

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

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ADVISORY NEIGHBORHOOD COMMISSION 6A;
NORTHEAST NEIGHBORS FOR RESPONSIBLE
GROWTH,

Appellants,

v.

APPLETREE INSTITUTE
FOR EDUCATION INNOVATION, INC.,
Appellee.

BZA APPEAL NOS. 18239 & 18241

**BRIEF FOR APPELLEE
APPLETREE INSTITUTE FOR EDUCATION INNOVATION, INC.**

DATED: September 14, 2011.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18239

EXHIBIT NO. 18(a)

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. BACKGROUND	4
A. AppleTree Purchased Property That Was Zoned For Use As A Preschool.....	4
B. This Board Rejected Attempts To Block Zoning Approval For Improvements To The Preschool	5
C. AppleTree Obtained A Construction Permit To Make The Improvements.....	9
D. This Board Rejected A New Wave Of Challenges To The Project.....	10
E. ANC-6A Withdrew A Third Appeal To This Board After Deciding To Support The Preschool, And NNRG Failed In Its Effort To Enjoin The School’s Construction.....	12
F. Appellants Filed The Instant Appeals.....	14
III. ARGUMENT	15
A. The Appeals Are Procedurally Defective	16
1. The Appeals Are Time Barred	16
2. Appellants Cannot Revive Their Stale Claims By Contesting A Non-Appealable Affirmation Of The Permit’s Validity	19
3. The Board Lacks Jurisdiction To Decide The Appeals	23
B. DCRA Properly Withdrew Its Revocation Notice.....	26
1. The Permit Is Valid Under Section 105.5 of the Construction Codes.....	26
2. The Permit Is Valid Under Section 3202.4 Of The Zoning Regulations	27
3. Section 3130.3 Of The Zoning Regulations Is Inapplicable To The Permit.....	30
4. The Permit Is Valid Under Section 206 Of The Zoning Regulations.....	33
C. Equity Ensures AppleTree’s Right To Complete The Preschool	33
1. The Construction Deadlines Were Tolloed During Appellants’ Persistent Obstruction Of The Project	34
2. AppleTree’s Right To Complete The Preschool Has Vested	36
3. The District Of Columbia Is Estopped From Preventing The Completion Of The Project.....	38
IV. CONCLUSION.....	40

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Am. Univ. Park Citizens Ass'n v. Burka</i> , 400 A.2d 737 (D.C. 1979)	19
<i>Basken v. D.C. Bd. of Zoning Adjustment</i> , 946 A.2d 356 (D.C. 2008)	19, 20, 27
<i>Beins v. D.C. Bd. of Zoning Adjustment</i> , 572 A.2d 122 (D.C. 1990)	39
<i>Cardinale v. Ottawa Reg'l Planning Comm'n</i> , 627 N.E.2d 611 (Ohio Ct. App. 1993)	36
<i>City of Bowie v. Prince George's Cnty.</i> , 863 A.2d 976 (Md. 2004)	34
<i>City of Cranston v. Carpionato</i> , 340 A.2d 134 (R.I. 1975)	34
<i>DCRA v. Frey</i> , No. 06-100027, 2007 WL 2198213 (D.C.O.A.H. April 24, 2007)	21, 25
<i>District of Columbia v. Economides</i> , 968 A.2d 1032 (D.C. 2009)	25
<i>District of Columbia v. Sierra Club</i> , 670 A.2d 354 (D.C. 1996)	25
<i>Economides v. D.C. Bd. of Zoning Adjustment</i> , 954 A.2d 427 (D.C. 2008)	38
<i>Fedorov v. United States</i> , 600 A.2d 370 (D.C. 1991)	25
<i>Fourth Branch Assocs. v. FERC</i> , 253 F.3d 741 (D.C. Cir. 2001)	21
<i>Fromer v. Two Hundred Post Assocs.</i> , 631 A.2d 347 (Conn. App. Ct. 1993)	34
<i>Goto v. D.C. Bd. of Zoning Adjustment</i> , 423 A.2d 917 (D.C. 1980)	19
<i>J.C. & Assocs. v. D.C. Bd. of Appeals & Rev.</i> , 778 A.2d 296 (D.C. 2001)	25
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	26
<i>Nat'l Waste Managers, Inc. v. Anne Arundel Cnty.</i> , 763 A.2d 264 (Md. Ct. Spec. App. 2000)	34
<i>Page Assocs. v. D.C. Bd. of Zoning Adjustment</i> , 463 A.2d 649 (D.C. 1983)	37

<i>Presault v. Wheel,</i> 315 A.2d 244 (Vt. 1974)	34, 36
<i>Saah v. D.C. Bd. of Zoning Adjustment,</i> 433 A.2d 1114 (D.C. 1981)	38, 39
<i>Speyer v. Barry,</i> 588 A.2d 1147 (D.C. 1991)	36
<i>Steuart Petroleum Co. v. Bd. of Cnty. Comm'rs,</i> 347 A.2d 854 (Md. 1975)	37
<i>Town of Castle Rock v. Gonzales,</i> 545 U.S. 748 (2005)	26
<i>Tucci v. District of Columbia,</i> 956 A.2d 684 (D.C. 2008)	26
<i>Waste Mgmt. of Md., Inc. v. D.C. Bd. of Zoning Adjustment,</i> 775 A.2d 1117 (D.C. 2001)	16
<i>Weil v. Markowitz,</i> 829 F.2d 166 (D.C. Cir. 1987)	22
<i>York Apartments Tenants Ass'n v. D.C. Zoning Comm'n,</i> 856 A.2d 1079 (D.C. 2004)	26

BZA Orders

BZA Appeal No. 14110 of Residential Action Coal. (Mar. 28, 1984)	19
BZA Appeal No. 16764 of Darryl J. Grinstead, 49 DCR 5227 (2002)	20
BZA Appeal No. 16849 of Robert Lehrman, 50 DCR 4055 (2003)	20
BZA Appeal No. 16935 of Se. Citizens for Smart Dev. (May 6, 2003)	20
BZA Appeal No. 16932 of J. Brendan Herron Jr. and ANC 3F (March 11, 2003)	<i>passim</i>
BZA Appeal No. 17276-B of Phillips Park, LLC (Sept. 13, 2005)	23
BZA Appeal No. 17235 of Patrick J. Carome (July 5, 2005)	23
BZA Appeal No. 17329 of Georgetown Residence Alliance (July 12, 2005)	23
BZA Appeal No. 17444 of Kuri Bros., Inc. (Apr. 3, 2007)	23, 31
BZA Appeal No. 17532 of AppleTree Instit. for Educ. Innovation, Inc. (July 25, 2007)	17, 32, 33
BZA Appeal No. 17532-B of AppleTree Instit. for Educ. Innovation, Inc. (Sept. 5, 2008)	28
BZA Appeal No. 17769 of ANC-6A (Dec. 28, 2010)	<i>passim</i>
BZA Appeal No. 17966-A of Stephen Bruce (July 13, 2010)	16, 19, 20, 22
BZA Appeal No. 18070 of ANC-6B (June 15, 2010)	16
BZA Appeal No. 18154 of Capitol Hill Restoration Soc'y (Jan. 4, 2011)	24

BZA Application No. 16582 of Gallaudet University (July 5, 2000).....	33
BZA Application No. 16593 of St. Luke’s Episcopal Church (Sept. 5, 2000).....	33
BZA Application No. 16654 of Sibley Memorial Hospital (Jan. 16, 2001).....	33
BZA Application No. 17149 of Sidwell Friends School (Oct. 5, 2004).....	33
BZA Application No. 17562-A of W Street, S.E. 38-42-43, L.L.C. (June 23, 2009)	32, 35, 36

