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

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Appeal of Advisory Neighborhood
Commission 6A and Appeal of Northeast
Neighbors for Responsible Growth

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Appeal Nos. 18139 and 18141

DISTRICT OF COLUMBIA'S PRE-HEARING STATEMENT

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully submits its pre-hearing statement in opposition to the appeals filed by ANC 6A and Northeast Neighbors for Responsible Growth ("NNRG") (collectively, the "Appellants").¹

BACKGROUND

While this is not the first "not in my back yard" case to be brought before this Board, it is perhaps the most epic and convoluted in recent history. In short, this case concerns the renovation of an existing building at 138 12th Street, NE ("the Property"), by AppleTree Institute for Education Innovation, Inc. ("AppleTree"), to operate a public-charter school. The Property is located within an R-4 District and a public-charter school is a matter of right use in that district. See 11 DCMR § 201.1(k)

Over the past five and a half years, AppleTree's efforts to construct a pre-school for three and four year old children have been met with resistance and litigation by Appellants. The instant appeals constitute (at least) the 9th and 10th civil and/or administrative proceedings

¹ As of this date, BZA Appeal Nos. 18139 and 18141 have not been consolidated; however, as the appeals concern the same subject matter, this document constitutes the District's Pre-Hearing Statement for both appeals.

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Board of Zoning Adjustment
District of Columbia
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concerning AppleTree's renovation of the Property.² To date, all of those challenges have been resolved in AppleTree's favor. These appeals require the same outcome.

Even before AppleTree filed an application for a building permit on February 9, 2006, NNRG filed suit in Superior Court seeking to enjoin the District from granting any permits to AppleTree. *See* Complaint (Feb. 2, 2006) at p. 7, *Northeast Neighbors for Responsible Growth v. District of Columbia*, No. 2006 CA 00685 (Super. Ct. of D.C.). The Court subsequently dismissed the suit, agreeing with the District and AppleTree that primary jurisdiction did not lie with Superior Court, that NNRG's claims were not ripe, and that NNRG failed to exhaust its administrative remedies, because it should have brought its zoning challenges to the BZA.

On February 13, 2006, the Zoning Commission ("ZC") adopted an emergency rule, codified in part at 11 DCMR § 401.3, which expanded the definition of "public school" in the Zoning Regulations to include public charter schools, increased the minimum lot area for a public school in an R-4 zone district, increased the minimum lot width requirement, and established a parking formula for schools (like AppleTree), requiring two spaces for every three teachers or staff members.³ *See BZA Appeal No. 17532 of AppleTree Institute for Education Innovation, Inc.* at p. 3 (July 25, 2007).

On April 28, 2006, the Zoning Administrator ("ZA") at the time denied AppleTree's application after determining that as a result of the emergency rulemaking AppleTree's proposed use of the Property failed to meet the minimum requirements in an R-4 zone district for lot area, lot width, and number of parking spaces. *Id.* at p. 4. AppleTree appealed the denial to the

² 2 cases in Superior Court, 1 appeal with the DC Court of Appeals, 2 cases before the Office of Administrative Hearings, and 5 separate BZA appeals.

³ This emergency rulemaking (Z.C. Case No. 06-06) increased the minimum lot area for a public school in an R-4 zone from 4,000 sq. ft. to 9,000 sq. ft. and the minimum lot width from 40 ft. to 120 ft. The Property has a lot width of 36 ft. and a lot area of 4,230 sq. ft. *See BZA Appeal No. 17532* at p. 2-3.

Board, resulting in BZA Appeal No. 17532. In that case, the Board granted NNRG party status. *Id.* at p. 1. ANC 6A also supported the denial of the building permit. *Id.* at p. 1.

The BZA reversed the ZA, agreeing with AppleTree that it was exempt from the new restrictions pursuant to 11 DCMR § 401.1, which (at the time of the decision) authorized buildings in existence as of 1958 to be enlarged or replaced so long as they comply with all other zoning regulations. *See BZA Appeal No. 17532* at p. 6-7. Additionally, the BZA found that AppleTree need only provide two parking spaces, pursuant to 11 DCMR § 2100.5, which provides that no additional parking spaces shall be required for a building located in a historic district certified “as contributing to the character of that historic district.” *Id.* at p. 8. The Board issued its Final Order on July 25, 2007 and subsequently denied a motion for reconsideration filed by ANC 6A and a motion for a stay of the Final Order filed by NNRG. *See BZA Appeal No. 17532-A* (July 24, 2008) and *BZA Appeal No. 17532-B* (Aug. 8, 2008).

