

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**
441 4th Street, N.W.
Washington D.C. 20001

In re:

**Advisory Neighborhood Commission 6A,
Appellant,**

Appeal No. 17769

*Rec'd
5/29/08*

**DISTRICT OF COLUMBIA'S OPPOSITION
TO ANC MOTION FOR CONTINUANCE**

The Appellee District of Columbia (hereinafter "District"), by and through undersigned counsel, respectfully submits this Opposition to the May 23, 2008 Request for a Postponement of Hearing ("Motion") submitted by Advisory Neighborhood Commission 6A ("ANC").

The ANC requested the continuance, "to allow Judge Steven M. Wellner of the Office of Administrative Hearings (OAH) to issue a decision on the matter of the Department of Consumer and Regulatory Affairs' (DCRA) revocation of the permit 17769 [sic] (OAH Case No. CR-C-07-100087)." Motion at 1. The Motion should be denied on grounds that Judge Wellner issued the Final Order in Case No. CR-C-07-100087 on Thursday, May 29, 2008 dismissing the case for lack of subject matter jurisdiction. A key finding in the Order was that "Neither the Settlement Agreement itself nor the dismissal of AppleTree's appeal in this administrative court deprives ANC 6A or any other proper party of any right it has to challenge issuance of Building Permit Number 89597 in the forum statutorily charged with that responsibility: the Board of Zoning Adjustment." See Exhibit 1. Therefore, the basis for the ANC's request is now moot.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17769 Board of Zoning Adjustment
District of Columbia
EXHIBIT NO. 15 CASE NO. 17769
EXHIBIT NO. 15

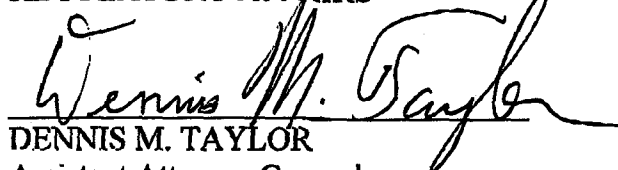
WHEREFORE, the District respectfully requests that the Board deny the ANC's Request
for a Postponement of Hearing.

Respectfully Submitted,

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General Counsel
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS


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Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing District of Columbia's Opposition to ANC Motion to Continuance was served by electronic mail this 29th day of May 2008, to the following:

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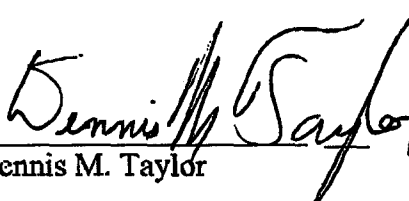

Dennis M. Taylor

Exhibit 1

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE, Suite 9100
Washington, DC 20002
TEL: (202) 442-8167
FAX: (202) 442-9451

APPLETREE INSTITUTE FOR EDUCATION
INNOVATION

Petitioner

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS

Respondent

Case No.: CR-C-07-100087

FINAL ORDER

On October 26, 2007, the Department of Consumer and Regulatory Affairs ("DCRA") issued Building Permit Number 89587 ("Permit") to AppleTree Institute for Education Innovation ("AppleTree"). On November 15, 2007, DCRA issued a Notice of Revocation of the Permit. The Notice of Revocation advised AppleTree that it could challenge the decision by filing a timely notice of appeal with the Office of Administrative Hearings. AppleTree filed a timely notice of appeal on November 20, 2007.

On January 30, 2008, Advisory Neighborhood Commission 6A ("ANC 6A") filed a Motion to Intervene in this case, expressing its longstanding opposition to AppleTree's plans to operate a school at the subject property, 138 12th Street, NE, and asserting that neither of the existing parties could adequately represent its interests in these proceedings. I granted ANC 6A's Motion to Intervene on March 21, 2008, finding that the requirements for intervention as of right had been met.

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On April 28, 2008, AppleTree and DCRA jointly filed a Motion To Dismiss this case with prejudice, explaining that they had "resolved all outstanding issues in this matter." AppleTree and DCRA attached to their Motion to Dismiss a letter from DCRA to AppleTree dated April 28, 2008, withdrawing the Notice of Revocation that had been issued on November 15, 2007.

On April 30, 2008, I issued an Order setting a briefing schedule for the filing of an opposition to the Motion To Dismiss and any replies to the opposition.¹

ANC 6A filed a timely Opposition on May 14, 2008, and AppleTree filed a timely Reply on May 21, 2008. DCRA filed an untimely Reply on May 22, 2008. Based on those papers and the entire record in this case, I now make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

On October 26, 2007, DCRA issued Building Permit Number 89587 to AppleTree. See AppleTree's Request For Hearing, Exhibit B. On November 15, 2007, DCRA issued a Notice of Revocation, advising AppleTree that the Permit was "being revoked." See AppleTree's Request For Hearing, Exhibit A, at 1. AppleTree appealed the Notice of Revocation to this administrative court on November 20, 2007.