Statutes

D.C. Code § 6-1405.01	25
D.C. Code § 6-641.07	16, 23
D.C. Code § 6-641.10	25

Regulations

11 D.C.M.R. § 199.2.....	29
11 D.C.M.R. § 330.5.....	5
11 D.C.M.R. § 3100.1.....	31
11 D.C.M.R. § 3100.2.....	24, 26, 31
11 D.C.M.R. § 3103.2.....	31
11 D.C.M.R. § 3112.....	31
11 D.C.M.R. § 3112.2.....	16, 18
11 D.C.M.R. § 3112.10.....	30
11 D.C.M.R. § 3113.....	31
11 D.C.M.R. § 3125.9.....	7
11 D.C.M.R. § 3130.3.....	31
11 D.C.M.R. § 3130.5.....	28, 31, 32
11 D.C.M.R. § 3200.1.....	25
11 D.C.M.R. § 3202.4.....	27, 28, 29, 30, 31, 32
11 D.C.M.R. § 3202.6.....	27
12 D.C.M.R. § 103.1.....	25
12 D.C.M.R. § 105.3.3.....	30
12 D.C.M.R. § 105.5.....	26
12 D.C.M.R. § 105.5.1.....	30
12 D.C.M.R. § 105.6.....	25, 27
12 D.C.M.R. § 105.6.1.....	21
12 D.C.M.R. § 112.1.....	23, 24
12 D.C.M.R. § 3200.2.....	23

Other Authorities

4 Edward H. Ziegler, Jr., Arden H. Rathkopf & Daren A. Rathkopf, <i>Rathkopf's The Law of Zoning and Planning</i> § 70:20 (4th ed.).....	37
Black's Law Dictionary 877 (7th ed. abridged, 2000).....	22
Lisa Gartner, <i>DCPS Receives Record Number of Applications</i> , Washington Examiner, Mar. 14, 2011	1
Mark S. Dennison, <i>Zoning: Proof of Vested Right to Complete Development Project</i> , 35 Am. Jur. Proof of Facts 3d 385 (updated 2011).....	37
<i>Random House Webster's Unabridged Dictionary</i> 436 (2d ed. 2001).....	29
Zoning Comm'n Order No. 06-43A (July 27, 2009).....	32

I. INTRODUCTION

AppleTree Institute for Education Innovation, Inc. is a Washington, D.C.-based not-for-profit corporation that has created and supported several successful education programs, including public charter schools, in the District of Columbia since 1996. AppleTree focuses on providing free, pre-literacy education to disadvantaged three- and four-year-old children. In so doing, it helps fill a critical need: The District of Columbia ranks last in reading achievement among urban school districts. Nine out of every ten fourth graders cannot read at grade level; seven out of ten cannot read at even a basic level. The D.C. Partnership for Early Literacy Program estimates that AppleTree saves the District over \$8.1 million each year by reducing the number of students who begin kindergarten as special education learners.

For more than half a decade, AppleTree has endeavored to improve a commercial building located on its property at 138 12th Street, N.E. (the “Property”) for use as a public preschool. The preschool will serve approximately 60 children and will create 13 high-quality jobs in the District. The public need for the preschool is extreme. Ward 6, where AppleTree is located, is one of the fastest growing but most scholastically underserved areas in the District. *See McCarthy Affidavit ¶ 9 (Ex. 1).* Peabody Elementary School, which is located just blocks from the Property, received 519 preschool applications this year for just 30 openings. *See Lisa Gartner, DCPS Receives Record Number of Applications, Washington Examiner, Mar. 14, 2011 (Ex. 2).* Although AppleTree has been beset by years of litigation and has not yet opened its preschool at the Property, it received more than 240 applications for the 60 seats that will be available to the school’s students. *See McCarthy Affidavit ¶ 28 (Ex. 1).*

This appeal marks the *fourth* time that this Board has been asked to stop AppleTree from completing its project and providing needed educational opportunities to young children. A

small group of individuals object to having a school in their neighborhood, and they have waged a persistent campaign to prevent AppleTree from opening its preschool to serve the children of the neighborhood and the District, even though the Property was indisputably zoned for that use when AppleTree purchased it. Those activists have exerted their influence to secure two amendments to the Zoning Regulations that were calculated to derail AppleTree's improvements to the Property. They filed two civil lawsuits in D.C. Superior Court to enjoin the project. They pressured officials of the District of Columbia to deny AppleTree's application for a building permit and then to revoke the permit after it was properly issued. And they have appeared before this Board in three prior appeals in opposition to the project.

Although they imposed massive costs on AppleTree and delayed the opening of the preschool for many years, these antagonists ultimately have failed in their every effort to defeat the project and keep a much-needed preschool out of the neighborhood. This Board twice ruled that AppleTree's construction plans comply with all applicable Zoning Regulations; the District's Department of Consumer and Regulatory Affairs ("DCRA") issued AppleTree's building permit (Permit No. 89589 / B1010205, the "Permit"); DCRA expressly declined to revoke the Permit on two occasions; and the D.C. Superior Court dismissed the first civil lawsuit against AppleTree and denied a motion to enjoin the construction in the second suit (which is awaiting decision on a pending motion to dismiss). In December 2010, the local Advisory Neighborhood Commission, ANC-6A—which is an appellant in this proceeding—voted to support AppleTree's project and withdraw the third appeal to this Board.

The twin appeals that are now before this Board were filed by ANC-6A (in yet another change of position on the project now that its membership has once again changed) and a small group of nearby property owners calling itself Northeast Neighbors for Responsible Growth

(“NNRG”) in a last-ditch effort to scuttle AppleTree’s preschool in the final days before its construction is complete. As with all of the challenges raised by these opponents of early childhood education over the last six years, these appeals are meritless.

Several fatal procedural defects compel the dismissal of both appeals. *First*, the appeals were time-barred long before they were filed. Both appeals raise exactly the same zoning arguments that this Board has rejected twice before, except that they now contest DCRA’s decision to extend AppleTree’s construction deadline on September 17, 2010. That challenge was required to be asserted no later than November 18, 2010, but ANC-6A and NNRG failed to appeal until April 21, 2011, and April 22, 2011, respectively. ANC-6A, in particular, not only missed its deadline, but deliberately forfeited its challenge to the extension in December 2010, when it *voted to support AppleTree’s project and withdrew an appeal it had previously filed to contest the very same permit extension*. *Second*, the administrative action that Appellants purport to challenge in a transparent effort to evade default—namely, DCRA’s withdrawal of a non-final revocation notice—is not appealable. That action merely confirmed DCRA’s prior decision that the permit is valid, and it is well settled that such subsequent affirmations of earlier administrative decisions are not appealable. *Third*, Appellants’ challenges are beyond this Board’s subject-matter jurisdiction because they concern the Construction Codes, and this Board’s authority is limited to reviewing applications of the Zoning Regulations.

Even if Appellants’ arguments could be heard by this Board, those arguments are meritless. Appellants fail to establish that AppleTree’s permit has expired under any of their assorted and conflicting interpretations of the Construction Codes and Zoning Regulations.

Finally, firmly established principles of equity entitle AppleTree to complete its preschool. Any applicable construction deadlines were tolled during Appellants’ unremitting

campaign to obstruct this project, which delayed AppleTree's ability to obtain construction financing. Furthermore, AppleTree indisputably holds a construction permit that is valid on its face through September 17, 2011. After years of litigation and hundreds of thousands of dollars in costs, AppleTree is entitled to rely on that permit and has a vested right to complete its preschool. The District is estopped from impeding that right, even through orders of this Board.