Members of NNRG then filed an appeal and an emergency motion for a stay of the Board’s Final Order with the District of Columbia Court of Appeals. The emergency motion was denied on September 21, 2007 and the appeal was subsequently withdrawn. *See Joseph Jorgens, III, et al. v. District of Columbia Board of Zoning Adjustment and AppleTree Institute for Education Innovation*, 07-AA-943 (Order, Nov. 8, 2007).

Following the Board’s decision in BZA Appeal No. 17532, the Zoning Commission, in Case No. 07-03, approved an amendment to 11 DCMR § 401.1 to add the following sentence: “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.” This amendment became effective on September 14, 2007. *See BZA Appeal No. 17769 of ANC 6A* at p. 4 (Dec. 13, 2008).

On October 26, 2007, DCRA issued Building Permit No. 89587 to AppleTree. On November 15, 2007, DCRA issued a notice that proposed to revoke Permit No. 89587 on the basis that it had been issued in error, prior to completion of zoning and environmental reviews. *See BZA Appeal No. 17769* at p. 5. AppleTree appealed the proposed revocation to the District of Columbia Office of Administrative Hearings (“OAH”). OAH subsequently permitted ANC 6A to intervene into that case.

On December 24, 2007, notwithstanding the proposed revocation, ANC 6A appealed the issuance of Permit No. 89587 to the Board resulting in BZA Appeal No. 17769. ANC 6A asserted that as a result of the amendment created by ZC Case No. 07-03, the project must conform to the new lot width and size requirements of 11 DCMR § 401.3. *See BZA Appeal No. 17769* at p. 5.

In a letter to AppleTree dated April 28, 2008, DCRA indicated that the necessary environmental and zoning approvals had been completed and therefore withdrew the Notice of Revocation and confirmed the validity of Building Permit No. 89587 *nunc pro tunc*. *Id.* at p. 6. Consequently, DCRA and AppleTree filed a joint motion to dismiss the OAH appeal, which was granted on May 29, 2008. *See AppleTree Institute for Education Innovation v. District of Columbia Department of Consumer and Regulatory Affairs*, OAH case No. CR-C-07-100087 (Order, May 29, 2008).

The Board then denied ANC 6A’s BZA appeal, finding that DCRA had properly processed AppleTree’s application for a building permit according to the Zoning Regulations in effect on August 6, 2007, the effective date of the BZA Order No. 17523 granting AppleTree’s appeal of the ZA’s denial of the application. *See BZA Appeal No. 17769* at p. 7. The Board found that the ZA correctly applied 11 DCMR § 3202.6, which allows construction authorized

by a permit to be carried to completion pursuant to the zoning regulations in effect on the date the BZA Order is issued. *Id.* at p. 5-6. Since the amendments created by ZC Case No. 07-03 became effective on September 14, 2007 (after BZA Order No. 17523 was issued), the Board concluded that those amendments were not applicable to AppleTree's application. *Id.* at p. 7.

Since the issuance of Permit No. 89587, AppleTree has applied for and received and three extensions of its building permit. October 21, 2008, DCRA issued Building Permit No. B0900498, with an expiration date of October 21, 2009. DCRA then issued Building Permit No. B0909377 on September 21, 2009, with an expiration date of September 21, 2010. On September 17, 2010, AppleTree received its final permit extension when DCRA issued Building Permit No. B1010205, with an expiration date of September 17, 2011.

Following DCRA's issuance of Permit No. B1010205, ANC 6A filed another appeal with the Board, on November 15, 2010, challenging DCRA's issuance of the permit resulting in BZA Appeal No. 18160.

On December 3, 2010, DCRA issued a notice proposing to revoke Permit No. B1010205 as issued in error, as it "erroneously extended the building permit beyond the maximum of eighteen months of extensions" AppleTree filed a timely appeal of this notice with OAH.

