 addressing what the Council Member believes is
10 the intent of the Zoning Commission and asking
11 for us to consider that.

12 In any event, they're not attached
13 to any motion. So I just want to say that
14 I've read them. I believe the other Board
15 Members have read them and to the extent that
16 they bear upon an issue that we'll be
17 addressing the motion for reconsideration they
18 have been read.

19 Now the next thing I want to do is
20 just set the context here. This is a motion
21 for reconsideration, what the standard is.
22 It's set forth in 3126.4 and 3126.6. A motion
23 for reconsideration shall state specifically

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1 all respects in which the final decision is
2 claimed to erroneous and the relief sought and
3 3126.6 goes to rehearing. No request for
4 rehearing shall be considered by the Board
5 unless new evidence is submitted that could
6 not reasonably have been presented at the
7 original hearing.

8 The ANC has put forth five grounds
9 for reconsideration and I think we should
10 start with the first ground because that
11 addresses the question of recusal including
12 the Vice Chair's recusal in this case and so
13 we need to address that first because were he
14 to recuse himself, we wouldn't even have a
15 quorum to continue this deliberation.

16 I am going to turn this over to
17 Mr. Etherly shortly, but I just wanted to also
18 set forth the standards for recusal. 6A said
19 that where reasonable people would judge them
20 to have such a conflict. In general, we
21 actually address this a little bit more fully
22 in another case and that was the NCRC case.
23 I think I just want to read a little bit so

1 that the public has an understanding of what
2 we're looking at and we said in that case
3 "here is no controlling statute or Board
4 regulation governing the disqualification of
5 Board Members. In order to insulate the
6 administrative process and its decision makers
7 from prejudice and bias, it has generally been
8 recognized that the same rules requiring the
9 recusal of judicial officers are applicable to
10 administrative officers who act in an
11 adjudicative or quasi-judicial capacity. In
12 the absence of a statute providing otherwise,
13 a Judge must recuse himself when his alleged
14 bias arises from a source outside the four
15 corners of the courtroom and results in
16 opinion on the merits on some basis, other
17 than what a Judge learned from his
18 participation in the case. A legally
19 sufficient claim of personal bias requires
20 that the facts alleged must be material and
21 stated with particularity; that the facts must
22 be such that if true would convince a
23 reasonable person that a bias exists and the

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1 facts must show that a bias is personal as
2 opposed to judicial in nature."

3 I also want to address one more
4 standard and that is for vacating an order.
5 Usually, those standards for recusal are often
6 used before the vote is taken, before the case
7 is deliberated and when you get to a point
8 where there's already been an order and you're
9 asking that a vote be vacated, you also have
10 to -- there's a higher standard you need to
11 show.

12 There are three factors: the risk
13 of injustice to the parties in the case, risk
14 of the denial of the relief will produce
15 injustice in other cases, and risk of
16 undermining the public's confidence in the
17 judicial process. And that is based on a
18 Supreme Court case, Lilliberg v. Health
19 Services Acquisition Corp.

20 Okay, so I think at this point I
21 would like to turn to Mr. Etherly because
22 there has been allegation that because of his
23 participation or being a Board Member on a

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1 child- related board, or a school-related
2 board, that he should be recused.

3 VICE CHAIRPERSON ETHLERLY: Thank
4 you very much, Madam Chair. This will
5 definitely, I think, be a very necessary,
6 complicated, and I think long conversation
7 because I think allegations of this type are
8 very, very important. They are very critical
9 whenever there is any concern or any question
10 raised about the impartiality of this Board's
11 decisions and the participation of its members
12 in such decisions. So I'm going to take a
13 very, what I think will be, hopefully a
14 deliberate and slow walk through a discussion,
15 both in terms of the facts as well as in terms
16 of the relevant case law and perhaps codified
17 practice as it relates to judicial conduct.

18 As the Chair indicated, there is
19 no direct statute on point that speaks to
20 issues of disqualification for Board Members.
21 Rather, the Courts have looked to the Judicial
22 Code of Conduct for general guidance, and in
23 particular, has looked at the issue of

1 personal bias, as you indicated, Madam Chair,
2 requiring one, the facts alleged must be
3 material and stated with particularity. Two,
4 the facts must be such that if true will
5 convince a reasonable person that a bias
6 exists and the facts must show that the bias
7 is personal as opposed to judicial in nature.

8 As I have taken a look at both
9 case law and some of the codified rules of
10 conduct as they apply to Judges here in the
11 District of Columbia, I think it will be
12 helpful and instructive to supplement my
13 discussion with respect to those issues with
14 some of the jurisprudence and some of the
15 discussion under some of our federal code
16 requirements as they relate to Federal Judges.
17 So I'm going to speak a little bit to some of
18 the case law and some of the practices under
19 Section 144 of the U.S. Code, which deals with
20 the issue of personal bias. I may also speak
21 a little bit to Section 455, and then I'm
22 going to reference some general case law.

23 But again, I want to just set the

1 stage for what I think needs to be a very
2 detailed discussion. At the end of the day,
3 I'm going to offer what I believe is my
4 perspective on the substantial requirements of
5 what the law requires or would require in this
6 particular case. But I just wanted to kind of
7 set a little bit of the stage for how I'm
8 going to try to walk through this.

9 I want to first and foremost thank
10 the ANC for bringing this matter forward.
11 Oftentimes, there are concerns raised about
12 the impartiality and conflicts of interest as
13 they relate to Board Members. Not only on
14 this Board, but in other contexts throughout
15 the District of Columbia Government. And at
16 times, these discussions can, shall we say,
17 get very vitriolic and rather energetic and
18 heightened. I don't view that as this type of
19 discussion. I view it as a very important
20 question that needs to be discussed and vetted
21 thoroughly. So that is indeed the intent and
22 spirit with which I approach the concerns that
23 the ANC has raised.

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1 Perhaps as a starting point, let
2 me deal with a little bit of the factual
3 discussion. Again, I'm going to just simply
4 recognize for the record that this is going to
5 be an unusual discussion, because to an extent
6 I'm going to speak a lot on this issue, and
7 the issue is at its heart about me. But I
8 want to kind of set the stage and talk a
9 little bit about what I understand to be the
10 factual context here and then try to put that
11 into the framework of the relevant legal tests
12 here.

13 What the ANC expresses a concern
14 about, and I'm going to reach and put my hands
15 on the ANC's submittal so I am clear to
16 reference specifically what the grounds are is
17 that in this instance, two Members of the BZA
18 failed to declare conflicts of interests, one
19 being former Chair Mr. Griffis, whom I will
20 not speak to in this regard. And then of
21 course, the second person being myself.

22 The concern expressed by the ANC
23 has to do with my affiliation with the

1 organization that does advocacy work on behalf
2 of children and children-related policies here
3 in the District of Columbia, that being D.C.
4 Action for Children. It became apparent to
5 the ANC during its work on this case that D.C.
6 Action for Children had in some respects
7 submitted communications in some form
8 expressing an opinion to the Zoning Commission
9 regarding proposed rules concerning the
10 location of charter schools in residential
11 neighborhoods.

12 As the ANC correctly and properly
13 noted, I am a member of the Board of Directors
14 of said organization. At this particular
15 juncture, what I have been able to ascertain
16 is the following. As part of the Zoning
17 Commission's look at the issue of charter
18 schools, there was quite a bit of advocacy on
19 the behalf of a wide-range of participants in
20 the community, both ANCs as well as other non-
21 profit organizations, groups that have an
22 interest and the desire to forward the
23 interest of charter schools here in the city.

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1 During the course of that
2 advocacy, it is my understanding that shall we
3 say a general call was put out to
4 organizations who were considered to perhaps
5 be in some way aligned or perhaps interested
6 in the outcome of this issue. Such a call
7 went out to D.C. Action for Children. As I
8 understand it, that outreach was made to the
9 Director of Policy, who was indicated in the
10 submittal of the ANC as Suzie Cambria, who is
11 indeed the Director of Policy and now is
12 currently the interim executive director of
13 D.C. Action for Children.

14 Ms. Cambria, in response to that
15 request for support in forwarding shall we say
16 a pro charter school outcome relative to the
17 Zoning Commission, as far as I can ascertain,
18 sent at least one email to other advocates, to
19 members of the D.C. Action network, if you
20 will, what some people oftentimes refer to as
21 an email tree. To the best of my knowledge,
22 and in discussions with Ms. Cambria, here is
23 what I have ascertained as it relates to

1 whether or not that type of activity would
2 typically come to the Board of Directors.
3 That type of activity would not, as a matter
4 of course, come to the Board of Directors.

5 Again, I'm only speaking from the
6 standpoint of the factual, my factual
7 understanding of the case, and I'm not
8 speaking to how we view those facts yet in
9 terms of the relevant legal tests. But from
10 the standpoint of discussion of the facts, at
11 no time did the Board of Directors of D.C.
12 Action for Children discuss the organization's
13 position with regard to this issue, with
14 regard to any of the matters before the Zoning
15 Commission, and at no time was any discussion
16 ever agendized. It is not unusual. It is
17 rather standard fare, standard for the course,
18 that the executive director or even the policy
19 director would have the ability to
20 unilaterally make a determination that a
21 position on behalf of the organization would
22 be appropriate in a given matter without
23 having to come to the Board of Directors.

1 So from a factual standpoint,
2 again not reading, not interpreting the
3 implication of those facts, from a factual
4 standpoint, there was never any discussion at
5 the Board level of D.C. Action for Children
6 regarding the facts or the circumstances
7 surrounding the Zoning Commission's look at
8 this issue. And as a corollary, of course,
9 there was never any discussion at the Board of
10 Director's level with respect to the
11 particular case pending before the Board of
12 Zoning Adjustment.

13 As the ANC also correctly noted, I
14 did disclose on the record a long-standing
15 affiliation with a charter school, that being
16 Washington Math, Science and Technology Public
17 Charter High School. At past times, I have
18 served as chair of that board. To the best of
19 my recollection, my term as chair had ended by
20 the time this case came before us, but I felt
21 that that was a very, very clear instance that
22 needed to be put on the record with regard to
23 any concerns about bias, any concerns about an

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1 inability to be impartial on the record
2 because of an obvious affiliation with a
3 charter school that ostensibly could, at some
4 point in the future, conceivably be affected
5 by whether it be the outcome of the Zoning
6 Commission's action or be it the outcome of
7 any of our work.