Today, AppleTree's preschool construction is almost complete. AppleTree enrolled students to fill all 60 of the available seats in the preschool, and it presently expects to have full enrollment at the time of its October 2011 enrollment audit. *See* McCarthy Affidavit ¶ 29 (Ex. 1). AppleTree began providing full-day, early education to its students in temporary classrooms on August 22, 2011. *Id.* ¶ 30. AppleTree anticipates that before the end of September, those preschoolers will be learning to read at their new desks at the Property, so that they can grow up to be responsible members of our community. *Id.* ¶ 31. These final appeals should be rejected so that AppleTree can fulfill its vital educational mission.

II. BACKGROUND

Through no fault of AppleTree's, the construction of this preschool has turned into one of the most contentious zoning battles in District history. For the Board's convenience, AppleTree has provided a chronology and timeline of significant events. *See* Appendix. The facts necessary to understanding these final appeals are set out below.

A. AppleTree Purchased Property That Was Zoned For Use As A Preschool

AppleTree's Property is situated in an R-4 zone between homes on a primarily residential street, but it has been used for non-residential purposes at least since the enactment of the Zoning Regulations. *See* BZA Appeal No. 17532 of AppleTree Instit. for Educ. Innovation, Inc., at 2 (July 25, 2007) (Ex. 3). The Property is improved with a building "constructed sometime in the

19-teens, first appearing in city directories in 1916 when it . . . functioned as an office facility.” Historic Pres. Rev. Bd. Report, at 1 (Dec. 15, 2005) (Ex. 4). On May 12, 1958, the effective date of the modern Zoning Regulations, the Property was used as an office facility for a heating-oil company. *See* Ex. 3 at 2. In the mid-to-late 1960s, the Property was used as an office facility for a hospice, and the Knights of St. John and the Women’s Auxiliary operated a private club there beginning in 1969. *Id.* At some point, the building was vacated and fell into disrepair.

AppleTree purchased the Property on July 2, 2005, after DCRA officials orally advised AppleTree that the Property would be suitable for matter-of-right use as a public charter school after being renovated. At the time of purchase, of-right uses included not just a school, but also a needle-exchange facility and a halfway house. *See* 11 D.C.M.R. § 330.5. Since it purchased the Property, AppleTree has intended to improve the structure on it for use as three classrooms, renovating the existing building and constructing a three-story addition with a basement. *See* BZA Appeal No. 17769 of ANC-6A, at 2–3 (Dec. 28, 2010) (Ex. 5).

In an effort to address any legitimate concerns of neighborhood residents, AppleTree undertook an active outreach effort, meeting with nearby neighboring property owners and ANC-6A to discuss the proposed project. In response to their comments, AppleTree voluntarily revised its construction plans to ensure that the footprint of the building would extend into its lot no deeper than the shallowest of its two neighboring structures, and the third story of its planned addition would not be visible from the street. On December 15, 2005, the Historic Preservation Review Board voted 9-1 to approve AppleTree’s plans with minor modifications. *See* Ex. 6.

B. This Board Rejected Attempts To Block Zoning Approval For Improvements To The Preschool

Before AppleTree even applied for a building permit, ANC-6A first took the position that the proposed use of the Property as a public charter school was not an “of right” use under the

Zoning Regulations. *See* Letters from ANC-6A to DCRA (Exs. 7 & 8). That position was contrary to all applicable authorities, as AppleTree explained to the Zoning Administrator. *See* Exs. 9 & 10.

Since AppleTree indisputably was entitled to a building permit under the existing Zoning Regulations, opponents of the project set out to change the regulations. On December 16, 2005—the day after the Historic Preservation Review Board approved the project—the Office of Planning stated that it “inten[ded] to do a set of zoning regulations which will define charter schools as public schools for zoning purposes, but will also revise the regs that apply to all public schools in terms of separation from residential units, rear and side yards, lot occupancy, parking, etc.” Ex. 11 at 1. A contemporaneous e-mail confirms that “[t]he specific case the [Zoning] Commission is considering involves 138 12th St., N.E.”—the Property at issue here. *Id.*

On February 2, 2006, NNRG filed a lawsuit against the District of Columbia in the D.C. Superior Court, seeking to enjoin the District from issuing a building permit to AppleTree. *See* Ex. 12. NNRG later amended its complaint to add AppleTree as a defendant. *See* Exs. 13 & 14.

On February 9, 2006, AppleTree filed its building permit application. *See* Ex. 15. Four days later, the Zoning Commission, on the recommendation of the Office of Planning, promulgated Order No. 06-06, which approved the proposed changes to the zoning rules on an “emergency” basis for the purpose of retroactively prohibiting AppleTree’s construction. On April 28, 2006, the Zoning Administrator denied AppleTree’s application, asserting that AppleTree’s proposed project failed to meet three new requirements set forth in Order No. 06-06 related to minimum lot area, lot width, and parking spaces. *See* Ex. 16.

AppleTree vigorously defended its right to develop the Property. It filed a motion to dismiss NNRG’s civil lawsuit in the Superior Court, and it filed a timely appeal with this Board

challenging the Zoning Administrator's denial of its permit application. *See* Ex. 17. ANC-6A moved to intervene in AppleTree's appeal to this Board and was granted party status. *See* Ex. 18 at 244–45.

It quickly became clear that the various challenges to AppleTree's Permit were without merit. On June 6, 2006, the D.C. Superior Court dismissed NNRG's lawsuit on numerous grounds, including that NNRG "failed to make any showing that [either economic or non-economic] injuries [were] likely to occur." Ex. 19. On January 9, 2007, the Board voted 4-1-0 to reverse the Zoning Administrator's denial of AppleTree's permit application. *See* Ex. 20 at 71. On July 25, 2007, this Board published its order, holding that the Zoning Administrator had erred in each of his three conclusions and that AppleTree's permit application was in compliance with all applicable Zoning Regulations, including the amendments. *See* Ex. 3. The Board held that the amended lot requirements did not apply to AppleTree's permit application and that no additional parking spaces were required. *See id.* at 7–9. The Board noted that it "has carefully considered the issues and concerns stated in the written report of the ANC and . . . finds them unpersuasive." *Id.* at 10. The order became effective on August 6, 2007. *See* 11 D.C.M.R. § 3125.9.

DCRA, which had suspended its review of AppleTree's application pending the outcome of the Board's proceeding, resumed that review after AppleTree prevailed. An experienced zoning technician in the Office of the Zoning Administrator approved AppleTree's application for zoning compliance on August 7, 2007. *See* Ex. 21.

ANC-6A, together with other opponents of AppleTree's project, then redoubled their attacks. On August 9, 2007, ANC-6A wrote this objection to the Zoning Administrator:

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. . . .

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.

Ex. 22 (emphases added). On August 23, 2007, following additional review, the Zoning Administrator personally approved AppleTree's application again. *See* Exs. 23 & 24.

ANC-6A also moved for reconsideration of this Board's decision, arguing that the Board had incorrectly construed the amendments adopted by Order No. 06-06. *See* Ex. 25. This Board held another public hearing on August 17, 2007, and after lengthy discussion it denied ANC-6A's motion. *See* Ex. 26. Several members of the Board made a point of explaining the care with which they had considered ANC-6A's arguments. *See, e.g., id.* at 97-99. Chairperson Miller summarized the issue in this fashion:

I would like to say that I recognize the hard work that the ANC has done and their great concern with this issue and their obvious frustration with the process. What I want to clarify is that we don't make decisions on the basis of what we would like the outcome to be. We, as a Board, are obliged to apply the law as we understand it and in the long run, I think it is adherence to the law is what is in the public interest. [¶] I will just say that . . . for the ANC's benefit, because I want them to realize that that's what we're doing. We're interpreting the regulations the way we truly believe we are required to do under the legal standards.