ANC 6A withdrew its appeal by letter of the Chair of ANC 6A dated December 13, 2010 "following substantial testimony received from the community in support of Appletree's case." See Exhibit A attached hereto. The letter goes on to say, "While there has been much discussion regarding the location of the school, please know that with this vote, the commission signals its support for providing expanded early childhood options for our community." *Id.*

After further review and reconsideration, DCRA withdrew the notice of revocation and confirmed that the permit was valid by letter dated February 24, 2011. See Affidavit of Rabbiah

Sabbakhan attached hereto as Exhibit B. DCRA and AppleTree then filed a joint motion to dismiss the OAH case on March 7, 2011. *See AppleTree Institute for Education Innovation v. District of Columbia Department of Consumer and Regulatory Affairs*, OAH case No. 2010-DCRA-00002 (Order, Mar. 9, 2011).

On March 15, 2011, NNRG, Ilene Blinick, and Joseph Jorgens filed suit against AppleTree and the District of Columbia in Superior Court for a declaratory judgment that AppleTree's building permit has expired and to enjoin AppleTree from engaging in any construction on the Property. *See* Complaint (Mar. 15, 2011) at p. 14, *Northeast Neighbors for Responsible Growth, et al. v. AppleTree Institute for Education Innovation, Inc., et al.*, No. 2011 CA 0001942 (Super. Ct. of D.C.). On March 29, 2011, the Court denied NNRG's request for a temporary restraining order to halt construction.

ANC 6A and NNRG then filed the instant appeals on April 22, 2011 and April 25, 2011 respectively.

THE ISSUES ON APPEAL

Appellants allege that AppleTree and DCRA have violated several provisions of the Zoning Regulations and the Construction Codes. Specifically, Appellants argue that AppleTree's building permit has expired and that AppleTree must now comply with the amended 11 DCMR § 401.3 because: DCRA issued a building permit extension for longer than 6 months (citing 12A DCMR § 105.5.1); AppleTree did not start work within 6 months of the issuance of Permit No. 89587 (citing 11 DCMR § 3130); and AppleTree did not start work within 2 years of the issuance of Permit No. 89587 (citing 11 DCMR § 3202.4(a)).

Despite these allegations, the Board must dismiss the appeals before reaching the merits as they are not within the jurisdiction of the Board and are untimely. Even if the Board does

address the merits of the appeals, it is clear that AppleTree's building permits have not expired, not lapsed, and are not in violation of any provision of the Zoning Regulations.

ARGUMENT

I. The Appeals Must Be Dismissed For Lack Of Subject Matter Jurisdiction

In the pending appeals, both Appellants are appealing the February 24, 2011 decision of DCRA to withdraw the Notice to Revoke Building Permit No. B1010205. Essentially, Appellants believe that DCRA was correct in its initial effort to revoke the building permit and thus, the error that DCRA allegedly committed was its decision to not revoke the building permit. However, DCRA's decision of whether or not to take enforcement action, such as revoking a building permit, is a prosecutorial decision, which lies within the discretion of DCRA and is not appealable to the Board.

The authority to enforce and administer the Construction Codes and the Zoning Regulations is vested in the Mayor and DCRA. *See* D.C. Official Code §§ 6-641.10, 6-1405.1. Accordingly, DCRA has broad discretion in determining how, or even whether, to enforce the appropriate law and regulations, as the D.C. Court of Appeals regularly reaffirms. "Here, the [plaintiffs] ask the courts to order more robust enforcement of the [statute] against their neighbors But such enforcement is a core executive function committed to the discretion of the [agency], meaning that judicial review is precluded." *Tucci v. District of Columbia*, 956 A.2d 684, 690 (D.C. 2008) (citing, *inter alia*, *District of Columbia v. Sierra Club*, 670 A.2d 354, 360 (D.C. 1996) ("[t]he determination whether and when to institute enforcement proceedings against a specific individual is a core executive responsibility which may reasonably be viewed as having been committed to agency discretion so as to preclude substantive judicial review.")). "[T]he decision of whether or not to prosecute, and what charges to file . . . generally rests

entirely in [the prosecutor's] discretion.” *District of Columbia v. Economides*, 968 A.2d 1032, 1036 (D.C. 2009) (alteration in original) (quoting *United States v. White*, 689 A.2d 535, 538 (D.C. 1997)). See also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767 n.13 (2005) (“a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)).

The Board has also recognized DCRA’s prosecutorial discretion. In the BZA Appeal No. 16950, the Board addressed a challenge to DCRA’s failure to issue fines for an alleged violation of a Zoning Commission order. The Board rejected that challenge and acknowledged the “absolute discretion” normally afforded to DCRA’s enforcement decisions. See *Appeal No. 16950 of the West End Citizens Association* (April 1, 2004) at p.10.