8 So as the ANC indicated, I did
9 disclose that on the record. I also I think
10 in the context of that disclosure indicated
11 that Apple Tree Institute in the past had also
12 been affiliated with the charter school.

13 So from a factual standpoint,
14 there I think that sets forth the details
15 around D.D. Action for Children. Again, in my
16 investigation of the factual circumstances
17 surrounding D.C. Action's input here, at no
18 time have I found that D.C. Action for
19 Children submitted anything on the record to
20 the Board of Zoning adjustment pursuant to its
21 action in front of Apple Tree, nor would the
22 BZA have reason to look to or reach out on its
23 own merit, on its own motion, for the Zoning

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1 Commission's record in its deliberations. I
2 raise that issue from the standpoint of
3 beginning to get into some of the context,
4 some of the legal tests and context here, and
5 that is well, should I have known that the
6 organization would likely take a position on
7 this. I'm going to put that into the context
8 of some of the judicial code as it relates to
9 the Code of Judicial Conduct here in the
10 District of Columbia under the Court of
11 Appeals.

12 From a factual standpoint, I have
13 further been able to ascertain that D.C.
14 Action for Children has not maintained records
15 of conceivably any other correspondence that
16 may have been submitted to the Zoning
17 Commission, so I can't say definitively
18 whether or not there was other advocacy that
19 may have taken place on the part of the
20 organization. Again, I'm only speaking to the
21 factual record here.

22 As the ANC indicated, there was at
23 least one email that was sent encouraging

1 other advocates to advocate before the Zoning
2 Commission, expressing an opinion that no rule
3 change be implemented that would conceivably
4 restrict the ability of charter schools to
5 locate. But I have not been able to determine
6 whether or not the organization sent an
7 official letter or any other type of
8 communication that may have gone to the Zoning
9 Commission.

10 Again, as a Board Member and in
11 the context of all of my recollections and my
12 participation in Board meetings, at no time
13 was this issue agendized for discussion at the
14 Board level. So it is my understanding that
15 the Board would not have had reason to know
16 that the organization was advocating in this
17 regard.

18 That's a little bit of the factual
19 underpinning here, based on my own research
20 after the ANC's motion was brought forward.
21 Again, there would have been no reason for me
22 to know that our Director of Policy would have
23 acted in this regard, but it is not an unusual

1 step. The Director of Policy and of the
2 Executive Director have the ability to take
3 this step without moving, without bringing it
4 forward to the Board.

5 I'm going to pause there from a
6 factual standpoint. Again, I think this needs
7 to be a very short, I mean a very long and
8 deliberate walk, so I want to be sure that my
9 colleagues are clear on what I understand the
10 facts of the participation of D.C. Action in
11 this issue may be, and I perhaps will pause
12 there for any factual questions before perhaps
13 connecting up the legal context here.

14 CHAIRPERSON MILLER: As I
15 understand what you said, you weren't aware of
16 the email or by actions by that organization
17 with respect to the rulemaking proceedings?

18 VICE CHAIRPERSON ETHLERLY: That
19 is correct.

20 CHAIRPERSON MILLER: Okay. So you
21 couldn't have disclosed it if you weren't
22 aware of it?

23 VICE CHAIRPERSON ETHLERLY: That

1 is correct.

2 CHAIRPERSON MILLER: Also, the
3 communication, at least this one as I
4 understand it, doesn't go to the issue that we
5 were considering because as I understand it,
6 the Zoning Commission didn't even recognize or
7 see this issue. One of the questions that we
8 are dealing with is the fact that there may
9 have been a "oversight" on the part of the
10 Zoning Commission with respect to 401. So
11 therefore, that issue wasn't before even the
12 public to be addressing, correct?

13 VICE CHAIRPERSON ETHLERLY: I
14 would agree with that interpretation.

15 CHAIRPERSON MILLER: Okay.

16 VICE CHAIRPERSON ETHLERLY: And
17 again, I think it is important to note here
18 the nuance of the ANC's concern is not
19 necessarily so much that there was
20 participation on the part of D.C. Action for
21 Children, but rather the organization of which
22 I was a member, a Board Director and continue
23 to be a member, has in fact taken a position

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1 on an issue which at least from the standpoint
2 of the relationship would perhaps raise a
3 concern about my ability to be impartial. So
4 I want to be very clear in terms of how I am
5 approaching the ANC's concern here.

6 I am not reading it narrowly. I'm
7 rather reading it very broadly. I think that
8 is the appropriate way to read it. Again, as
9 I have looked at the case law and the relevant
10 code of conduct jurisprudence, there is
11 oftentimes a very broad approach to these
12 issues because of the issue of judicial
13 impartiality. It is so essential and so
14 critical and it is absolutely important that
15 the public's trust in the actions of a Judge,
16 be it a Judge on a traditional Court or a
17 quasi-judicial entity, as I believe we sit, it
18 is absolutely essential that their
19 participation and their decisions rise above
20 any appearance of impropriety and bias.

21 So as you indicated, Madam Chair,
22 in the outset of your remarks, we aren't
23 governed by a specific statute, but rather as

1 the NCRC case indicates, in order to -- and
2 I'm reading directly from the Court of Appeals
3 decision, which is quoted in that case, and
4 that's Morrison v. D.C. Board of Zoning
5 Adjustment. "n order to insulate the
6 administrative process and its decision makers
7 from prejudice and bias, it is generally been
8 recognized that the same rules requiring the
9 recusal of judicial officers are applicable to
10 administrative officers, who act in an
11 adjudicative or quasi-judicial capacity.
12 In the absence of a stature providing
13 otherwise a Judge must recuse himself when his
14 alleged bias arises from a source outside of
15 the four corners of the court room."

16 So essentially, I am reading the
17 ANC's concern here in this particular account
18 to be that by virtue of my affiliation as a
19 board member of D.C. Action for Children,
20 there would in fact or there would be some
21 personal bias or concern that my decision
22 might have been impacted by a source outside
23 of the four corners of the court room.

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1 As that discussion continues to
2 note, "a legally sufficient claim of personal
3 bias requires that one, the facts alleged must
4 be material and stated with particularity.
5 Two, the facts must be such that if true would
6 convince a reasonable person that a bias
7 exists. Three, the facts must show that the
8 bias is personal as opposed to judicial in
9 nature."

10 So what I would like to suggest,
11 Madam Chair, and with leave of my other
12 colleague, Mr. Mann, would be to walk first
13 through that particular conversation and then
14 perhaps look to some other guiding principles
15 as they relate both to the Code of Judicial
16 Conduct set forth by the District of Columbia
17 Courts. Then I think there is some
18 instructive discussion again that appears
19 under Section 144 and Section 455 of the U.S.
20 Code as it relates to the conduct of Federal
21 Judges.

22 With respect to the facts alleged
23 "must be material and stated with

1 particularity," there are some concerns that
2 I have here. First and foremost, there is no
3 doubt that the facts that are alleged here are
4 indeed material. I do not question that in
5 the least. An organization of which I am a
6 Board Member, took a position albeit not in
7 this particular case, but on the broader issue
8 of charter schools and their ability to exist
9 and operate here in the District of Columbia.
10 I do indeed agree that that would indeed be a
11 material part of our conversation here and one
12 which is ripe for discussion. So I have no
13 issue with that.

14 It is a concern perhaps that I
15 have with the particularity. And by
16 particularity, I mean this: as I have looked
17 at the discussions of bias and personal
18 prejudice under Section 144, which is perhaps
19 somewhat instructive in terms of how Courts,
20 Supreme Court, and otherwise have looked at
21 the issue of bias, there has been great
22 attention paid to the issue of particularity
23 here. And my concern with the particularity

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1 here is that I believe the argument stops
2 simply at Mr. Etherly is a Member of the Board
3 of Directors of an organization which appeared
4 to take a position on a related issue, but one
5 which does have some impact on part of the
6 issue that Mr. Etherly was adjudicating as a
7 Member of the Board of Zoning Adjustment.

8 There are a couple of assumptions
9 that I think are left out of the ANC's
10 submittal that I think would be very important
11 here. But I am going to encourage my
12 colleagues not to necessarily, not to
13 necessarily deny this particular count on that
14 issue. I think it is an important issue, but
15 I'm not suggesting here that because of the
16 lack of particularity that we cease our
17 inquiry.

18 I would perhaps like to have seen
19 more of an indication that there was some
20 personal involvement or some direct
21 involvement in the fashioning of the
22 organization's position by myself as a Board
23 Member or by the Board as a whole, but to an

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1 extent I recognize that the ANC perhaps would
2 be very challenged in terms of its ability to
3 fathom that out. The ANC and its members of
4 course, not being privy to D.C. Action for
5 Children board meetings or minutes would
6 perhaps have no way of knowing that the Board
7 had never discussed this issue or agendized it
8 in any way.

9 So with that regard, I'm not again
10 necessarily ready to hang the hammer on the
11 particularity account. But I do have some
12 concerns again with respect to that particular
13 aspect. As I looked at some of the case law
14 that deals with the issue of either personal
15 bias or extra-judicial sources influencing a
16 Judge's ability to rule impartially on a case,
17 some of the case law that I have found on this
18 particular issue speaks to the the following
19 with respect to the issue of looking at
20 particularity.

21 Quite a few of the case law, quite
22 a few of the jurisprudence speaks to the issue
23 of subjective conclusions and/or opinions that

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1 bias or the appearance of impropriety may
2 exist are insufficient to requirement a
3 Judge's disqualification. That's a quote
4 taken from the Bumpus v. Uniroyal Tire Company
5 decision, which was an Eastern District of
6 Pennsylvania decision from 1974. Not binding
7 on us in terms of our jurisdiction, but again
8 constructive as secondary authority.

9 Many of the Courts, as I have
10 found them, deal with when looking at concerns
11 or allegations around bias, attempt to strip
12 the allegation of conjecture, opinion, and
13 speculation that facts alleged by the movant,
14 which must be accepted as true. So in looking
15 at the ANC's concern here, what I would
16 suggest or what I think the case law suggests
17 is to an extent, you must presume that their
18 concerns are true. But in doing that, you
19 must strip the conjecture. You must strip the
20 presumptions, and you must strip the
21 subjective conclusions out of the mix.