Id. at 102-03. The Board voted 3-0-2 to again reject all the arguments that ANC-6A saw fit to make in opposition to the project. *Id.* at 103.

By August 31, 2007, all required disciplines had approved AppleTree's application, authorizing the Permit to be granted. DCRA's designated representative testified that he could identify no reason why AppleTree's Permit was not granted at that time. *See* Ex. 27 at 108-09.

C. AppleTree Obtained A Construction Permit To Make The Improvements

Having failed in their first attempt to change the rules of the game in mid-play, opponents of AppleTree's project set out to revise the Zoning Regulations again and persuaded the Zoning Commission to consider further amendments. The Commission Chair acknowledged that "[t]he origin of [these additional amendments] was the AppleTree appeal of their building permit." Ex. 28 at 140. The Zoning Commission proceeded to adopt the amendments in Order No. 07-03, which took effect on September 14, 2007. *See* Exs. 29 & 30.

Before the new amendments took effect, several neighbors petitioned the D.C. Court of Appeals to review this Board's order, and ANC-6A was copied on all court filings. On September 7, 2007, NNRG attempted to stall AppleTree's project by seeking stays of the Board's order both from the Board and from the Court of Appeals. *See* Ex. 31. The D.C. Court of Appeals denied the motion to stay on September 21, 2007. *See* Ex. 32. On October 23, 2007, this Board likewise denied NNRG's motion to stay its order. *See* Ex. 33. The Board concluded that NNRG's motion for stay "fail[ed] to satisfy any of the four prongs of the test required for the granting of a stay," as, among other things, NNRG did not address the likelihood of success on the merits. *Id.* at 2.

After Zoning Commission Order No. 07-03 became effective, the neighbors moved to dismiss their appeal to the D.C. Court of Appeals, claiming that the amendments mooted this Board's decision. *See* Ex. 34. AppleTree filed a response explaining that:

Because the amendments . . . did not take effect until September 14, 2007, they do not apply to AppleTree's application. "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." 11 D.C.M.R. § 3202.6. The BZA's order authorizing the issuance of a building permit to AppleTree Institute was promulgated on July 25, 2007 and became final and effective on August 6, 2007. *See* 11 D.C.M.R. § 3125.9. Thus, any subsequent amendments to the Zoning Regulations—including the

amendments effective September 14, 2007—do not apply to the application at issue.

Ex. 35 at 2. AppleTree further pointed out that “[i]f the Court . . . dismisses the appeal, [the neighbors] will have forfeited any opportunity to obtain judicial review of the BZA’s order authorizing issuance of the permit.” *Id.*

On October 26, 2007, DCRA, having thoroughly examined AppleTree’s project, issued a construction permit allowing AppleTree to improve the property (the “Permit”). *See* Ex. 36. The Court of Appeals dismissed the petition for review on November 8, 2007. *See* Ex. 37. After more than 18 months of vigorous litigation—before this Board and the District’s court system—the path appeared clear for AppleTree’s construction. But only for a moment.

D. This Board Rejected A New Wave Of Challenges To The Project

On November 15, 2007—less than three weeks after the Permit was granted—DCRA issued a notice stating that it intended to revoke AppleTree’s Permit due to an error in its review process. *See* Ex. 33. In particular, DCRA represented, it had issued the Permit before it completed zoning and environmental reviews.

On December 24, 2007, ANC-6A initiated a new round of litigation before this Board, this time alleging that DCRA erred in its decision to grant Zoning and Environmental Disciplines to AppleTree and challenging DCRA’s review of the environmental impact the school would have on the Property and the Property’s compliance with District lot size and width requirements. *See* Ex. 39.

In early 2008, AppleTree conducted an additional environmental study of the Property at DCRA’s request, and on March 28, 2008, the D.C. Department of the Environment (“DDOE”) completed its review and informed DCRA that it “d[oes] not have any environmental objection to allowing construction of the project to move forward.” Ex. 40. The D.C. Office of the Zoning

Administrator also conducted an additional review in light of the opponents' complaints, and it concluded once again, on April 28, 2008, that the Permit satisfied all applicable zoning requirements. *See id.*

Following these additional approvals, DCRA determined that there was no basis to revoke the Permit. On April 28, 2008, DCRA withdrew the notice of revocation and expressly "confirm[ed] the validity of the Permit *nunc pro tunc*." *Id.*

Unsurprisingly, *neither ANC-6A nor the NNRG attempted to appeal DCRA's April 2008 withdrawal of its own revocation notice.* Despite their repeated efforts to scuttle AppleTree's preschool, it was abundantly clear that DCRA's decision was non-appealable because it resulted in no change to the status of AppleTree's Permit: DCRA had issued a notice of its intent to take an action that it never took. The Permit thus stood, unchanged in its status and decidedly valid as of the date of its issuance.

On December 28, 2008, this Board issued an order rejecting ANC-6A's second appeal and affirming the validity of AppleTree's Permit for a third time. *See Ex. 5.* This Board "was not persuaded by the Appellant that an error occurred in any decision made in the administration of the Zoning Regulations with respect to the approval of AppleTree's application for a building permit and the issuance of Building Permit No. 89587." *Id.* at 6. The Board held, yet again, that AppleTree's Permit was not subject to the amended lot requirements because AppleTree was entitled to rely on an exception to those requirements that was fully applicable at the time the Board authorized its Permit. *See id.* at 6–7.

Throughout this litigation, AppleTree's opponents had successfully stalled the school's construction, even though their legal challenges were meritless. The uncertainty they created also prevented AppleTree from obtaining needed financing. To ensure that its Permit would not

lapse during these delays, AppleTree made timely applications to extend the deadline for its construction, each time before the existing deadline had passed. On September 21, 2009, AppleTree obtained an extension of the Permit while it secured a Qualified School Construction Bond and additional financing and support. *See* Ex. 41. On September 17, 2010, AppleTree obtained another extension—valid through September 17, 2011—to secure additional financing and construction bonds. *See* Ex. 42. In the meantime, AppleTree has made significant investments in the project and continued its efforts to complete its construction.

E. ANC-6A Withdrew A Third Appeal To This Board After Deciding To Support The Preschool, And NNRG Failed In Its Effort To Enjoin The School's Construction

On November 15, 2010, ANC-6A initiated a third appeal with the Board regarding this same preschool project. This appeal challenged DCRA's decision to renew the Permit on September 17, 2010. *See* Ex. 43. This time, however, community support for AppleTree's neighborhood school prevailed. ANC-6A reconvened to consider the appeal, and on December 9, 2010, it withdrew its appeal. *See* Ex. 44. The commissioners explained: "While there has been much discussion regarding the location of [AppleTree's] school, please know that with this vote, the *commission signals its support for providing expanded early childhood options for our community.*" *Id.* (emphasis added).

Further demonstrating community support for the preschool project, the District of Columbia government was instrumental in financing the project through a Qualified School Construction Bond that closed on November 23, 2010, and an accompanying Qualified Zone Academy Bond and grant from the D.C. State Superintendent for Education. *See* Exs. 45 & 46. Through these financing vehicles and grants, AppleTree ultimately secured \$4.5 million in funds from the District of Columbia to support the construction and startup of its preschool. *See* McCarthy Affidavit ¶¶ 12–14 (Ex. 1).