Accordingly, the appeals must be dismissed.

II. The Appeals Must Be Dismissed As Untimely

The pending appeals are also barred as they are untimely. Under 11 DCMR § 3112.2(a), an appeal must be filed within sixty days from the date the person “reasonably should have had notice or knowledge of the decision complained of.” While the instant appeals purport to appeal the February 24, 2011 decision of DCRA to not revoke the Permit No. B1010205, the Appellants had notice of the violations of the Zoning Regulations that they currently allege long before that date.

All of the alleged violations of the Zoning Regulations of which the Appellants now complain existed on the date Permit No. B1010205 was issued (September 17, 2010). First, Appellants’ argument that Permit No. B1010205 was issued in violation of 12A DCMR § 105.5.1 because it extended the permit for longer than 6 months should have been raised within 60 days of the issuance of the permit. Second, Appellants’ argument that AppleTree’s permit

expired under 11 DCMR § 3202.4(a) because it did not start work within 2 years of the issuance of Permit No. 89587 should have also been raised at the time Permit No. B1010205 was issued. Lastly, Appellants' argument under 11 DCMR § 3130 that AppleTree should have started work within 6 months of the issuance of Permit No. 89587 (October 26, 2007) should have been raised when DCRA issued AppleTree's first permit extension on October 21, 2008.

Both Appellants had the opportunity to appeal the issuance of Permit No. B1010205 and ANC 6A did in fact appeal the issuance of that permit. In its appeal statement in that case, ANC 6A raises many of the same issues as it does in this appeal. DCRA's decision to not revoke AppleTree's building permit does not give the Appellants a second chance to pursue that appeal.

Therefore, this Board is compelled to dismiss the appeals as untimely.

III. AppleTree's Permits Are Valid And Comply With The Zoning Regulations

In addition to the jurisdictional issues, the Appellants have not established that AppleTree's permit has expired, lapsed, or is in violation of any provision of the Zoning Regulations.

A) 12A DCMR § 105.5 does not create a basis for appeal

The District of Columbia Construction Codes, codified in Title 12 of the District of Columbia Municipal Regulations, contain regulations governing the expiration and extension of building permits issued by DCRA.

In relevant part, those provisions state:

Expiration of Permit. Any permit issued shall become invalid if the authorized work is not begun within one year after the permit is issued, or if the authorized work is suspended or abandoned for a period of one year, after the date work is begun. Inspections are required to verify that work has not been suspended or abandoned for a period of one year.

See 12A DCMR §§ 105.5.

Extension of Permit. A permit extension is required if no work has begun within one year. Upon written request, and upon a showing of good cause, the code official is authorized to grant extensions of time not to exceed six (6) months per extension. Not more than three (3) extensions of time will be granted to any permit.

See 12A DCMR §105.5.1.

Lapsed Permits. Permits issued under the *Construction Codes* shall not be extendable if permitted to expire, unless extension is approved in writing by the code official.

See 12A DCMR § 105.5.2.

Appellants argue that AppleTree's permit has expired because the permit extensions that DCRA issued were for one year and not for six months as provided for in 12A DCMR §105.5.1; however, the error Appellants complain of here is not appealable to the Board.

The Board's jurisdiction is limited to allegations of error in the in the administration or enforcement of the Zoning Regulations. *See 11 DCMR § 3100.2.* The Board's jurisdiction does not extend to the Construction Codes. "[A]ny person adversely affected or aggrieved" by a decision of DCRA with respect to the Construction Codes must file an appeal with the Office of Administrative Hearings and not the Board. *See 12A DCMR § 112.* Therefore, Appellants have brought this challenge to the wrong forum and it must be dismissed by the Board.

B) AppleTree's permit has not expired or lapsed

Since the issuance of Permit No. 89587 on October 26, 2007, AppleTree has continuously held a valid building permit. AppleTree has extended its building permit three times. Each extension was obtained before the previous one expired, without any gap or lapse in time. Even though DCRA proposed to revoke Permit No. B1010205, that action did not affect the validity of the permit. The OAH has held "A Notice to Revoke is nothing more than a proposed action... It does not become final unless affirmed after a hearing or the right to a

hearing is waived.” *See DCRA v. Frey*, OAH case No. CR-C-06-100027, 2007 WL 2198213 (April 24, 2007). Accordingly, where a permit holder has continuously held a valid building permit without any gaps between permit extensions, the permit cannot be said to have lapsed.