22 Let me say here that the work ANC
23 6A, in my opinion, and this is not necessary

1 for our discussion here, but I will say it.
2 The work of ANC 6A has always been solid,
3 solid work as is the work of many of our ANCs
4 across the city. They have always been very
5 diligent in their work and their attention to
6 detail, especially as it relates to planning
7 and zoning issues here.

8 I don't necessarily think that the
9 motion here is any different in terms of that
10 tradition, but again there is a little bit of
11 a concern on my part that there are a couple
12 of unspoken suppositions which move from Mr.
13 Etherly was a Member of Board of Directors of
14 this organization, and the organization in
15 turn submitted something on the record to the
16 Zoning Commission, which involved an entirely
17 different matter. Therefore, Mr. Etherly must
18 be biased.

19 It is a fairly long walk to get
20 from point A to point Z, but again I want to
21 be very, very clear here that I don't want to
22 encourage my colleagues to simply rest their
23 deliberations and their thinking on that

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1 particular point. But I simply want to raise
2 it as part of the discussion of the relevant
3 tests.

4 With respect to the on-going
5 discussion of the NCRC decision, secondly,
6 "the facts must be such that if true, would
7 convince a reasonable person that a bias
8 exists." Now there is quite a bit of
9 discussion that gets into how you approach the
10 issue of reasonableness. I'm not going to
11 bore anyone with the benefits of all of my
12 wonderful legal research at 2 a.m. in the
13 morning on the question of reasonableness, but
14 I will simply say this that I think the case
15 law requires that you simply take a reasonable
16 person's position and say based on what we
17 know, which is Mr. Etherly is a Member of the
18 Board of Directors for this organization and
19 this organization took a position on a matter
20 that is in some respects broadly related to
21 the issue of charter schools and their ability
22 to locate in the District of Columbia.

23 Would a reasonable person expect

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1 or be convinced that a bias exists?

2 You know, again I'm walking
3 through the test and trying to kind of build
4 up the case before I kind of take shall we say
5 positions. And to an extent, I want to be
6 very careful in how I express my positions
7 because I recognize again, I'm participating
8 in the discussion and I'm the subject of that
9 discussion. But I think in terms of my look
10 at the case law, an important inquiry here is
11 would a reasonable person believe or think
12 that bias would exist by virtue of D.C. Action
13 of Children's participation by expressing an
14 opinion that did not come before the Board.

15 I would say it is arguable. I
16 would say it is arguable. As some of the case
17 law looks, the case law doesn't presume a
18 reasonable person to necessarily be a civic
19 expert, someone who is deeply steeped in
20 community affairs. So I am not looking at it
21 from the standpoint of would a reasonable ANC
22 Commissioner think that. The ANC Commissioner
23 is oftentimes privy to much more information

1 than perhaps a member of the general public.

2 Some of the case law that I found
3 doesn't suggest that a reasonable person has
4 to know every conceivable fact. So I am more
5 than comfortable simply saying that that is an
6 arguable point. It is one that perhaps I
7 would encourage some discussion from my
8 colleagues as we move through the discussion
9 of this case. Again, the case law, as
10 recorded in the NCR case, NCRC case, the facts
11 must be such that if true, would convince a
12 reasonable person that a bias exists.

13 I think in this regard, however,
14 the word facts refer to the facts that are
15 alleged in the allegation of bias. And again,
16 as I indicated in the discussion on the first
17 prong, I'm a little concerned that other than
18 the fact that I am a Member of the Board of
19 Directors, there is not a whole lot of meat on
20 the bone here. But I am asking my colleagues
21 to hold that somewhat in abeyance, because
22 ultimately I think the goals of ensuring
23 judicial impartiality and assuring that there

1 is no impropriety in any judicial decisions,
2 quasi-judicial or otherwise, I think there is
3 some larger, larger goals here that I want to
4 get to before perhaps passing my
5 -- offering my own judgment on the test.

6 And then finally the third prong
7 of the test is the facts must show that the
8 bias is personal as opposed to judicial in
9 nature. In this regard, I've struggled with
10 trying to figure out exactly oftentimes how
11 that is interpreted. With respect to D.C.
12 Action's position on the broad issue before
13 the Zoning Commission, I think the Chair is
14 absolutely correct in what she indicated that
15 those are in fact two very different
16 proceedings. In terms of the ultimate,
17 overall question that the Zoning Commission
18 and we were dealing with from a matter of law,
19 I felt those questions to be very different.

20 But with respect to did D.C.
21 Action for Children's communication in any way
22 for -- what's the word I'm looking for,
23 indicate or suggest that I would perhaps be

1 predisposed to a particular outcome in the
2 case before us. Again, I think it is
3 arguable. I would submit that I don't believe
4 it did, especially since I had no knowledge
5 and should not have had any knowledge of the
6 action of one of our employees in this regard.
7 I don't think that there's enough there to
8 suggest that the bias is personal as opposed
9 to judicial in nature.

10 That is kind of the first part of
11 the test, and again, the Chair walked through
12 that. I'm taking a little bit of a longer
13 walk through it, but I'm suggesting that we
14 take our inquiry a little further. And as is
15 indicated in the Morrison case, generally it
16 has been recognized that the same rules
17 require recusal of judicial officers are
18 applicable to administrative officers who act
19 in an adjudicative or quasi-judicial capacity.
20 So I took a look at the Code of Judicial
21 conduct for the District of Columbia Courts,
22 readily available online if you go to the D.C.
23 Superior Court Website.

1 I believe that there are two
2 canons in that code that are on point with
3 respect to this issue. One, which is general
4 and one which speaks more to the issue of
5 Judges as members of Boards of Directors in
6 civic and charitable organizations. None of
7 them necessarily offer, and I will be sure to
8 highlight this, none of them offer I think a
9 dispositive resolution to the ANC's concerns,
10 but I think they specifically speak to the
11 types of issues that are raised by the ANC.

12 Canon 2 reads "a Judge should
13 avoid impropriety and the appearance of
14 impropriety in all of the Judge's activities."
15 Clause A reads that "a Judge shall respect and
16 comply with the law and shall act at all times
17 in a manner that promotes public confidence in
18 the integrity and impartiality of the
19 judiciary."

20 Now as I have looked at the case
21 law under the appearance of impropriety
22 standard, and there is quite a bit of it,
23 there's quite a bit of discussion under it.

1 The American Bar Association recently dealt
2 with proposed changes to that standard, which
3 prompted quite a bit of discussion, all of
4 which is readily and easily available online,
5 especially if you are up at 2 a.m. in the
6 morning taking a look at it.

7 The issue of the appearance of
8 impropriety is very critical, however, because
9 it does not require that there be an actual
10 impropriety. It simply says the appearance.
11 Moreover, the case law that I have found
12 supports that it doesn't matter that the Judge
13 or the quasi-judicial official knew of the
14 impropriety. And that's very important. I
15 want to be sure to state that on the record
16 here that as I have looked at this issue, this
17 is such an important consideration for the
18 judiciary that simply the appearance of
19 impropriety is strongly, strongly, strongly
20 repudiated here.

21 That's Canon 2. I'm going to
22 highlight the two canons and then I will come
23 back for further discussion. The other canon

1 which I believe is on point here is Canon 4C3,
2 which reads that "a Judge may serve as an
3 officer, Director Trustee, or non-legal
4 advisor of an organization or governmental
5 agency devoted to the improvement of the law,
6 the legal system, or the administration of
7 justice or of an educational, religious,
8 charitable, fraternal, or civic organization
9 not conducted for profit subject to the
10 following limitations and the other
11 requirements of this code."

12 In relevant continuation, 4C3A
13 reads "a Judge shall not serve as an officer,
14 director, trustee, or non-legal advisor if it
15 is likely that that organization (1) will be
16 engaged in proceedings that would ordinarily
17 come before the Judge, or (2) would be engaged
18 frequently in adversary proceedings in the
19 Court of which the Judge is a member or in any
20 Court subject to the appellate jurisdiction of
21 the Court of which the Judge is a member."

22 Broadly speaking, I'm going to
23 deal with Canon 4C3 first and then move back

1 to Canon 2, because I think Canon 2 is the
2 much broader, more aspirational discussion.
3 But broadly speaking, Canon 4C3 in my research
4 has been read to mean that Judges can in fact
5 participate in extra-judicial activities of a
6 civic nature. They simply have to be
7 monitored very, very, very closely and
8 oftentimes that monitoring has to be updated
9 on a regular basis because of the changing
10 nature of some organizations and their
11 relationship to the law may make it necessary
12 for a Judge to regularly reexamine their
13 activities. I'm reading directly from the
14 commentary to rule 4C3.

15 With respect to D.C. Action for
16 Children, as I look at 4C3, I most certainly
17 do not believe that D.C. Action for Children
18 would be engaged in proceedings that would
19 ordinarily come before me and my capacity as
20 a Member of the Board of Zoning Adjustment.
21 I simply have never seen it in my experience.
22 I have never seen it come before the Board,
23 the issue of land use issues as they relate to

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1 impacts on children and the District of
2 Columbia. So from the standpoint of my
3 thinking whether it would be likely for D.C.
4 Action to appear before us, I found it to be
5 very unlikely.

6 Secondly, I would submit to my
7 colleagues that I find it very unlikely that
8 D.C. Action would frequently be engaged in
9 adversary proceedings of any nature before
10 this body or before the Zoning Commission. It
11 is very unusual for the organization to
12 participate, again, in a land use or zoning
13 matter. But just because I don't have
14 knowledge of it ever happening during my
15 tenure as a Board Member or during the
16 organization's history, again I don't think is
17 dispositive of the question that is presented
18 by the ANC. But I am simply offering my
19 interpretation as it relates to the
20 application of 4C3.

21 With respect to Canon 2, again a
22 Judge shall avoid the impropriety and the
23 appearance of impropriety in all of the

1 Judge's activities. I think this is the area
2 that merits quite a bit of discussion in
3 addition to those elements that were
4 identified in the NCRC decision and the
5 Morrison v. Board of Zoning Adjustment
6 decision. Again, that is the issue of the
7 appearance of impropriety. As the chair
8 indicated in quoting from Lilliberg v. Health
9 Services, which is one of the key seminal
10 Supreme Court Cases, U.S. Supreme Court cases
11 on this issue, "Courts have repeatedly held
12 that positive proof of the partiality of a
13 Judge is not a requirement, only the
14 appearance of impartiality. Further, what
15 matters is not the reality of bias or
16 prejudice, but its appearance."