By December 2010, AppleTree had invested nearly \$200,000 on architectural and engineering plans, and its contractor, Turner Construction, had completed demolition work throughout the property and was prepared to implement those plans. AppleTree also had paid over \$96,000 in property taxes and \$82,000 in insurance fees. *See id.* ¶ 22.

On December 22, 2010, David Holmes, one of ANC-6A's commissioners, advised AppleTree's construction foreman that DCRA had once again issued a notice that it would revoke AppleTree's permit (the "Revocation Notice"). *See id.* ¶ 25. The Revocation Notice was accompanied by a Stop Work Order requiring AppleTree temporarily to halt its ongoing construction. *See Ex. 55.* AppleTree had not received the notice or order previously because they were incorrectly addressed. AppleTree immediately appealed to DCRA's Office of Administrative Hearings ("OAH"). *See Ex. 47.*

On February 24, 2011, DCRA confirmed the validity of the Permit and withdrew the Revocation Notice, expressly noting that "DCRA confirms that Building Permit No. B1010205, issued on September 17, 2010, is valid and has not lapsed, *nunc pro tunc.*" *Ex. 48.* Accordingly, the Permit was not revoked. Following DCRA's withdrawal of the Revocation Notice, neither ANC-6A nor NNRG filed appeals to OAH.

Without the support of ANC-6A, NNRG and two of its self-described "members" resorted again to civil litigation, filing another lawsuit against DCRA and AppleTree in D.C. Superior Court on March 15, 2011. They claimed that AppleTree's Permit had expired, and they moved for a temporary restraining order to halt AppleTree's construction. *See Ex. 49.* Their complaint largely repeated the claims that were dismissed in the first lawsuit they filed in 2006.

AppleTree and the District of Columbia opposed the motion for a temporary restraining order and moved to dismiss. *See Ex. 50.* The court denied the plaintiffs' motion, explaining that

it disagreed “that there is a substantial likelihood of success on the merits for the plaintiffs.” Ex. 51, at 42. The court further observed that “[t]he issues we have in this case have been presented to appropriate administrative agencies over the years and they have consistently decided . . . against the plaintiffs.” *Id.* The motions to dismiss remain pending.

At this point (the spring of 2011), AppleTree had prevailed in two appeals before this Board, won community support resulting in the dismissal of a third, obtained dismissal of a civil lawsuit in D.C. Superior Court, defeated a motion to enjoin its construction in a second civil lawsuit, and overcame the many financing hurdles occasioned by all this obstruction. AppleTree thus proceeded vigorously to complete construction in time for the fall 2011 school year, incurring substantial costs to expedite the work that had been delayed.

AppleTree’s renovations are now underway and are just days from completion. At the time of this submission, AppleTree already has enrolled students in the preschool and is teaching them in temporary classrooms that are available for a limited time. *See* McCarthy Affidavit ¶¶ 29–30 (Ex. 1). Thirteen full-time employees are educating these students, including nine teachers, a site administrator, an instructional administrator, and two teaching assistants. *See id.* ¶ 34. AppleTree also has arranged and signed a host of contracts with service providers that will work at the school. *See id.* ¶ 35. AppleTree expects that construction will be complete and its five dozen preschoolers will be in their new classrooms within days of the hearing scheduled before this Board. *See id.* ¶ 31.

F. Appellants Filed The Instant Appeals

ANC-6A filed its instant appeal on April 21, 2011, and NNRG filed a nearly identical appeal the next day. Both appeals challenge DCRA’s decision to extend AppleTree’s Permit deadline in September 2010. *See* NNRG Statement of Applicant at 2 (arguing that DCRA granted extension in violation of the Construction Codes); ANC-6A Statement of Applicant at 1

(same). Although the appeals purport to challenge DCRA's interpretation of the Construction Codes, *see id.*, neither ANC-6A nor NNRG raised that challenge to OAH. The appeals are virtually identical to the one ANC-6A previously filed and then dismissed on December 9, 2010. *See Ex. 43.*

III. ARGUMENT

These appeals—the latest in a long series of meritless claims whose sole aim is to prevent AppleTree from opening a neighborhood preschool to teach young children from the community how to read—should be dismissed.

Appellants' challenge to DCRA's September 2010 decision to extend AppleTree's Permit comes too late. The Appellants were not only aware of that administrative decision when it occurred, but ANC-6A actually challenged it in an appeal that it later dismissed. Not surprisingly, ANC-6A and NNRG now attempt to recast their arguments to claim that DCRA should have revoked the Permit at a later time. Their efforts to disguise the nature of their claims, however, cannot conceal the fact that those claims expired—and were deliberately forfeited—long before they were asserted.

The time bar is not the only procedural defect that compels dismissal of these appeals. First, there has been no administrative action from which an appeal can be taken. When DCRA decided that it had no basis to revoke AppleTree's Permit in February 2011, it merely confirmed its earlier decisions to grant and extend the Permit. DCRA's affirmation of its previous decisions is not appealable. Second, ANC-6A and NNRG impermissibly challenge DCRA's application of the Construction Codes. Such challenges can be raised only to OAH. Appellants waived those challenges and cannot revive them in appeals to this Board, whose jurisdiction is confined to the Zoning Regulations.

The appeals are just as flawed on the merits as on the rules of procedure. Their belated contentions about why AppleTree's Permit should not have been extended rest on a cascade of factual and legal inaccuracies. Remarkably, NNRG filed a brief arguing in one breath that AppleTree was required to *begin* construction within two years of the Permit's issuance and in another that AppleTree's Permit expired because construction was not *completed* within that time. *See* NNRG Br. at 3–4. The same brief observes on its second page that AppleTree's Permit was issued on October 26, 2007, and then baselessly contends two pages later it was issued on February 9, 2006. *See id.* Inconsistencies aside, all of Appellants' arguments lack merit, and AppleTree is in any event equitably entitled to complete the preschool it has so nearly built after a half a decade of vexatious obstructionism.

This Board should hold, as it has held three times before, that AppleTree is authorized to complete its project, thereby allowing the doors of its preschool to open this month.

A. The Appeals Are Procedurally Defective

1. The Appeals Are Time Barred

Section 8 of the Zoning Act authorizes appeals of any decision “granting or refusing a building permit . . . based in whole or in part upon any zoning regulation.” D.C. Code § 6-641.07(f). An appeal must be filed within 60 days from the date the appellant “had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.” 11 D.C.M.R. § 3112.2(a). “Timeliness is jurisdictional and if an appeal is untimely filed, the Board is without power to hear it.” BZA Appeal No. 17966-A of Stephen Bruce, at 2 (July 13, 2010); *see also* BZA Appeal No. 18070 of ANC-6B, at 4 (June 15, 2010) (“The Board lacks jurisdiction to hear any appeal that is not filed in a timely manner”); *Waste Mgmt. of Md., Inc. v. D.C. Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121 (D.C. 2001).

The instant appeals hinge entirely on Appellants' challenge to DCRA's decision to extend AppleTree's Permit on September 17, 2010. *See, e.g.*, ANC-6A Statement of Applicant at 2 (claiming that under "a correct application of DCMR Title 12" the Permit was "not eligible to be extended beyond [September 2010]"); NNRG Statement of Applicant at 3 (same). Their challenge to this extension is a necessary and indispensable predicate to their other arguments, because their sole contention under the Zoning Regulations is that AppleTree's project does not meet the lot-size and lot-width requirements set forth in the *current version* of 11 D.C.M.R. § 401.3. *See* ANC-6A Statement of Applicant at 2; NNRG Statement of Applicant at 5. The expiration of AppleTree's Permit is vital to that argument because this Board has repeatedly held that AppleTree is entitled to rely on an exception to the current version of those requirements. *See* BZA Appeal No. 17532 of AppleTree Instit. for Educ. Innovation, Inc., at 6–7 (July 25, 2007) (Ex. 3); BZA Appeal No. 17769 of ANC-6A, at 7 (Ex. 5).¹ If Appellants contend the applicability of the current regulation has changed, then they necessarily contend that the Permit expired and must be sought anew, pursuant to new rules.

