

Before the
DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Advisory Neighborhood Commission 6A from the Administrative Decision of DCRA on Building Plan Review Status 3758 A 2006 (DCRA Permit No. 89587) on Approval of Zoning Discipline:

STATEMENT OF THE APPLICANT

Advisory Neighborhood Commission 6A (“ANC6A”) hereby requests that the Board of Zoning Adjustment (“the Board”) grant the appeal from the Administrative Decision of the Department of Consumer and Regulatory Affairs’ approval of the Zoning and Environmental Disciplines at 138 12 th St NE and in support of its appeal states the following:

The Department of Consumer and Regulatory Affairs (“DCRA”) erred in its decision to grant a construction permit contained in Building Plan Review Status Tracking Number 3758 A 2006. The property, which is the subject of this appeal, is located at 138 12th St NE, in an R-4 District. The proposed purpose of the property is as a public charter school. Appeal is sought because the property does not meet the lot size or lot width requirements stipulated by Title 11 DCMR §401.3, as recently amended by Z.C. Order No. 06-06.

DISCUSSION

Simply put, the property at issue does not meet the lot size or lot width requirements stipulated by Title 11 DCMR §401.3, as recently amended by Z.C. Order

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No. 06-06. As noted, the property is located in an R4 District. The proposed use by the current owners is as a public charter school. The property is 4,230 sq. ft. in area with a width of 36 ft. Its prior use was as a “private club.” The permit issued by DCRA on October 26, 2007 does not comply with the Zoning Regulations, specifically the lot dimension requirements, in effect on that date. Thus, “[a]ny construction authorized by a permit may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued.” 11 DCMR §3202.4. Title 11 DCMR §401.3 as recently amended by Z.C. Order No. 06-06 (“Charter Schools Test Amendments”) stipulates that a property to be used as a “public school” have a *minimum* lot size of 9,000 sq. ft. and a *minimum* lot width of 120 ft. Further, Title 11 DCMR §401.1 as recently amended by Z.C. Order No. 07-03 (“Minimum Lot Dimensions in the Residential Districts”) stipulates that, even though the lot and building existed prior to 1958, it must meet the minimum lot area and minimum lot width requirements of §401.3 if the building is being converted to a use that requires more lot area and lot width than is on the building’s lot. The lot area and lot width required for the conversion of use to a ‘public charter school’ is dramatically larger than that available on the lot at 138 12th St., NE. The DCRA could not approve the Environmental Discipline prior to September 14, 2007, the effective date of Z.C. 07-03, because sufficient information to approve that discipline was not available until after that date. DCRA states in the November 15, 2007 ‘Notice of Revocation Building Permit No. 89587’ that “even though DDOE returned the plans to DCRA on October 25, 2007, it is DCRA’s understanding that DDOE had, and still has not, completed its investigation with respect to the toxic waste issue to adequately evaluate the requirements of the Environmental Discipline.

§11 DCMR 3202, which governs issuance of building permits in the District of Columbia, provides as follows, in pertinent part:

3202.4 Any construction authorized by a permit *may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued*, subject to the following conditions:

(a) The permit holder shall begin construction work within two (2) years of the date on which the permit is issued; and (b) Any amendment of the permit shall comply with the provisions of this title in effect on the date the permit is amended. [emphasis supplied]

* * *

3202.6 All applications for building permits authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date those orders are promulgated; provided, that all applications for building permits shall be accompanied by the plans and other information required by 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation.

It is clear that on the date of permit issuance (that is, October 26 or 29, 2007, the date that a permitting clerk mistakenly issued a building permit to AppleTree), AppleTree's application for the permit postdated promulgation of physical limitations placed on public schools by the recent amendments to Section 401 of the Building Code cited above. It follows that, pursuant to 11 DCMR 3202.4, the plans submitted by AppleTree with respect to its proposed alterations to 138 12th could not lawfully be "carried to completion," because the dimensions of the project were, in several respects, simply too small.