17 So what I think we have at the end
18 of the day, Madam Chair, and my colleague, Mr.
19 Mann, is the test that's laid forth under our
20 NCRC discussion and in Morrison directly, the
21 three- prong test, facts must be alleged, must
22 be material and stated with particularity, the
23 facts must be such that if true would convince

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1 a reasonable person that a bias exists, and
2 the facts must show that the bias is personal
3 as opposed to judicial in nature. We have
4 that and I think we have Canon 2, which speaks
5 broadly to the concern about the appearance of
6 impropriety.

7 I need to pause there for a
8 moment, Madam Chair, because I have thrown a
9 lot at my colleagues in terms of the
10 discussion, but again I wanted to walk very
11 slowly through what I think are some of the
12 relevant code issues and legal test issues in
13 this matter and perhaps open it up for further
14 questions as we kind of parse through the
15 facts here.

16 At the end of the day, I'll now
17 offer my opinion on what I think the outcome
18 should be. I think as I have looked at all of
19 this jurisprudence, and as I have looked at
20 the ANC's concerns that were expressed in
21 their motion, as I look at the facts of the
22 case here, I would hope that it is very clear
23 to all parties involved that at the outset of

1 that case, the Apple Tree case, I want it to
2 be very certain that it was absolutely
3 understood that I had a longstanding
4 affiliation with a charter school and with the
5 charter school movement here in the District
6 of Columbia. I wanted to put that up front,
7 first, and foremost. I wanted to indicate, as
8 I did, the past affiliation between my charter
9 school and Apple Tree, which had long since
10 ended well before the case came before this
11 Board. But I want it to be very clear that
12 the general public, as well as the parties,
13 had an opportunity to express any concerns
14 with regard to those affiliations.

15 Quite frankly, I felt that that
16 would have been a very obvious opportunity to
17 get at any concerns about recusal or personal
18 bias. Not because I felt I couldn't be
19 impartial, but because I felt simply it was
20 just entirely too obvious. You are the Chair,
21 or your have chaired the Board of Directors
22 for a charter school. You have nurtured that
23 charter school. In many respects, that

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1 charter school was my alma mater, because it
2 predecessor was the Math Science Program at
3 Ballou Senior High School. Is it an
4 institution that I am tremendously passionate
5 about, and I want to be clear about that
6 affiliation at the outset.

7 But there were no concerns raised
8 about my continued participation. But again,
9 that is not the question here. The question
10 put forth by the ANC is well, if we had known
11 however that an organization of which you were
12 part of the Board of Directors expressed an
13 opinion before the Zoning Commission on this
14 broader issue of charter schools, we might
15 have perhaps taken a different position.

16 Again, that is where I think the
17 appearance of partiality or the appearance of
18 impropriety is perhaps most significant for
19 our discussions here. I'm going to pause
20 there, Madam Chair.

21 Again, I have thrown quite a bit
22 at my colleagues, but I think that is a fairly
23 exhaustive discussion in highlight fashion for

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1 the most part, of some of the key factors
2 dealing with the issues of judicial bias,
3 dealing with the issue of appearance of
4 impropriety, and I think we're at a point
5 where we can begin looking at the facts and
6 applying them to this test and perhaps seeing
7 where we are at the end of the day.

8 CHAIRPERSON MILLER: I just want
9 to ask you one question before I start to do
10 that. Did you find that there
11 is a different test for appearance of
12 impropriety versus the test I read for recusal
13 on the basis of alleged bias? Or are they the
14 same standards, material and stated with
15 particularity, if true, would convince a
16 reasonable person that a bias exists. And
17 three, facts must show that the bias is
18 personal as opposed to judicial in nature.

19 VICE CHAIRPERSON ETHLERLY: I
20 would suggest in looking at the appearance of
21 impropriety standard, that there is a somewhat
22 broader reading that some have referred to as
23 a totality of circumstances inquiry. Others

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1 have looked at, you know, is there
2 circumstantial appearance of impropriety. I
3 would say to the best of my knowledge in
4 looking at the jurisprudence, that it is a
5 somewhat broader read, that it is a somewhat
6 broader read. I think that is by design
7 because of the critical nature of this
8 particular rule and the absolute dedication to
9 assuring that our judicial decisions are above
10 question, are above partiality and are beyond
11 taint, beyond taint according to the
12 reasonable person's perspective.

13 So as I have looked at the
14 jurisprudence, I would say that it is perhaps
15 a different and somewhat broader inquiry as
16 opposed to the three standards that were noted
17 in the Morrison case. So I am suggesting in
18 terms of the prism that we look through in
19 looking at the ANC's allegation on this count,
20 that we look at the Morrison standard. I
21 think the two codes of judicial conduct in
22 Canon 2 and Canon 4 are broadly applicable,
23 because as Morrison indicated the rules

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1 requiring the recusal of judicial officers are
2 applicable to us, so I think Canon 2 and Canon
3 4 need to be looked at. Canon 2 gets us to
4 that broader jurisprudence around the
5 impropriety standard and how it has been dealt
6 with. Again, it is not a crystal clear
7 standard. It is a very difficult one to look
8 at.

9 CHAIRPERSON MILLER: Okay, and
10 actually I have also, I've referenced in my
11 notes D.C. Canon 3E1, which talks in relevant
12 part about a Judge disqualifying himself or
13 herself in a proceeding which a Judge's
14 impartiality must reasonably questioned. So
15 I think perhaps we're looking at maybe broader
16 facts, but the standards really I think go to
17 reasonableness and for a bias.

18 What I see in this case is that
19 the ANC come across something which I think
20 does raise a red flag, and I think that's
21 really though just the beginning, and if they
22 were aware of that earlier they would have
23 raised it at the hearing and you would have

1 responded at the hearing.

2 What has happened now is that they
3 found it later and they raised it and you have
4 responded to it, so I think at this point
5 we're now at the juncture of evaluating the
6 bigger picture. I don't think it is enough to
7 say that this email then shows that you are
8 likely to be biased in this case, personally,
9 that that is enough. Particularly when I have
10 heard you say that you weren't even aware of
11 the email, that the issues that Board and the
12 organization deals with are very broad
13 relating to children, and that this particular
14 issue that was before the Board is not really
15 a subject of this email.

16 We don't even know if the
17 organization took any position on it. There's
18 no evidence on the record of that. There is
19 no evidence of bias in this case that's been
20 even alleged. We had a whole hearing. We had
21 a whole deliberation and there isn't any
22 pointing in the record to instances of what
23 you may have said or questions you may have

1 asked during the hearing or anything that
2 shows a bias.

3 So in my view, what the ANC has
4 presented is enough to raise a flag, but it is
5 not enough to be grounds for recusal, Just
6 looking at recusal. I will turn to Mr. Mann
7 in a minute. We're doing these little
8 speeches here. But also, we're not even
9 talking about just recusal now. We're talking
10 about vacating your vote and there hasn't been
11 any showing that there was a risk of injustice
12 to the parties in this case, and that denial
13 of the relief produced injustice in other
14 cases or that it will undermine the public's
15 confidence in the judicial process.

16 I think the process is working as
17 it is intended. I think had ANC found this
18 email and you had responded otherwise or the
19 facts had lead to other conclusions, then at
20 this point I might have supported recusal, but
21 based on the facts that you have put in the
22 record, I don't see that grounds exist.

23 VICE CHAIRPERSON ETHLERLY: I will

1 perhaps before Mr. Mann jumps in. One, there
2 is a clarification at OAG, Ms. Glaser offered,
3 that I want to make sure that I emphasize. I
4 think I have touched upon it earlier, but that
5 is the issue that as we look at kind of this
6 broader standard, it is a fairly discretionary
7 look, but it is one which I am advocating that
8 we absolutely take into consideration here.

9 Again, as Morrison indicates,
10 Morrison sets forth the three-prong test that
11 we have been talking about here: the facts
12 with particularity; the facts must be
13 substantive, true, which would convince a
14 reasonable person that a bias exists. The
15 facts must show the bias is personal.

16 Morrison also speaks broadly to
17 the code of the judicial conduct as also being
18 applicable to quasi-judicial officers and then
19 that's essentially kind of where Morrison
20 stops. But I've gone much further in terms of
21 looking at some of the 455 jurisprudence under
22 the U.S. Code, some of the 144 stuff, because
23 I think it all grapples with this appearance

1 question and it all grapples with the bias
2 question. And much of the language tracks
3 what you see in the judicial code. Much of
4 the language tracks some of the jurisprudence.
5 One of the -- it's somewhat of a commentary on
6 the appearance of impropriety standard, but
7 I'll provide some of the comment to you to
8 help perhaps further elucidate an answer to
9 the question which you ask which is is there
10 a difference in terms of the test. And I'm
11 going to read some of this commentary into the
12 record because it speaks a little bit to how
13 you look at the appearance of impropriety --
14 or how it has been looked at across varying
15 jurisdictions. So it may be helpful to
16 further elucidate, perhaps how my colleagues
17 may want to deal with this particular
18 question.

19 And it reads, and I'm reading from
20 -- just so others might be able to find the
21 article if they want to pull it, it's from the
22 July/August 2005 issue of Judicature.
23 Judicature is spelled J-U-D-I-C-A-T-U-R-E. I

1 apologize for not recalling the name of the
2 society or the organization to which the
3 magazine belongs. I want to say I believe
4 it's the American Judicature Society and as I
5 ascertained from some of my research it
6 appears as though it was a society, it is a
7 society that was very much engaged in
8 expressing an opinion about proposed changes
9 to the appearance of impropriety standard.
10 But it's an article that appears in the
11 July/August 2005 issue by Cynthia Gray titled
12 "Avoiding the Appearance of Impropriety, With
13 Great Power Comes Great Responsibility." And
14 it's a commentary on how Judges must
15 demonstrate their commitment to maintaining
16 public confidence in the integrity and
17 impartiality of their decisions by considering
18 how the public might reasonably view their
19 conduct. In its discussion of the appearance
20 of impropriety standard it reads as follows:
21 "In a literal approach to the appearance of
22 impropriety standard, judicial discipline
23 cases often start with the improprieties to

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1 find in the code and then proceed if an actual
2 violation is not proven to consider whether
3 the Judge created the appearance of a
4 violation. In other words, an appearance of
5 impropriety is found if notwithstanding the
6 absence of proof of any actual or intended
7 impropriety the Judge's conduct 'inescapably
8 created a circumstantial appearance of
9 impropriety.' Similar pronouncements of the
10 rule provide that an appearance of impropriety
11 is established if a reasonable person would be
12 justified in suspecting that the Judge
13 violated the code in having an 'undispelled
14 suspicion of actual impropriety or believing
15 that an impropriety is afoot.'"