¹ As this Board explained in rejecting this very same challenge to this very same preschool, before February 13, 2006, "the minimum lot area for a public school (defined to include charter schools) in an R-4 zone" was "4,000 square feet . . . , and the minimum lot width" was "40 feet." BZA Appeal No. 17769 of ANC-6A, at 3 (Ex. 5). Both Appellants concede that AppleTree's school satisfies those requirements. In Order No. 06-06, the Zoning Commission increased the lot area and width requirements, subject to an important exception: structures that were built on or before May 12, 1958 and that complied with the other Zoning Regulations could be enlarged or replaced without regard to the new requirements. *Id.* at 4 (citing the former version of 11 D.C.M.R. § 401.1). AppleTree's opponents secured a subsequent amendment to the Zoning Regulations in an effort to eliminate that exception (*see* Zoning Commission Order No. 07-03), but the amendment did not take effect until September 14, 2007. By that time, this Board had already issued an order authorizing AppleTree's Permit. *Id.* at 7. Since permit applications are processed in accordance with the Zoning Regulations in effect on the date of this Board's orders authorizing them, AppleTree was entitled to rely on the exception and was not required to meet the amended (and enlarged) lot requirement. *Id.* at 7 (citing 11 D.C.M.R. § 3202.6).

Consequently, despite its tactical attempt at diversion, NNRG's brief in support of its appeal hinges on the contention that DCRA incorrectly issued an extension of the Permit through September 17, 2011. *See* NNRG Br. at 2–5.² Moreover, the “Discussion” portions of both Appellants’ Statements focus entirely on contesting the validity of DCRA’s permit extension. *See* ANC-6A Statement of Applicant at 2; NNRG Statement of Applicant at 2–6.

But that train has left the station. Appellants’ right to contest DCRA’s extension decision, which was made on September 17, 2010, was extinguished sixty days later—on November 18, 2010. *See* 11 D.C.M.R. § 3112.2(a). Yet ANC-6A failed to appeal until April 21, 2011, and NNRG failed to appeal until April 22, 2011. Appellants’ arguments about permit expiration have thus themselves expired.

Appellants, who have followed this project closely over the years and had actual notice of DCRA’s action, had every opportunity to appeal soon after DCRA extended AppleTree’s Permit in September 2010. In fact, ANC-6A initially *did* appeal the extension to this Board on November 15, 2010. Its arguments mirrored those that are before this Board now. *See* Ex. 43 (claiming that DCRA erred in extending the Permit). On December 9, 2010, however, ANC-6A decided against pursuing its challenge. It withdrew the appeal, pledged support for AppleTree’s preschool project, and forfeited any right to contest the Permit extension. *See* Ex. 44.

Having blown the jurisdictional deadline for appeal—and, in ANC-6A’s case, having deliberately forfeited its challenge—Appellants cannot contest the validity of DCRA’s Permit extension now. If they attempt to do so, their appeals should be dismissed as time-barred. If

² As explained in Part III.A.2, *infra*, NNRG’s repeated assertion that DCRA made a “determination” that the Permit expired is a misrepresentation of historical fact. NNRG Br. at 3–5. DCRA made a determination to issue a notice of its intent to revoke AppleTree’s Permit, subject to AppleTree’s right to appeal. AppleTree did appeal, and DCRA then made a determination that there was no basis for revocation. The Permit thus was never revoked, and its legal status was never changed.

they do not, their zoning argument is doomed for the same reason this Board rejected it before: the new lot area and width requirements do not apply to AppleTree's permit. BZA Appeal No. 17769 of ANC-6A, at 7 (Ex. 5). Either way, the appeals should be dismissed.³

2. Appellants Cannot Revive Their Stale Claims By Contesting A Non-Appealable Affirmation Of The Permit's Validity

Foreclosed from appealing DCRA's September 2010 extension of AppleTree's Permit, Appellants attempt to smuggle their stale claims into a superficially different argument, which they characterize as a challenge to DCRA's discretion to withdraw its Revocation Notice on February 24, 2011. This sleight of hand is unavailing to them. DCRA's withdrawal of the Revocation Notice merely affirmed the validity of the Permit; such a subsequent affirmation of an earlier administrative decision is not appealable.

An agency action is a "subsequent affirmation of an original zoning decision" if it does not "contain[] a 'new' zoning decision." BZA Appeal No. 17966-A of Stephen Bruce, at 2 n.2 (citing *Busken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 364–70 (D.C. 2008)). A new zoning decision is one that "change[s]" or "reverse[s]" an original decision more significantly than a simple "revision" or attendant communication. *Id.* at 2–3; *see also* BZA Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F, at 9–10 (March 11, 2003).

³ Appellants' claims are also barred by the doctrine of laches, which precludes them from inflicting prejudice on AppleTree through their unreasonable delays. *See, e.g., Goto v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 917, 925 n.16 (D.C. 1980); *Am. Univ. Park Citizens Ass'n v. Burka*, 400 A.2d 737, 740 (D.C. 1979). Appellants forestalled these appeals for seven months after DCRA extended AppleTree's Permit. Such delay was patently unreasonable, since they knew about the extension and AppleTree's subsequent construction efforts. *See Goto*, 423 A.2d at 926 (collecting cases); BZA Appeal No. 14110 of Residential Action Coal., at 8 (Mar. 28, 1984) (five-month delay unreasonable). AppleTree would unquestionably be prejudiced if their claims were not rejected. *See, e.g., Goto*, 423 A.2d at 926 (finding that prejudice has occurred where a party has commenced construction and undertaken financial commitments in reliance on the issuance of a building permit).

Only a new zoning decision gives rise to an appeal. Absent such a decision, “when an appeal challenges the grant or denial of a building permit . . . , no subsequent communication from DCRA may be appealed, including, but limited to, a refusal to issue a stop work order or take other enforcement action.” *Id.* at 10. This Board stated that rule unambiguously in *Herron* to ensure that permit holders could exercise their construction rights free from the risk that a later confirmation of those rights could put those very rights in jeopardy by opening the door to new appeals. *Id.* at 9. The Board, in fact, carefully examined and overruled its precedents to eliminate that fog of uncertainty from construction in the District of Columbia. *Id.* at 8–9 (overruling BZA Appeal No. 16764 of Darryl J. Grinstead, 49 DCR 5227 (2002); BZA Appeal No. 16849 of Robert Lehrman, 50 DCR 4055 (2003)).

This Board also made clear that DCRA’s confirmations of earlier decisions do not restart the 60-day deadline for appealing those earlier decisions. *Id.* at 9. “If such ‘re-starting’ were allowed there would be no certainty for a permittee, whose project could be halted at any point by an appeal of a subsequent affirmation of the initial permit issuance decision.” *Id.* at 9. Since DCRA could confirm the validity of a permit at any time, “a permit holder may never know when it is safe to proceed.” *Id.* Therefore, it is well settled that “[t]he 60-day period . . . starts to run from the date of the original decision, and subsequent decisions *reinforcing* that original decision . . . do not change that starting date.” BZA Appeal No. 17966 of Stephen Bruce, at 2 (emphasis in original); *see also Basken*, 946 A.2d at 367–68; BZA Appeal No. 16935 of Se. Citizens for Smart Dev., at 4–5 (May 6, 2003).