On April 28, 2008, DCRA issued a letter withdrawing the Notice of Revocation and "confirm[ing] the validity of the Permit *nunc pro tunc*." See Joint Motion To Dismiss, Appendix

¹ On April 21, 22 and 25, 2008, ANC 6A filed papers anticipating the Motion To Dismiss and opposing it in principle. I established a briefing schedule to give ANC 6A an opportunity to address issues actually raised by Motion To Dismiss filed on April 28, 2008, and to set a schedule for the filing of any opposition and reply.

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B. Also on April 28, 2008, AppleTree and DCRA jointly moved to dismiss AppleTree's appeal with prejudice.

III. CONCLUSIONS OF LAW AND DISCUSSION

An appeal of a notice to revoke a building permit is a "contested case" under the District of Columbia Administrative Procedure Act, D.C. Official Code §§ 2-501-511 ("DCAPA"). 12A District of Columbia Municipal Regulations ("DCMR") 105.6.4.1.² The Office of Administrative Hearings has jurisdiction to adjudicate such contested cases pursuant to D.C. Official Code § 2-1831.03(b)(2).

In its Reply, AppleTree argues that DCRA's withdrawal of the underlying Notice of Revocation deprives this administrative court of jurisdiction over this case because "there is no longer any legal right that is required to be determined after a hearing." AppleTree's Reply at 5. I agree. Once the Notice of Revocation was withdrawn, there was no longer any "adjudicated case" before me. See D.C. Official Code § 2-1831.01(1) (an "adjudicated case" is a "contested case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type"). In the absence of an "adjudicated case," there is no basis for an assertion of jurisdiction by the Office of Administrative Hearings. D.C. Official Code § 2-1831.03(b)(2) (The jurisdiction of the Office of Administrative Hearings extends to "adjudicated cases under the jurisdiction of . . . [the] Department of Consumer and Regulatory Affairs . . .").

² As noted by AppleTree in its Reply, a notice revoking a building permit is actually a "proposed action[]" subject to challenge in a hearing before becoming final. 12A DCMR § 105.6.1.

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If I could not resolve this case on jurisdictional grounds, I would grant the pending Joint Motion to Dismiss with prejudice, as requested by AppleTree and DCRA, for the following reasons:

Although some contested cases are resolved by final order of an administrative law judge after a hearing, "any contested case may be disposed of by stipulation, *agreed settlement*, consent order, or default." D.C. Official Code § 2-509(a) (emphasis supplied). In this case, AppleTree and DCRA jointly requested dismissal of the action on grounds of agreed settlement. As they stated in the Joint Motion To Dismiss, "The parties have resolved all outstanding issues in this matter."

I permitted ANC 6A to address the Joint Motion To Dismiss before I ruled on it, although issuance of a Final Order immediately upon receipt of the joint motion would have complied with OAH Rules. OAH Rule 2817.1 provides, "A petitioner may file a summary motion to voluntary dismissal of any action, or of any claim asserted in an action, at any time, either before or after a respondent has . . . appeared in an action, and the presiding Administrative Law Judge may grant a summary motion for voluntary dismissal without awaiting a response from the respondent."

Nothing in the DCAPA or the laws and regulations governing DCRA or this administrative court prohibits the voluntary dismissal of this action at AppleTree's request under these circumstances, or gives this administrative court authority to second-guess AppleTree's decision to withdraw its appeal. Although I granted ANC 6A intervenor status because of its *practical* interest in this case, the existence of that interest does not confer independent standing on the intervenor or the right to "preclude other parties from settling their own disputes and

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thereby withdrawing from litigation.” *WMATA v. Reid*, 666 A.2d 41, 45 (D.C. 1995) (quoting *Int’l Ass’n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 529 (1986)).

ANC 6A argues that the Settlement Agreement is unfair. The fairness of the Settlement Agreement, however, is not an issue I must decide. Even if fairness (or “legal prejudice” to the intervenor, as discussed in *WMATA*) were an issue, as it might be in Superior Court under Super. Ct. Civ. R. 41(a)(2), I have reviewed the terms of the Settlement Agreement and find nothing about it unfair to ANC 6A or contrary to public policy. See Joint Motion to Dismiss, Exhibit A (Settlement Agreement); D.C. Official Code § 2-509(a). Neither the Settlement Agreement itself nor the dismissal of AppleTree’s appeal in this administrative court deprives ANC 6A or any other proper party of any right it has to challenge issuance of Building Permit Number 89597 in the forum statutorily charged with that responsibility: the Board of Zoning Adjustment. See D.C. Official Code § 6-641.07(f). Moreover, although I determined that it would be unfair to exclude ANC 6A from proceedings already underway in the Office of Administrative Hearings, that decision did not confer on ANC 6A an absolute right to keep the litigation going at its pleasure and in the absence of any independent claim for relief within this administrative court’s purview. *WMATA*, 666 A.2d at 45.