16 The article continues to read that
17 "a crucial element of the appearance of
18 impropriety standard is the consideration of
19 whether the conduct was readily avoidable. In
20 other words, whether there were reasonable
21 precautions the Judge could have taken to
22 avoid creating the appearance of impropriety.
23 Cases have described the reasonable person as

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1 'a reasonably intelligent and informed member
2 of the public, an objective observer and the
3 average person encountered in society. Other
4 formulations emphasize what a reasonable
5 person is not, not the Judge himself or
6 herself, not a well-trained lawyer, not a
7 highly sophisticated observer of public
8 affairs and not a cynic skeptical of the
9 government and the Courts. Perhaps the most
10 evocative variation characterizes the
11 reasonable person as neither excessively
12 indulgent nor excessively jaundiced."

13 That's just a little bit of the
14 discussion from that article on the appearance
15 of impropriety standards, so again, in answer
16 your question, Madam Chair, about whether or
17 not there are kind of differences in the test.

18 As I looked at the judicial code
19 with respect to some of the factors that have
20 been identified as grounds for
21 disqualification, and I'm reading from what is
22 Canon 3E on disqualification and I apologize
23 if I have my cite incorrect, but I believe

1 it's Canon 3E, "a Judge shall disqualify
2 himself or herself in a proceeding in which
3 the Judge's impartiality might reasonably be
4 questioned including, but not limited to
5 instances where (a) the Judge has a personal
6 bias or prejudice concerning a party or a
7 party's lawyer or personal knowledge of
8 disputed evidentiary facts concerning the
9 proceeding; (b) the Judge served as a lawyer
10 in the matter in controversy or lawyer with
11 whom the Judge previously practiced law,
12 served during such association as a lawyer
13 concerning the matter, or the Judge has been
14 a material witness concerning; (c) the Judge
15 knows that he or she individually or as a
16 fiduciary or the Judge's spouse, parent, or
17 child were ever residing or any other member
18 of the Judge's family residing in the Judge's
19 household has an economic interest in the
20 subject matter in controversy, or in a party
21 to the proceeding or has any other more than
22 de minimis interest that could be
23 substantially affected by the proceeding, the

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1 Judge or the Judge's spouse or person within
2 the third degree of relationship to either of
3 them or spouse of such a person as party to
4 the proceeding is acting as a lawyer, is known
5 by the Judge to have more than a de minimis
6 interest that could be substantially affected
7 by the proceeding, or is to the Judge's
8 knowledge likely to be a material witness in
9 the proceeding."

10 Those are some of the specific
11 grounds under disqualification. I think
12 again, it's not dispositive on the question.
13 I think most squarely we're probably in the
14 orbit of talking about Section A which speaks
15 to the Judge, has a personal bias or prejudice
16 concerning a party or party's lawyer. And I
17 think the concern again is the ANC's
18 consideration of my role as a Board Member of
19 D.C. Action for Children setting forth
20 potentially a ground for a personal bias with
21 regard to a particular outcome.

22 So again, I'm going to pause there
23 and invite further deliberation and

1 discussion.

2 CHAIRPERSON MILLER: I just want
3 to make a general point because I think we've
4 gone really far in covering all aspects of
5 disqualification, grounds for recusal and the
6 allegation talks about conflicts of interest
7 and I don't think that that's evident there at
8 all, that there was a conflict of interest
9 with your being on this D.C. Action for
10 Children and participating on this case.
11 That's not what's meant by a conflict of
12 interest. That often goes to financial
13 matters and things like that. But I think
14 what the ANC does mean is that probably a
15 personal bias, so I think that the standards
16 are that I stated from the NCRC case for
17 Morrison are the ones that do apply.

18 Mr. Mann, did you want to address
19 any of the standards, what you think with
20 respect to what Mr. Etherly has said?

21 MEMBER MANN: Well, if the Chair
22 would like to hear my opinion, I'm certainly
23 going to express an opinion on this whole

1 subject. I don't have any particular
2 questions regarding this. I thought that it
3 was very helpful for Mr. Etherly to lay out
4 just the plain facts of the case and quite
5 frankly I thought what the facts of the case
6 have been laid just on its face I was
7 convinced that there was no bias or conflict.
8 I simply did not have any problem knowing the
9 full range of facts.

10 It was particularly helpful then
11 to put it into the context of this legal
12 framework and these legal tests to see what
13 the Courts have said about this and what other
14 judicial bodies would have to say about the
15 way that you would evaluate this. And putting
16 it into that context though I'm further
17 persuaded that there is no conflict and no
18 bias and I certainly don't object to Mr.
19 Etherly's continued participation in this
20 case.

21 CHAIRPERSON MILLER: Thank you. I
22 think we spent a lot of time on this issue and
23 I don't know if you want to add any more, Mr.

1 Etherly, but I'm certainly -- I think I've
2 already said it, probably, that I don't
3 believe that the tests have been met for
4 either that you should have recused yourself,
5 that you didn't even know about the action and
6 I don't want to repeat myself, and that also
7 to vacate your order that those tests have not
8 been met either. But I understand why the ANC
9 brought this up and I think it is enough to
10 raise a flat, but not enough to vacate your
11 vote.

12 VICE CHAIRPERSON ETHLERLY: Thank
13 you, Madam Chair. I'd be more than
14 comfortable offering some opinion now on
15 everything that I've laid out and I appreciate
16 the time of both my colleagues and of the ANC
17 in bringing this matter forward. And again,
18 as I said at the outset of my remarks and I
19 believe I would be fairly sure my colleagues
20 would share my opinion in that I think this
21 has been time very well spent and I wanted to
22 err, I came into this room prepared to err on
23 the side of spending just as much time as we

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1 have, if not even more, being very clear in
2 our understanding of what some of the relevant
3 jurisprudence and case law says on this issue,
4 but really speaking to what I think ultimately
5 at the end of the day is a concern on the part
6 of the ANC that there may be some appearance
7 of impropriety or some broad personal bias
8 here. I simply do not believe that to be the
9 case, not only in terms of the context of the
10 relevant legal test here, but simply the
11 understanding of what D.C. Action did, which
12 I had absolutely no knowledge of. If I had I
13 would have absolutely disclosed it, but I have
14 no knowledge of their participation in any way
15 in the Zoning Commission's activities or the
16 expression of an opinion on what the Zoning
17 Commission was doing.

18 I am very confident that I should
19 not have had any reason to know. If it had
20 been discussed at a board meeting, if it had
21 been agendized for discussion by the board,
22 and I had not attended, I wouldn't see that as
23 excusing me from being responsible for knowing

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1 as a Board Member what the organization was
2 doing. But I simply have found no evidence to
3 suggest that the discussion ever came before
4 the Board in any meeting that I would have
5 been or should have been or was, in fact, a
6 participate in.

7 With respect to the appearance
8 aspect of it, that is what troubled me the
9 most here because I think the case law is
10 fairly clear that at the end of the day it is
11 a step that the Judge, him or herself, must
12 ultimately take and review on a consistent
13 basis. And so here my biggest and most
14 greatest concern was though I believe there
15 clearly to be no facts which would indicate a
16 bias or an appearance or an actual
17 impropriety, the standard still says there
18 should be no appearance of it. And it's there
19 where I grapple with the whole reasonable
20 person aspect of it. And it is indeed highly
21 arguable that a reasonable person knowing what
22 we know may very well think oh, well, there's
23 an appearance there. There's an organization

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1 he's part of the board of and they express
2 something.

3 And I absolutely have struggled with
4 that.

5 On the law and on the face of it,
6 I think the outcome is arguable, but fairly
7 clear that there was no impropriety here, but
8 I think again the issue of appearance is the
9 one that is most arguable. As I look at the
10 language from Morrison which is probably, not
11 probably, which is most directed to us as
12 quasi-judicial members, it reads that a Judge
13 must recuse himself when his alleged bias
14 arises from a source outside the four corners
15 of the courtroom and results in an opinion on
16 the merits on some basis other than what a
17 Judge has learned from his participation in
18 the case. That inquiry is meant to, of
19 course, be applied prospectively, but all we
20 can do here is look retrospectively.

21 Retrospectively, I can absolutely
22 say without a shadow of a doubt that my
23 decision in the case rested squarely on what

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1 took place in the four corners of this room
2 and in the context of our proceedings. One,
3 because I had no knowledge of D.C. Action for
4 Children's expression of an opinion on the
5 case and had no reason to have any knowledge
6 of that. Two, obviously, but I will state it
7 anyway, had no outside discussions with
8 anybody involved in the case or any exposure
9 to information or argument that appeared
10 outside of the context of the case.

11 But I will say just as we move
12 forward, the issue of the appearance is one
13 that I simply take very, very seriously.
14 Quite honestly, Madam Chair, I'm struggling
15 with it.

16 CHAIRPERSON MILLER: Well, let me
17 see if I can help you on that then. Because
18 the way I read the law -- you're struggling
19 with this question of appearance, but we're
20 not considering just this email or action of
21 the organization on its own. We look at that
22 action plus what you have just said on the
23 record and then that's the whole picture.

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1 Then we can look at the standard, what a
2 reasonable person then be convinced that a
3 bias exists.

4 I believe Mr. Mann is of the same
5 view that I am that no, not based on this
6 whole picture would we think that a bias
7 exists or that a reasonable person would think
8 a bias exists. I'm not sure the ANC would
9 either. I think the ANC only had half the
10 picture.

11 VICE CHAIRPERSON ETHLERLY: And
12 Madam Chair, I would tend to agree with you on
13 that interpretation and that is ultimately the
14 direction that I was moving towards. But I
15 most certainly want to be honest that I think,
16 and I think we're all being here. I'm not
17 implying any lack of honesty. But at the end
18 of the day, all of what we have talked about
19 recognizes the difficulty in parsing this
20 stuff out.