DCRA’s withdrawal of its Revocation Notice is a subsequent affirmation of the validity of the Permit because it does not contain a new zoning decision—it never changed the status of the Permit. The Construction Codes provide that:

Revocations [of building permits] . . . are *proposed actions* and *shall become final* . . . [i]f the permit holder fails to request a hearing from . . . the Office of Administrative Hearings within ten (10) business days of receipt of the notice of revocation . . . or the Office of Administrative Hearings . . . finds that grounds exist to revoke the permit as a result of a hearing requested by the permit holder

12 D.C.M.R. § 105.6.1 (emphases added). Accordingly, as OAH has explained, “[a] Notice to Revoke is nothing more than a proposed action.” *DCRA v. Frey*, No. 06-100027, 2007 WL 2198213, at 4 (D.C.O.A.H. April 24, 2007). It does not change the status of a permit and “become final unless affirmed after a hearing or the right to a hearing is waived.” *Id.*

AppleTree prevented its Permit from being revoked by filing a timely request for a hearing on the Revocation Notice before OAH. *See* Exs. 47 & 52 (granting AppleTree’s timely request for a hearing). In response to that request, DCRA examined the Permit and its history and determined, before the hearing convened, that there was no basis for revoking the Permit. DCRA accordingly confirmed that the Permit *remained* valid and withdrew the Revocation Notice. *See* Ex. 48. That decision effected no change to the status of AppleTree’s Permit; it merely maintained the *status quo*. *See Fourth Branch Assocs. v. FERC*, 253 F.3d 741, 746 (D.C. Cir. 2001) (“There is nothing definitive in an agency’s intending to do something, and an agency that has made ‘no final decision’ could not possibly have taken a final action.”).

As its letter withdrawing the Revocation Notice explained, “DCRA confirms that Building Permit No. B1010205, issued on September 17, 2010, is valid and has not lapsed, *nunc pro tunc*” Ex. 48. This language emphasizes that the withdrawal of the Revocation Notice merely validated—and did not change—DCRA’s original decision. Inclusion of the text “*nunc pro tunc*,” makes clear that AppleTree’s Permit remains exactly as it was at the time of DCRA’s original decision—its effective date unaltered, its scope unmodified, and the deadline for appeal

unchanged.⁴ DCRA's decision to withdraw the Revocation Notice consequently cannot be appealed. *See* BZA Appeal No. 17966-A of Stephen Bruce, at 2–3 (holding that a subsequent decision that “d[oes] not change” a permit “in [its] own right” is “not separately appealable”).

Nor does that decision enlarge the deadline for appealing DCRA's decision to extend AppleTree's Permit deadline through September 17, 2011. That deadline ran “from the date of the original decision” to grant the extension in September 2010, and it did not restart when DCRA subsequently “*reinforc[ed]* that original decision.” *Id.* at 2

The instant appeals are essentially identical to the appeal that this Board dismissed for lack of jurisdiction in its *Herron* decision. *See* BZA Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F, at 7–13. In *Herron*, a disgruntled neighbor and an ANC contested DCRA's issuance of residential building permits to a contractor. They argued that the permits did not comply with new Zoning Regulations “set down” by the Zoning Commission after the contractor filed its application for the permits. *Id.* at 1. Because the appellants had not timely appealed the issuance of the permits, they attempted to characterize their claims as challenges to DCRA's subsequent refusal to vacate the permits. *Id.* at 7. This Board squarely rejected that attempt to revive their time-barred arguments. “The Board does not find it in the interests of judicial economy or fairness,” it explained, “to allow an appeal of a second or subsequent determination on the same basic issue . . . at a point where the permittee has progressed beyond mere preparation.” *Id.* at 9. Thus, the Board ruled that appellants may never appeal DCRA's subsequent affirmations of its earlier decision to grant a permit, including by refusing to vacate that permit or take other enforcement actions. *See id.* at 10.

⁴ The phrase “*nunc pro tunc*” literally means “now for then.” It “signifies that there is to be a relation back to a designated past date and that the judgment and/or entry are to be given certain anterior effects.” *Weil v. Markowitz*, 829 F.2d 166, 175 n.18 (D.C. Cir. 1987); *see also* Black's Law Dictionary 877 (7th ed. abridged, 2000) (“Having retroactive legal effect”).

The tactic this Board rejected in *Herron* is exactly the same tactic that ANC-6A and NNRG are transparently employing here. Having sat on their rights (and in ANC-6A's case, *forfeited* its appeal) while AppleTree proceeded to build its preschool, Appellants' now seek to shoehorn a belated attack on AppleTree's Permit extension into their superficial challenge to DCRA's later refusal to revoke the Permit. The Board should dismiss these disingenuous appeals just as it dismissed the stale appeal in *Herron*.

3. The Board Lacks Jurisdiction To Decide The Appeals

"[T]he Board's jurisdiction is limited to hearing and deciding appeals 'where it is alleged by the Appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body in the carrying out or enforcement of *any regulation adopted pursuant to* the Zoning Act.'" BZA Appeal No. 17329 of Georgetown Residence Alliance (July 12, 2005) (quoting D.C. Code § 6-641-07(f)) (emphasis in original). "The Board has no jurisdiction to hear allegations of error concerning the DCRA's interpretation of a provision not contained in the Zoning Regulations." BZA Appeal No. 17444 of Kuri Bros., Inc., at 7 (Apr. 3, 2007); *see also* 12 D.C.M.R. § 3200.2. This Board has made that clear in this very litigation. *See* BZA Appeal No. 17769 of ANC-6A, at 6 (declining to consider the claim that DCRA misapplied environmental requirements in issuing AppleTree's permit because claim did not concern "compliance with the zoning regulations") (Ex. 5). Claims of error in the application or enforcement of the Construction Codes specifically "fall outside of the jurisdiction of this Board." BZA Appeal No. 17285 of Patrick J. Carome, at 6 n.3 (July 5, 2005); *see also* BZA Appeal No. 17276-B of Phillips Park, LLC, at 13–14 (Sept. 13, 2005). Such claims instead are heard by OAH. *See* 12 D.C.M.R. § 112.1; BZA Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F, at 12.

In an effort to avoid the time-bar that is fatal to their appeals, Appellants artfully characterize their challenge as an attack on DCRA's decision to withdraw the Revocation Notice. *See* ANC-6A Form 125; NNRG Form 125. Even if that characterization withstood scrutiny (and it does not), their appeals are defective. The withdrawal of the Revocation Notice, like the issuance of the Revocation Notice, was based solely on DCRA's interpretation of the Construction Codes—not the Zoning Regulations. The Revocation Notice states:

This action is taken pursuant to [D.C.M.R.] *Title 12A § 105.6*, which authorizes the code official to revoke a building permit when the permit was issued in error. Here, the *Construction Code* does not allow an extension of the existing building permit beyond a total of eighteen months from the original building permit. . . . Building Permit B1010205 erroneously extended the building permit beyond the maximum eighteen months of extensions and must be revoked.

Ex. 55 (emphasis added). This reasoning reflects only DCRA's decision to act under a Construction Codes provision to enforce a Construction Codes limitation. Appellants even admit that the "stated basis" for the Revocation Notice is its "application of [Construction Codes] Title 12 Chapter 105.5.1, Extension of Permit." *See* ANC-6A Statement of Applicant at 1; NNRG Statement of Applicant at 3. The withdrawal of the Revocation Notice likewise implicates the Construction Codes in reversing the reasoning and conclusions of the Revocation Notice. *See* Ex. 48. It nowhere relies on or reviews the Zoning Regulations.