ANC 6A’s Opposition includes a request for an “interlocutory restraining order” forbidding DCRA to issue the permit in question and requiring that the permit’s status remain unchanged until this case is resolved. Opposition at 8-9. ANC 6A bases its request on the assertion that settlement of this case “would detrimentally impact the interests of the constituents of ANC 6A and deny them any avenue to obtain relief for the hard cause by issuance of a permit, in open abrogation of the applicable zoning regulations now in effect.” Opposition at 8. As discussed above, to the extent ANC 6A and its constituents have a statutory right to appeal the

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granting of AppleTree's building permit, that avenue of relief remains as available to them now as it has ever been. Without deciding whether I have authority to enjoin issuance of building permits in particular cases, I conclude that such relief would not be warranted here because ANC 6A has not shown that an injunction is necessary to prevent irreparable harm. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1256 (D.C. 2003). No such relief is available under the present circumstances anyway, of course, in the absence of subject matter jurisdiction.

Accordingly, it is, this 29th day of May, 2008:

ORDERED, that this case is **DISMISSED** for lack of subject matter jurisdiction; and it is further

ORDERED, that appeal rights of any person aggrieved by this Order are set forth below.


Steven M. Wellner
Administrative Law Judge

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APPEAL RIGHTS

I. VIOLATIONS NOT INVOLVING THE DISTRICT OF COLUMBIA ZONING REGULATIONS

Any party suffering a legal wrong or adversely affected or aggrieved by a determination involving infractions not involving the District of Columbia Zoning Laws or Regulations, Title 11, Chapter 32 of the D.C. Municipal Regulations, may appeal such determination pursuant to D.C. Code, 2001 Ed. § 2-1831.16(c) by filing a petition for review and six copies with the District of Columbia Court of Appeals at the following address:

Clerk
District of Columbia Court of Appeals
H. Carl Moultrie I Courthouse
500 Indiana Avenue, N.W.
Sixth Floor
Washington, DC 20001
202-879-2700

The petition for review (and required copies) may be mailed or delivered in person to the Clerk of the Court of Appeals, and must be received by the Clerk of the Court of Appeals within 30 calendar days of the mailing date of this Order, pursuant to D.C. App. R. 15(a)(2). Information on petitions for review to the Court of Appeals can be found in Title III of the Rules of the District of Columbia Court of Appeals.

II. VIOLATIONS OF THE DISTRICT OF COLUMBIA ZONING REGULATIONS

Any party suffering a legal wrong or adversely affected or aggrieved by a determination involving infractions of the District of Columbia Zoning Laws or Regulations, including Title 11, Chapter 32 of the D.C. Municipal Regulations, may appeal such determination to the District of Columbia Board of Zoning Adjustment (the "Board") pursuant to D.C. Code, 2001 Ed. § 2-1831.16(b) by filing a Notice of Appeal to the Board at the following address:

District of Columbia Board of Zoning Adjustment
One Judiciary Square
441 4th Street, N.W., Suite 210 South
Washington, DC 20001
202-879-2700

IMPORTANT NOTICES:

1. By law, the amount of a lawfully imposed fine cannot be modified or reduced on appeal. D.C. Code, 2001 Ed. § 2-1831.16(g).
2. Filing an appeal does not stay (stop) the requirement to comply with a Final Order, including any requirement to pay a fine, penalty or other monetary sanction imposed by a Final Order. If you wish to request a stay, you must first file a written motion for a stay with the Office of Administrative Hearings. If the presiding Administrative Law Judge denies a stay, you then may seek a stay from the D.C. Court of Appeals.
3. If you are a member of the United States Armed Forces on active duty, you may have certain rights under the Servicemembers Civil Relief Act 50 U.S.C.S. Appx. §501 et seq. If you qualify for these rights and you have LOST this case because you were not present, you MAY be able to have this case reopened. If you think you may qualify under this law, you must notify this court promptly to ensure that your rights are protected.

Case No.: CR-C-07-100087

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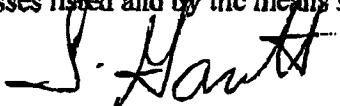
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I hereby certify that on 5-29
2008, this document was caused to be served
upon the above-named parties at the
addresses listed and by the means stated.



Clerk / Deputy Clerk

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Date: 5/29/2008

Re: In Re ANC 6A, # 17769

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Ms. Bailey,

Please find the attached District's Opposition to the ANC's request for a continuance.

Dennis