21 One of the articles that I looked
22 at talked about the nature of public service
23 and the fact that oftentimes as public

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1 servants, many of us are brought to boards and
2 commissions because of either outside
3 affiliations or because of our broader
4 knowledge and expertise with regard to a wide
5 range of issues. And at the same time, it is
6 exactly that broader knowledge and experience
7 and network of relationships that sometimes
8 may give rise to the appearance of impropriety
9 or conflicts of interest.

10 I want it to be sure that I
11 acknowledge that and that I spoke to that.
12 Again, I think very clearly that I am firmly
13 in agreement with you with regard as the
14 Supreme Court indicated in a 455 discussion is
15 whether a reasonable person, knowing all the
16 facts and circumstances, would question a
17 Judge's impartiality. I am convinced that
18 with the discussion of the facts and the
19 circumstances that we've had on the record
20 here surrounding this communication,
21 surrounding my understanding of it, my lack of
22 knowledge of it, and the fact that I would not
23 have any reason to be aware of it, I think I

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1 am hopeful that the facts would support a
2 finding that there is really no question of my
3 impartiality in this case.

4 CHAIRPERSON MILLER: Let me just
5 take this one step further. Even if knowing
6 what you know now and you weren't even aware
7 of that email or action before, say you did
8 know that and then you decided well, out of
9 utmost caution so as not to create any
10 appearance of impartiality, you would recuse
11 yourself.

12 That is a different question that
13 what is before us now, because the Court has
14 said that once there has been an order and a
15 hearing in which you have participated in, if
16 you were to now decide to vacate your vote,
17 the standard is different. The standard is a
18 risk of injustice to the parties in the case,
19 risk the denial of the relief of produced
20 injustice in other cases and risk of
21 undermining the public's confidence in the
22 judicial process.

23 Now, the ANC has not addressed

1 that, but I would say that in situations like
2 ours, where there are five Board Members and
3 taking one out affects how the vote is,
4 etcetera, actually doing something like that
5 often creates an injustice to the other party
6 because it may change the outcome of a case.
7 To do that in which there has been no bias
8 found at all I think does create an injustice
9 to the other parties and I think it can also
10 risk undermining the public's confidence in
11 the judicial process because I don't believe
12 that the ANC is doing that in this case, but
13 it might encourage other parties to try to
14 knock off Board Members later whose votes they
15 didn't like based on something that they might
16 dig up after the fact.

17 I think that's a very bad way to
18 go. So I don't see any grounds for this
19 recusal. Again, I just want to say or
20 disqualification that I also think it was the
21 right thing for the ANC to bring this out and
22 that you have a chance to address it and
23 there's probably nothing more important to

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1 this Board than its integrity and if any of
2 the Board Members also felt that there was
3 something wrong here, that you were biased,
4 the Board Members themselves would be seeking
5 that. I don't have anything
6 further to say. I'm ready to go onto the next
7 issue unless either of you have further
8 comments.

9 VICE CHAIRPERSON ETHLERLY:
10 Nothing further, Madam Chair.

11 I would as a procedural matter
12 perhaps just inquire as to how you want to
13 approach this. I would perhaps suggest
14 dealing with the motions seriatim as we've
15 started. I think as you've mentioned at the
16 outset, because obviously we have to get
17 through this first question before proceeding
18 to the other ones. So if it is appropriate to
19 act on the motion?

20 CHAIRPERSON MILLER: I don't think
21 so. I don't think so because there is one
22 motion before us for reconsideration, and that
23 if we find there are grounds for

1 reconsideration as we go through this, then we
2 will vote at the end and see where we are.

3 I think we have thoroughly
4 exhausted the discussion on you. I would like
5 to go to the discussion on Mr. Griffis next
6 because he also was alleged to have had a
7 conflict of interest in this case and the ANC
8 says that then Chair Chairman Griffis failed
9 to disclose that he was a member of two
10 charter schools if I have that correct? Let's
11 see.

12 VICE CHAIRPERSON ETHLERLY: Yes.

13 CHAIRPERSON MILLER: And that they
14 would have asked for his disqualification had
15 they known and that somehow his membership in
16 those charter schools tainted our
17 deliberations. Okay, unfortunately we do not
18 have Mr. Griffis to give the other side of his
19 story because he is no longer a Member of the
20 Board.

21 So what we have are the standards
22 and the evidence or allegation presented by
23 the ANC with respect to Mr. Griffis.

1 I would say that you know, again
2 we're talking about vacating somebody's vote
3 and I don't believe that the standards are met
4 at all, just as yours. But also with respect
5 to him in particular we don't know why he
6 didn't do it, again that's a red flag but I
7 don't think that the ANC has gone far enough
8 to then show any bias on his part in the
9 proceedings.

10 We have a full record again of
11 deliberation and how he conducted the hearing.
12 Often, I've read these cases dealing with bias
13 and they talk about how the Judge was biased
14 and he did certain things and he wouldn't
15 allow in certain evidence, etcetera, and
16 certainly the Chairs in that position of
17 directing the proceedings and there is no
18 evidence here that he did anything that shows
19 any bias or that he had any information
20 outside the four corners of the court room.

21 Any other comments?

22 VICE CHAIRPERSON ETHLERLY: No, I
23 would tend to agree, Madam Chair.

1 I think ultimately on these
2 questions it is -- there are two concerns to
3 be balanced, and I believe that they are both
4 equally critically. One of course again is
5 the issue of assuring that the Board's
6 decisions are absolutely above question and
7 reproach. But I think also the case law that
8 I have looked at has really looked at the
9 issue with regard to as one Circuit put it,
10 the Tenth Circuit, that a Judge not recuse
11 himself simply on unsupported, irrational, or
12 highly tenuous speculation.

13 I'm not using any of those
14 qualifiers to refer to the ANC's concerns in
15 this regard, but I think what's a critical
16 part of this inquiry is that there must
17 absolutely be solid, credible facts that would
18 speak to a concern about bias and ultimately
19 at the end of the day what we're left with
20 here is the concern about a board membership
21 and the allegation that just by virtue of that
22 board membership, one is biased.

23 The ANC is absolutely correct in

1 that I made the disclosure, but that was a
2 determination for me to make personally based
3 on my own understanding and my relationship
4 with the particular charter school institution
5 in question and how much I had been involved.
6 It may have indeed and I am absolutely not
7 going to speculate what was in Mr. Griffis'
8 head or what should have been or could been in
9 his head with regard to his own disclosure.
10 But I think again, the case law is very clear
11 that the flip side of the coin is just as
12 important and that is that you don't knock off
13 judicial officers or quasi-judicial officers
14 simply based on speculation or the conjecture
15 or presumption without clear particularity and
16 detail and that is simply what we are lacking
17 here.

18 I just simply can't find anything
19 that would suggest that ultimately the bright
20 line of rule is by simple virtue of the fact
21 that you are on the Board of a civic or
22 charitable organization, you are inclined or
23 will tend to act or decide in a certain way.

1 So I would tend to agree with you
2 on your assessment, Madam Chair.

3 CHAIRPERSON MILLER: I probably
4 should not rush through these. I think we
5 could just go through the standards perhaps
6 and then move on.

7 The first is that the facts must
8 be material and stated with particularity. In
9 my opinion, the fact that he is on two charter
10 schools is perhaps material. We were
11 considering an issue that affected some
12 charter schools, but there is no connection
13 then to how those charter schools, being on
14 the Board of those, led to bias in his or
15 would necessarily lead to a bias.

16 Just as you said, you can be in
17 charter schools and disclosed it and nobody
18 raised a concern about that per se because it
19 doesn't lead directly to a bias or a conflict
20 of interest with the issue that we were
21 discussing. I don't believe that the facts --
22 it's true, okay, if I take that as true that
23 he was on these charter school boards, that

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1 that convinces me that there would be a bias,
2 just as I am not convinced that you had a bias
3 just because you were on charter school board.

4 Not being convinced as a bias, you
5 can't even get to the next step that it is
6 personal as opposed to judicial. And again,
7 I would say that going to the U.S. Supreme
8 Court case when you're talking about vacating
9 an order, there has been no showing or
10 addressing of a question about risk of
11 injustice to parties or the denial of relief
12 or produced injustice in other cases or
13 undermine the public's confidence in the
14 judicial process. In fact, probably the
15 opposite effect would be true because -- I
16 mean, it's exactly the point that the ANC was
17 making. If you take off Mr. Griffis and Mr.
18 Etherly from deliberations, then we didn't
19 have a quorum and the order doesn't have
20 effect. So that's a pretty drastic result for
21 very little evidence if any that shows bias.
22 And I don't see any evidence of bias.

23 VICE CHAIRPERSON ETHLERLY: I

1 would continue to agree, Madam Chair.

2 Under some of the jurisprudence
3 that I have looked at, as I talk to the issue
4 of what precisely, what type of interest
5 precisely would be supporting the nature of
6 bias and in the Bumpus v. Uniroyal Tire case
7 that I mentioned, actually, strike that, in
8 the United States versus Morrison case, it's
9 a Second Circuit case, but in discussing the
10 interest that was at issue in that case, the
11 Court ruled that where an interest is not
12 direct but is remote, contingent, or
13 speculative, it is not the kind of interest
14 which brings into question the Judge's
15 impartiality.

16 I think here the argument again
17 stripped down to its barest essentials is
18 simply by virtue of the fact that one is a
19 member of a charter school board, he or she
20 would be inclined to rule or order in a
21 certain way because that charter school at
22 some point may be the beneficiary of the
23 activity that is at issue before the Judge.

1 I think that is precisely the type
2 of contingent or remote or speculative
3 interest that is not at issue or is not ripe
4 for the discussion of a Judge's impartiality.
5 But rather it needs to be direct, and by that
6 I think an appropriate material fact would
7 have been if either my charter school or the
8 charter school that Mr. Griffis -- the two
9 schools that Mr. Griffis allegedly were
10 affiliated with, and I'm only using allegedly
11 because we don't have him here to confirm or
12 deny.