In deciding to withdraw the proposed revocation of Permit No. B1010205, Rabbiah Sabbakhan, DCRA’s Chief Building Official reviewed AppleTree’s permit history and the applicable provisions of the Construction Codes. *See Exhibit B*. Mr. Sabbakhan determined that while extensions had been granted for one year increments as opposed to 6 month increments, that was not a sufficient basis for him to conclude that AppleTree’s permit had expired under the Construction Codes. *Id.*

C) 11 DCMR § 3130 is not applicable to AppleTree’s permit

NNRG, in its Statement of Appeal, points to 11 DCMR § 3130 as a basis for its appeal. NNRG misapplies this section as it only applies to Board orders where the Board has granted an application for a variance or special exception and does not apply to appeal cases.

11 DCMR § 3130 is titled “Time Limits On The Validity Of Board Orders” and contains a series of time based restrictions for permits authorized by orders of the Board.⁴ It is clear that this section is specifically limited to variance and special exception cases, as the time restrictions cannot be reasonably applied to an appeal case. This is evident in the Board’s variance and special exception orders where the Board incorporates 11 DCMR § 3130 into the order, but does not do so in appeal cases.

⁴ Under 11 DCMR § 3130.1, “No order authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years, ... unless, within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit[.]” Under 11 DCMR § 3130.2, “Any permit approved under this chapter shall be issued within a period of six (6) months after the date of the filing of an application for the permit.” 11 DCMR § 3130.3 states, “The erection or alteration approved in the permit shall be started within six (6) months... If the work is not started within such period the permit shall expire and shall not be renewed.”

For example, § 3130.1 provides for the expiration of an order of the Board; however, unlike a variance or special exception case, an order where the Board has granted or denied an appeal does not expire. Second, it is illogical to apply § 3130.3 to an appeal case. That section requires a permit holder to begin work within 6 months and if he fails to do so, the permit expires and cannot be renewed. Considering the harsh restrictions of § 3130.3, it does not make sense that the regulations would treat permit holders who have successfully defended their matter of right building permits in appeals any differently than permit holders who have not been burdened by litigation. However, it does make sense to place such restrictions on permit holders who have obtained special exceptions and variances, as they are not engaging in matter of right construction.

Accordingly, 11 DCMR § 3130 is inapplicable to AppleTree's permit.

D) The 2 year limit of 11 DCMR § 3202.4(a) is not applicable to AppleTree's permit

11 DCMR § 3202.4 states:

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.

This provision allows the holder of a building permit to complete construction where there has been an intervening change in the law that would otherwise prohibit the construction, provided the permit holder begins work within 2 years.

However, the condition that work must begin within 2 years is only applicable to permits where the permit holder is seeking complete construction "pursuant to the provisions of this title in effect on the date that the permit is issued." That is not the case here. Instead, AppleTree is

seeking to complete construction in accordance with the Zoning Regulations in effect on the date BZA Order No. 17523 was issued pursuant to 11 DCMR § 3202.6. In BZA Appeal No. 17769, the Board recognized that § 3202.6 is an exception to the general rule set forth in § 3202.4. *See BZA Appeal No. 17769* at p. 6.

11 DCMR § 3202.6 states in part, “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.” Accordingly, when the ZA approved AppleTree’s permit application, he did it in accordance with the law that was in effect when BZA Order No. 17523 was issued. The ZA’s application of § 3202.6 to AppleTree’s permit application has already been upheld by the Board in BZA Appeal No. 17769. Since the ZA processed AppleTree’s permit application in accordance with § 3202.6 and not § 3202.4, the 2 year condition attached to § 3202.4 is not applicable.

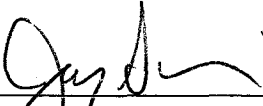
For these reasons, the appeals must be dismissed.

Respectfully Submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

MELINDA M. BOLLING
General Counsel

September 14, 2011


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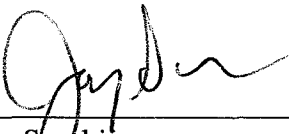
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by regular mail or email, this 14th day of September 2011, to the following:

ANC 6A
c/o David Holmes
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Northeast Neighbors for Responsible Growth
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Jay Surabian

Exhibit A



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



December 13, 2010

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

RE: **WITHDRAW ANC Request for Appeal** of Building Permit No. B1010205

Dear Mr. Moy:

At a regularly scheduled and properly noticed meeting on December 9, 2010, Advisory Neighborhood Commission 6A voted 4-3-0 (with 5 Commissioner required for a quorum) to **withdraw its request for appeal** of the administrative decision of the Department of Consumer and Regulatory Affairs Building and Land Regulation Administration to issue Building Permit No. 1010205 for the property at 138 12th St NE.