AppleTree, for all that appears, does not directly assail the strictures of the text amendments or Section 3202.4. Instead, it seems to rely entirely on the claim (Br. __) that the language of Section 3202.6 (quoted above) that a permit application approved in an order by BZA "may be processed in accordance with the Zoning Regulations in effect

on the date those orders are promulgated” has somehow “grandfathered” it into a right to restructure 138 12th as if it had received a valid permit, notwithstanding the intervening imposition of new strictures. But Section 3202.6 says nothing of the kind. Unlike Section 3202.4, which actually governs, and which provides that “[a]ny construction authorized by a permit *may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued,*” 3202.6 simply provides that construction permits “may be *processed* in accordance with the Zoning Regulations in effect on the date those orders are promulgated.” Whatever might be the meaning of the word “processed,” it stands in marked contrast to the language of 3203.4 that “construction . . . may be carried to completion” under regulations in effect on the date the permit is issued. AppleTree would redefine “processed” to mean the same as “carried to completion.” A more rational interpretation suggests a plain meaning: if the permit submission conforms to existing regulations, work may proceed at the site; if, on the other hand, a permit is in litigation before the Board, it need not be rejected out of hand, but can be “processed” pending resolution of litigation. Yet that says nothing about what rules apply when litigation is completed. Hence, without more, attempted alignment between the two sections is a false one and should be rejected by the Board.

AppleTree tacitly concedes that it has no precedent whatever to support the novel proposition that there is a substantive equivalence between the two sections of 3202 based only on their language. Nor, so far as research indicates, does any such equivalence exist. Instead, AppleTree would have the Board borrow meaning from other regulations and engraft that meaning onto the provisions of 3202. Yet that attempt fits not at all with the provision reached for, namely “certificate of occupancy” rules in effect

in 1983. See *Page Associates v. District of Columbia*, 463 A.2d 649 (D.C. App. 1983) (“*Page*”). First, AppleTree cites what in the instant context is ancient jurisprudence that, for all that appears from its argument, may not even exist today. Nor is AppleTree’s attempt at equivalence persuasive. The certificate of occupancy language relied on (from D.C. Code 1981 § 5-423) reads as follows:

All applications for certificates of occupancy filed before the effective date of these regulations may be processed and *any occupancy authorized thereby may be established* in accordance with the zoning regulations in effect on the date such applications are filed.

No certificate of occupancy is at issue here . Special factual circumstances of *Page* make it virtually inapplicable to modern permitting cases, assuming that the regulation is still in effect (which AppleTree nowhere asserts). Most important, the italicized language above does not appear in 3202.6—which is all that AppleTree can cite--and any attempt to engraft that language onto the relevant regulations borders on outright deception. Finally, although AppleTree would represent to the Board that the *Page* anomaly is settled law, none of the other cases cited support it, and a review of the cumulative citators reveal that it has never been cited for the proposition relied on. In short, the argument advanced by AppleTree is specious and should be rejected.

Finally, there is no merit to AT’s related contention (BR. __) that imposition of current zoning strictures promulgated to bring the construction of private educational enterprises into line with the physical dimensions that define, and confine, public school parameters would somehow deny it a “natural” right of property—that is, a right to intrude on a community regardless of the public will, a will that is expressed in the limitations determined by the existing regulations. But AppleTree hints that there is a Constitutional issue lurking to its benefit in the case—namely, it refers, obliquely, to the

Fifth Amendment admonition that “private property shall [not] be taken for public use, without just compensation.” U.S. Constitution, Amendment 5 (the so-called “takings” clause of the Fifth Amendment). In raising the issue, AppleTree has blundered into what is perhaps the thorniest constitutional question currently besetting the Federal judiciary. At the least, it is not an issue that can be resolved by an administrative panel with limited constitutional expertise in the bedrock property issues at stake. If the Board sees that a “takings” question is raised here, it should allow the case to proceed on appeal to the appellate court, and then perhaps to the Supreme Court, rather than attempting to resolve it at the administrative level.

Submitted for and on behalf of Advisory Neighborhood Commission 6A,

David Holmes, designated representative of ANC 6A

June 3, 2008