13 But if those schools were in fact
14 pending some type of activity that would have
15 been impacted by very tenuously the Zoning
16 Commission's action or by our decision, that
17 I think would move us in the direction of
18 getting to material facts that have some
19 particularity to them. But I think at the end
20 of the day, the presumption or the argument
21 here is that just by virtue of the fact that
22 you were on a charter school board, the broad
23 brush of bias and partiality therefore applies

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1 and attaches to you.

2 I simply think that is not the
3 outcome that is contemplated under the
4 jurisprudence as it relates to bias. It has
5 to be direct and not remote, contingent, or
6 speculative. I think to find bias in this
7 instance requires us to infer some facts that
8 are simply not offered in the record.

9 CHAIRPERSON MILLER: I agree. I
10 mean, I think if they had said something like
11 well, these schools are on non-conforming lots
12 and they want to make an addition or something
13 or even if they were on something, not just
14 the fact that they are charter schools. It's
15 just too unconnected.
16 Do you have any comments?

17 MEMBER MANN: I have no additional
18 comments. I agree with the position of the
19 Chair and Mr. Etherly.

20 CHAIRPERSON MILLER: Okay, then I
21 suggest we move to the second grounds. At
22 least, I have identified this as the second
23 one. If we could look at the issue where they

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1 say that the BZA failed to consider the clear
2 intent of Zoning Commission Order 0606. The
3 BZA failed to reconcile statutes that failed
4 to be in conflict, rendering a more recently
5 adopted regulation meaningless.

6 I think this is perhaps the meat
7 of the appeal in this whole case. I would say
8 that that's not true, that we did not consider
9 this and I'm going to read from our order
10 specifically where we did. We stated at one
11 point, accordingly, the only issues before the
12 Board with respect to the lot requirements are
13 whether the subject property is exempt from
14 the public school lot requirements set forth
15 in 401.3 and whether the property complies
16 with all other provisions of the Zoning
17 regulations.

18 The new public school regulations,
19 while amending several regulations in Chapter
20 4, including 401.3, in particular leave 401.1
21 intact. The Zoning Administrator and the
22 parties in opposition ask this Board to treat
23 the admission to amend this regulation as an

1 oversight on the part of the Zoning Commission
2 and to read the inapplicability of 401.1 to
3 buildings used for public schools as
4 consistent with the Zoning Commission's intent
5 with respect to the new public school
6 regulations.

7 The Board notes that the Zoning
8 Commission specifically reviewed the
9 regulations in Chapter 4 when adopting the new
10 regulations, and that 401.1 was a part of the
11 regulatory scheme that it was reviewing.
12 Further, there is evidence in the record that
13 this specific issue was brought to the
14 attention of the Office of Planning prior to
15 final action.

16 Accordingly, the Board finds that
17 it is beyond its purview to assume that the
18 admission to amend 401.1 was an oversight on
19 the part of the Zoning Commission. As stated
20 by the Chair of the Zoning Commission in
21 participating in this decision to the extent
22 that 401.1 is ultimately inconsistent with the
23 Commission's intent, but remains meaningful on

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1 its terms, then it is the flaw of the
2 Commission interacting and enacting the
3 rulemaking, not an area of interpretation for
4 the Zoning Administrator.

5 The Board further recognizes that
6 any such flaws of rulemaking are not for the
7 Board to fix in an appeal case, but rather
8 within the authority of the Zoning Commission
9 to correct in a rulemaking proceeding.

10 Now I can see the frustration on
11 the part of the ANC in that it is certainly,
12 there is certainly evidence that the Zoning
13 Commission didn't intend the result that
14 happened. But what we said was we looked at
15 those regulations and we said you know, we
16 can't fix it and the Zoning Administrator
17 can't read in a fix either that that is the
18 authority of the Zoning Commission to fix.

19 I was looking at their filing and
20 I thought, you know, they said that there is
21 new evidence and this new evidence was showing
22 that the Zoning Commissioner's intent, that
23 401, not .1, did not defeat the newer

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1 regulation. But it takes more than intent to
2 give authority to the Zoning Administrator or
3 the Board to read a regulation that is clear
4 on its face.

5 It is not enough for the Zoning
6 Commission to say look, this is what we
7 intended. They have to translate their intent
8 into a regulation through the legislative
9 process. That means that there is an
10 opportunity for a notice and comment, and
11 that's how regulations are enacted. They
12 cannot just be interpreted the way we think
13 that the Zoning Commission really wanted them
14 to be, but didn't make them that way.

15 When you are talking about
16 legislative intent, I was looking at the rules
17 of statutory construction, and basically where
18 the rules of the statute are clear, the
19 judicial inquiry is complete. That's what the
20 Court says. With limited exceptions,
21 unambiguous statutory language trumps all
22 other considerations.

23 We didn't find any ambiguity in

1 401.1. All we found was that the Zoning
2 Commission perhaps wished that it had made
3 changes to it but didn't and it is now in the
4 process of doing that through the regulatory
5 process. So it is not for this Board to jump
6 in and say oh, you don't have to do that,
7 we'll just read it this way. We'll reconcile
8 the two regulations the way we think you
9 wanted them to be. We have to look at each
10 regulation and if they are not ambiguous, we
11 have to read them based on the clear meaning
12 of the words.

13 So number one, I would say yes, we
14 did look at the intent of both and the intent
15 of the Commission and just reiterate that you
16 know, we're bound by our authority and we
17 interpret the law. We don't make the law and
18 the Zoning Commission, as the chair who was
19 sitting here said, it is up to them to fix
20 something if there is a flaw and their failure
21 to enact maybe what they wished they had
22 enacted with respect to the public school
23 regulations.

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1 Any comments?

2 MEMBER MANN: I agree entirely
3 with what you just said and the analysis of
4 that. I also agree that this is beyond the
5 first issue that we discussed this morning,
6 perhaps the most important aspect of this
7 case.

8 When this appeal was first filed
9 and without even reviewing the record, it did
10 give me cause to think oh gosh, I wonder if
11 that's, you know, did we do the right thing.

12 As I read through all the filings,
13 as I read through the decision that we made,
14 I come to the conclusion that we absolutely
15 went through the correct thought process and
16 the correct analysis and came to the right
17 conclusion for all the reasons that you just
18 reiterated, so I won't go back other those.
19 But it is not our place to try to figure out
20 what somebody meant to say or might have meant
21 to say or to get into their head. We know
22 what they did say and we know what the law
23 does say and we have to apply that law. We

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1 can't just go in and arbitrarily decide that
2 we think something should have been when it is
3 not written that way.

4 CHAIRPERSON MILLER: Yes, I
5 actually did struggle with this one until I
6 realized, until I went back and looked at the
7 cases and statutory construction and etcetera,
8 you use intent or you look to intent only when
9 you have an ambiguous regulation or statute.
10 You can't figure out what it means and then
11 you look at the whole intent to try to help
12 you figure it out.

13 In this case, we knew what each
14 regulation meant and so did the Chair of the
15 Zoning Commission who sat here and said oh,
16 okay, we need to take more legislative action.

17 Okay, so I think we concur on that
18 and we will move onto the next issue I have
19 identified is that an objection that there
20 were findings of fact that weren't presented
21 before at the hearing.

22 Findings of fact actually are
23 addressed in 3121 of our regulations, and

1 3121.2 says that there should be submitted
2 within such time as the presiding officer may
3 direct, which in any event shall not be less
4 than seven days after the transcript is
5 delivered to the Office of Zoning.

6 So findings of facts are not ever
7 presented at the hearing, but I think that the
8 ANC objected to the fact that in the finding,
9 in these findings of fact was a fact that
10 wasn't addressed at the hearing per se. They
11 ask -- they said that we should have a re-
12 hearing so they could have the opportunity to
13 dispute it and the facts that proceeded from
14 it in our finding of facts.

15 Okay, basically the findings of
16 fact dealt with the parking regulations that
17 were in effect I believe in 1973. It was a
18 public record what this was and the appellants
19 submitted in their proposed finding of fact,
20 as we had been discussing at the hearing, what
21 were the prior uses, what were the regs that
22 were applied, and they later put this fact in.
23 I don't see any grounds for a re-hearing on

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1 this. I think in a motion for a
2 reconsideration, if the appellant wanted to
3 dispute this fact that this was in fact not
4 so, this was the opportunity to do it in their
5 motion for reconsideration that there was an
6 error and then bring it to our attention and
7 then we could decide whether we needed a
8 hearing.

9 I think it is unlikely, and this
10 is a matter of public record fact that we are
11 talking about. So I don't see any reason for
12 a re-hearing on this issue.

13 MEMBER MANN: I agree.

14 VICE CHAIRPERSON ETHLERLY: I also
15 agree, Madam Chair.

16 CHAIRPERSON MILLER: Okay, the
17 next issue I have identified is that the
18 subsequent Zoning Commission case has rendered
19 this decision moot. They are referring to the
20 proposed action that is being taken by the
21 Zoning Commission to actually, I guess, amend
22 or clarify or whatever the problem that arose
23 in this case, that was spotted in this case

1 with respect to the regulation. In any event,
2 the regulation isn't in effect yet and it is
3 not law.

4 Our regs say that no regulation is
5 in effect until published in the D.C.Register.
6 That's 11 DCMR 3028.9. Therefore, the current
7 regulation is still in effect and therefore
8 the case is not moot.

9 Let's see. Finally, I think that
10 they alleged that there is a new fact that
11 Apple Tree is not a public charter school.

12 Do you want to address that?

13 MEMBER MANN: Well, I am sure that
14 you will have perhaps a different framework to
15 put this in, but it just seems to me that that
16 is not much different than many cases that we
17 see under a lot of different circumstances
18 where there is a lot of parallel processes,
19 regulatory and review processes that
20 applicants have to go through. Typically, we
21 would see, for example, historic preservation
22 review that may or may not precede before a
23 hearing before the Board of Zoning Adjustment.

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1 But I mean there is a lot of
2 different regulatory processes that applicants
3 have to go through and there is no definitive
4 information given regarding which one they
5 have to go through first. So if you are, I
6 don't know, a restaurant for example, you
7 might require a liquor license. Where are you
8 going to get the liquor license before or
9 after you have gone to BZA and before you've
10 gotten various approvals.

11 So I don't see this as much
12 different than any other case where people
13 have to seek special or seek several different
14 permits or levels of review.