The Commission took this action following substantial testimony received from the community in support of Appletree's case to move forward its application to locate and operate its school at this site. While there has been much discussion regarding the location of this school, please know that with this vote, the commission signals its support for providing expanded early childhood options for our community.

On behalf of the Commission,

Kelvin J. Robinson
Chair, Advisory Neighborhood Commission 6A

cc: Russ Williams, Appletree Institute
Jack McCarthy, Appletree Institute
Linda Argo, DCRA
Matthew LeGrant, DCRA

Exhibit B

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

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

Appeal of Advisory Neighborhood
Commission 6A
and
Appeal of Northeast Neighbors for
Responsible Growth

Appeal Nos. 18139 and 18141

AFFIDAVIT OF RABBIAH SABBAKHAN

1. I, Rabbiah Sabbakhan, am the Acting Chief Building Official of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), a position I have held since January 2011.
2. Before taking that position, I was Acting Chief of the Permitting Operations Division.
3. I make this affidavit upon personal knowledge, information, and belief, including information provided to me by other District of Columbia officials and employees in my official capacity. I would testify as stated herein if called to do so.
4. As Chief Building Official, I am responsible for interpreting and enforcing the *District of Columbia Construction Codes*. In addition, I manage the Inspections and Compliance Administration, which is responsible for inspecting buildings for compliance with the *Construction Codes*, and the Permitting Operations Division, which is responsible for reviewing and issuing building permits.
5. The *District of Columbia Construction Codes* consist of the codes referenced in 12A DCMR § 101.1 and the 2008 Construction Code Supplement, which is Title 12 of the District of Columbia Municipal Regulations ("DCMR").
6. On October 26, 2007, DCRA issued Building Permit No. 89587 to AppleTree Institute for Education Innovation, Inc. ("AppleTree") to renovate an existing building at 138 12th Street, NE ("the Property") to operate a public-charter school.
7. Since the issuance of Permit No. 89587, AppleTree has applied for and DCRA has issued three extensions of its building permit. On October 21, 2008, DCRA issued to Building Permit No. B0900498, having an expiration date of October 21, 2009. On September 21, 2009, DCRA issued Building Permit No. B0909377, having an expiration date of September 21, 2010. On September 17, 2010, DCRA issued Building Permit No. B1010205, having an expiration date of September 17, 2011. Building Permit No. B1010205 constitutes the last permit extension AppleTree is allowed under 12A DCMR § 105.5.1.

8. Under 12A DCMR § 105.5, unless a building permit is extended, it expires if work has not begun within one year after the permit is issued, or if work is abandoned for a period of one year.

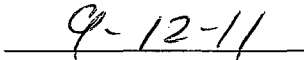
9. On December 3, 2010, I issued a notice that proposed to revoke Permit No. B1010205 as being issued in error. At that time I determined the permit was issued in error because AppleTree had received an extension of its building permit beyond eighteen months from the date of issuance of the original building permit. After giving the matter further consideration, I determined that AppleTree's permit was valid. Consequently, in a letter dated February 24, 2011, I withdrew the notice of revocation and confirmed that the permit was valid.

10. Prior to deciding to withdraw the notice of revocation, I met with representatives of AppleTree, reviewed DCRA's records, and reviewed the relevant provisions of the *Construction Codes*. Based on my review, AppleTree obtained all three of its permit extensions before the stated expiration dates of its prior permits. Although the permit extensions were granted for one year increments and not six month increments, I did not find that to be a sufficient basis to conclude that AppleTree's permit had expired under the *Construction Codes*. Further, under my interpretation of the *Construction Codes*, AppleTree's permit has not lapsed, because there is no gap in the dates of AppleTree's permits. As AppleTree has begun work before the expiration date of its last permit extension, the permit remains valid.

* * *

I hereby swear, subject to the penalties of perjury, that the foregoing is true and correct.


RABBIAH SABBAKHAN


DATE