15 CHAIRPERSON MILLER: Yes, I think
16 in fact the Chairman of the Zoning Commission
17 also made that comment in their proceedings.
18 Also, I looked at our regs to the extent that
19 I could see what else is germane to this
20 question and I believe it was 3202 which
21 talked to proposed uses and compliance with
22 this title in order to get a building permit.
23 Because the ANC here were saying that they

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1 couldn't get a building permit unless they had
2 authorization by PCSB for a charter school.

3 I don't believe that is really
4 true. I think you have to be the owner to get
5 a permit and then you present your proposed
6 uses and show your compliance with the title.
7 So I think you are right. You don't have to
8 show that you are a charter school, per se,
9 even though you may be seeking use as a
10 school. So I don't see any grounds for that
11 allegation.

12 So any other comments? I think we
13 have gone through them.

14 (Pause.)

15 At this point, I'm going to make a
16 motion to deny the motion for reconsideration
17 to Appeal Number 17532 of Apple Tree Institute
18 for Education Innovations, Inc., pursuant to
19 Section 3126, the regulations.

20 MEMBER MANN: Second.

21 CHAIRPERSON MILLER: Is there
22 further discussion?

23 VICE CHAIRPERSON ETHLERLY: Madam

1 Chair, just as we move towards dealing with
2 the motions, again I want to kind of emphasize
3 two points. One which is and this is not, I
4 can't think of what the informal phrasing is
5 for it. This is not a -- you hear the
6 expression crocodile tears, which are meant to
7 suggest that tears are not honest. And so I
8 don't want this to be viewed as a crocodile
9 compliment. I said it earlier and I will say
10 it again that I want to thank the ANC for the
11 excellent work they have done and continue to
12 do on planning and zoning issues.

13 And I mean that in all
14 seriousness. It would be very easy and I
15 recognize, of course, that there is quite the
16 level of public scrutiny with regard to this
17 particular case, and scrutiny that will extend
18 to members of the media, members of the press,
19 and I think it is very important that as
20 especially with respect to my participation in
21 this case, and I say and I say repeatedly that
22 I thank ANC for its work and for the questions
23 that they have raised here.

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1 Clearly, my position on the
2 outcome of all of these counts are contrary to
3 what the ANC believes the record and the facts
4 and the law to dictate. But I believe on all
5 of these counts as it relates to the concerns
6 that have been raised by the ANC, I think we
7 have dealt with them in extraordinary detail
8 and rightfully so. So I want to again make
9 that compliment.

10 Secondly, I'm going to simply
11 close on the issue of recusal again, because
12 I think it again is so important that at the
13 end of the day there was perhaps one bit of
14 language that I found which I think very
15 adequately sums up how I have tried to
16 approach this question and resolve it as it
17 relates to my participation both in the past
18 with respect to this case as well as going
19 forward. I would like to just share that in
20 the record as we kind of close and then I want
21 to be done.

22 It comes from a slip opinion in a
23 case out of Pennsylvania. Again, it speaks

1 ultimately to how one from Federal Judge
2 standpoint, but the principles are all very,
3 very transferable and applicable here. It
4 wraps up a discussion of 144 and 455. Again,
5 Section 144 of 28 USC deals with personal
6 bias. Section 451 of 28 USC deals with the
7 appearance of impropriety. And it reads as
8 follows: it says "one additional point needs
9 to be made in the interest of wise judicial
10 administration.

11 Both sections describe a process
12 designed to ensure not only the fact, but also
13 the appearance of impartiality in our Courts.
14 Section 144, in particular, is quite powerful
15 requiring recusal on the basis of bare
16 allegations and unadjudicated facts. When
17 used in good faith, these provisions serve to
18 strengthen the public's confidence in the
19 administration of justice.

20 When misused or used for improper
21 purpose, they can cause great harm."

22 Let me pause here in the reading
23 in that and say that I am not in any respects

1 suggesting that they were misused or used for
2 improper purposes here. It continues to read
3 that "in the final analysis, it is the
4 willingness of the Judge so accused to make
5 time in the judicial calendar to work through
6 the allegations, dispassionately about the
7 facts and fairly as to the law that best
8 protects the system of justice from the
9 corrosive effects of Judge shopping by
10 litigants."

11 Again, I am not suggesting that
12 that is what we have here. "Although at times
13 it may seem appealing or even wise to yield to
14 another Court on the premise that the
15 allegations of impartiality are a distraction
16 to the main event, to do so while a short-term
17 expedient will reward the culprit, punish the
18 other parties to the litigation, and encourage
19 the tactic of Judge shopping. It is thus
20 'vital to the integrity of the system of
21 justice that a Judge not recuse himself on
22 unsupported, irrational, or highly tenuous
23 speculation.'" Those quotes from this

1 opinion are coming from a 10 Circuit Case,
2 Hinman v. Rogers.

3 I offer that final word on the
4 issue of recusal again, not to put the ANC's
5 considerations in the context of any of those
6 questionable motives. There is no belief on
7 my part that the ANC is motivated by anything
8 other than the concern for making sure this
9 Board's decision in this particular instance,
10 as it should be in all instances, rises above
11 reproach and question.

12 But I think what those final words
13 in that particular case highlight is that
14 there are two sides to this coin, both in
15 terms of the commitment to ensuring that
16 decisions are without partiality and without
17 bias and favor, but also in ensuring that when
18 we raise these critical and very important
19 questions, that we delve into them with the
20 utmost of care and concern and attention to
21 detail. That is the motivation, that is the
22 approach, and that is the framework that I
23 would try to apply and suggest to my

1 colleagues as we've looked at the question of
2 refusal.

3 So I simply wanted to offer that
4 final closing snapshot with regard to my
5 perspective on how we have tried to approach
6 these issues. Clearly, we are coming to a
7 different outcome, not only on that count but
8 all of the accounts that are raised by the
9 ANC. But I think it is important to have that
10 added perspective because the issue of
11 impartiality is so absolutely critical to what
12 this Board and any Board or Commission in this
13 city does moving forward.

14 Thank you, Madam Chair.

15 CHAIRPERSON MILLER: Thank you. I
16 guess I just want to make a philosophical
17 comment as well. I would like to say that I
18 recognize the hard work that the ANC has done
19 and their great concern with this issue and
20 their obvious frustration with the process.
21 What I want to clarify is that we don't make
22 decisions on the basis of what we would like
23 the outcome to be. We, as a Board, are

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1 obliged to apply the law as we understand it
2 and in the long run, I think it is adherence
3 to the law is what is in the public interest.

4 I will just say that for the most
5 part, for the ANC's benefit, because I want
6 them to realize that that's what we're doing.
7 We're interpretating the regulations the way
8 we truly believe we are required to do under
9 the legal standards.

10 Okay, are we ready for a vote? Do
11 we have anymore comments? Okay, all those in
12 favor say aye.

13 (Chorus of ayes.)

14 All those opposed? All those
15 abstaining?

16 Mr. Moy?

17 MR. MOY: Yes, ma'am. The staff
18 would record the vote as 3-0-2. This is on
19 the motion of the Chair, Ms. Miller, to deny
20 the motion to appeal Number 17532 of Apple
21 Tree. Seconding the motion, Mr. Mann and in
22 support of the motion Mr. Etherly. We have
23 Carol Mitten not present, not voting and

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1 another Board Member not participating.

2 CHAIRPERSON MILLER: Okay, thank
3 you. Anything else on the agenda for this
4 public meeting?

5 VICE CHAIRPERSON ETHLERLY: Madam
6 Chair, if I may, I want to come back to one of
7 the comments that you made at the outset and
8 that is the impending departure of our
9 esteemed colleague Mr. Mann. I want to say
10 not only as Vice-Chair, not only as a
11 colleague on this Board, but I hope after what
12 has been a dynamic and oftentimes challenging
13 experience on a daily basis here, as we all
14 grapple with the issues, I hope I speak as a
15 friend when I say to Mr. Mann that he will be
16 sorely, sorely missed, that his loss is indeed
17 a loss for this body.

18 It is indeed, as the Chair
19 indicated, a rotation and it is one that
20 happens on a regular basis. But there are
21 times when you have the opportunity to work
22 with someone whom you have come to enjoy and
23 respect and appreciate, personally and

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1 professionally, and Mr. Mann and I haven't
2 seen eye-to-eye all the time. More times than
3 not, we find ourselves in the same posture on
4 the same outcome. But his perspective, his
5 ability to look at our cases and to argue his
6 positions passionately, as well as
7 dispassionately, has been greatly, greatly
8 appreciated.

9 I am happy to say that he
10 continues to be a Ward 6 resident and one who
11 fortunately doesn't live too far from me, so
12 I hope to from time-to-time find him out and
13 about enjoying all there is to enjoy about
14 Ward 6, especially in our Southeast/Southwest
15 waterfront area. I also understand he will
16 not be going too far from what he is currently
17 doing and will continue to bring his expertise
18 to bear on behalf of the residents of the
19 District of Columbia and his continued service
20 with the Federal Government.

21 So with all of that, that's a
22 beautiful long-winded way of saying Mr. Mann,
23 I'm going to miss you. I am going to miss

1 your presence on Tuesdays, your perspective,
2 your laughter, your cheesy jokes from time to
3 time. But you most certainly sorely, sorely
4 be missed. But we are going to continue to
5 look out for you and we look forward to
6 working with you in the future in all of your
7 endeavors, which continue to inure to the
8 benefit of the residents of the District of
9 Columbia. So Mr. Mann, you got to speak.

10 MEMBER MANN: Thank you for your
11 comments, Mr. Etherly, and thank you for your
12 comments earlier Madam Chair. It has been
13 really a pleasure and an honor to serve on the
14 Board and it certainly has been a tremendous
15 learning experience. It has been terrific to
16 work with both my fellow Board members, the
17 Zoning Commission Members and the staff of
18 Office of Planning, Office of Zoning, and I
19 certainly look forward to crossing paths with
20 you in the future. Thanks.

21 CHAIRPERSON MILLER: Okay, well I
22 think we can continue our good-byes property
23 in executive session.

1 (Laughter.)

2 CHAIRPERSON MILLER: But thanks
3 again. Yes, you will definitely be sorely
4 missed but I know that you will do great
5 things where you put your energies. So okay,
6 I am going to adjourn this meeting.

7 (Whereupon, at 12:16 p.m., the
8 meeting was concluded.)

9
10
11
12