Because the withdrawal of the Revocation Notice does not involve the "administration or enforcement of the Zoning Regulations," this Board lacks subject-matter jurisdiction to review it and should dismiss Appellants' appeals. 11 D.C.M.R. § 3100.2; BZA Appeal No. 18154 of Capitol Hill Restoration Soc'y (Jan. 4, 2011) ("Because [DCRA's] decision was not based in whole or part on any zoning regulation, the Board lacks subject matter jurisdiction to hear and decide this appeal and must dismiss it."). To challenge DCRA's withdrawal decision, Appellants would have had to appeal to OAH. *See* 12 D.C.M.R. § 112.1. That is exactly what the

Revocation Notice explains in its “Right To Appeal” section, *see* Ex. 55 (“You have the right to appeal . . . this Notice to the Office of Administrative Hearings”), and it is precisely what this Board and OAH have held in the past, *see, e.g.*, BZA Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F, at 12; *DCRA v. Frey*, No. 06-100027, 2007 WL 2198213, at 8–9 (D.C.O.A.H. April 24, 2007) (asserting “original jurisdiction to entertain requests for hearings concerning all Building Permit revocations”).

Furthermore, Appellants seek relief that is obviously beyond this Board’s jurisdiction to issue. Both Appellants expressly demand that this “Board ORDER the Department of Consumer and Regulatory Affairs to [d]eclare that [AppleTree’s] permit . . . expired. . . .” *See* ANC-6A Statement of Applicant at 3; NNRG Statement of Applicant at 6. This Board lacks authority to compel DCRA to take such a discretionary action. As the agency responsible for the enforcement of building requirements in the District of Columbia, *see* D.C. Code §§ 6-641.10, 6-1405.01; 11 D.C.M.R. § 3200.1; 12 D.C.M.R. § 103.1, DCRA has discretion under the Construction Codes to decide whether and when to revoke a building permit, *see* 12 D.C.M.R. § 105.6 (stating DCRA “is *authorized* to revoke a permit”—not *required* (emphasis added)). The exercise of this discretion “is a core executive responsibility which may reasonably be viewed as having been committed to agency discretion so as to preclude substantive judicial review.” *District of Columbia v. Sierra Club*, 670 A.2d 354, 360 (D.C. 1996); *see also District of Columbia v. Economides*, 968 A.2d 1032, 1036 (D.C. 2009). Appellants’ request for the Board to second-guess DCRA’s enforcement decisions and order the revocation of AppleTree’s Permit thus seeks relief that is beyond the Board’s power to grant. *See J.C. & Assocs. v. D.C. Bd. of Appeals & Rev.*, 778 A.2d 296, 309 (D.C. 2001); *Fedorov v. United States*, 600 A.2d 370, 376 (D.C. 1991) (en banc). Appellants simply want a “more robust enforcement” of the

Construction Codes “against their neighbors,” *Tucci v. District of Columbia*, 956 A.2d 634, 690 (D.C. 2008), in which they have no “judicially cognizable interest,” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767 n.13 (2005).⁵

B. DCRA Properly Withdrew Its Revocation Notice

Setting aside the fatal procedural defects in these appeals, Appellants are wrong on the substance: DCRA properly affirmed the validity of the Permit by withdrawing the Revocation Notice. Appellants’ scattershot of inconsistent arguments fail to show otherwise.

1. The Permit Is Valid Under Section 105.5 of the Construction Codes

Appellants argue that DCRA’s extension of AppleTree’s permit on September 17, 2010—which they decided not to appeal and are barred from appealing now—was improper under Section 105.5 of the Construction Codes (12 D.C.M.R. § 105.5). *See* ANC-6A Statement of Applicant at 2–3; NNRG Br. at 2–4. This argument would be meritless even if it were timely.

First, because Section 105.5 is a provision of the Construction Codes, this Board lacks jurisdiction to review its “administration or enforcement.” *See supra* Part III.A.3; 11 D.C.M.R. § 3100.2; BZA Appeal No. 17769 of ANC-6A, at 6 (Ex.5). Appellants’ claim should therefore be dismissed.

Second, DCRA’s exercise of its discretion to confirm the validity of AppleTree’s Permit forecloses Appellants’ claim that the extension of AppleTree’s Permit violates Section 105.5. The Construction Codes vest DCRA with the power to determine whether or not to revoke permits. According to Section 105.6 of the Construction Codes, a code official is “authorized,” but not required, “to revoke a permit” that does not comply with the requirements of the

⁵ It is well-established that “an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable. . . .” *York Apartments Tenants Ass’n v. D.C. Zoning Comm’n*, 856 A.2d 1079, 1084 (D.C. 2004) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575–76 (1992)).

Construction Codes or Zoning Regulations. 12 D.C.M.R. § 105.6. DCRA has previously exercised its discretion to uphold a permit that did not comply entirely with these requirements. *See Baskey*, 946 A.2d at 359–60 (noting that a code official refused to revoke a permit that failed to comply with the Zoning Regulations because revocation would work an injustice on the permit holder). Thus, even if Appellants’ interpretation of AppleTree’s construction deadline was correct—and it is not—DCRA has statutory authority to uphold the Permit nonetheless.

Regardless of what Appellants may argue about what DCRA was *authorized* to do as a result of AppleTree’s inability to commence construction earlier, Appellants do not—and cannot—deny what DCRA *decided* to do: uphold the Permit. *See* Ex. 48. Nor can they dispute DCRA’s unambiguous statutory discretion to do just that.

2. The Permit Is Valid Under Section 3202.4 Of The Zoning Regulations

Perhaps aware that they cannot appeal to this Board based on the Construction Codes, Appellants also assert that DCRA’s decision to withdraw the Revocation Notice violates Section 3202.4 of the Zoning Regulations (11 D.C.M.R. § 3202.4). *See* ANC-6A Statement of Applicant at 2; NNRG Br. at 3–4. This assertion fails. Because AppleTree’s Permit was authorized by an order of this Board, it is governed by the construction requirements of Section 3202.6—not Section 3202.4. *See* 11 D.C.M.R. § 3202.6; Appeal No. 17769 of ANC 6A, at 5–7 (holding Section 3202.6 controls the Permit and rejecting claim that Permit violates Section 3202.4) (Ex. 5). Even if Section 3202.4 applied, however, Appellants’ argument misconstrues that section’s established deadlines for construction and ignores operative tolling provisions. Although Section 3202.4 imposes a deadline for *beginning* construction work, the Zoning Regulations toll that deadline during the pendency of appeals challenging the validity of the permit authorizing that work.

Section 3202.4 states that a “permit holder shall begin construction work within two (2) years of the date on which the permit is issued. . . .” 11 D.C.M.R. § 3202.4(a). Appellants read this requirement to suggest that AppleTree needed to start building its preschool by October 26, 2009—two years after the initial issuance of its Permit—to preserve the validity of its Permit. *See* ANC-6A Statement of Applicant at 2–3; NNRG Statement of Applicant at 3–4. This reading, however, ignores the tolling provisions of the Zoning Regulations. Section 3130.5, for example, provides that: “[i]n the event an appeal is filed in a court of competent jurisdiction from an order of the Board, all time limitations in this section shall commence to run from the decision date of the court’s final determination of the appeal.” 11 D.C.M.R. § 3130.5. By tolling “all time limitations” during the pendency of subsequent challenges to a Board order authorizing a permit, Section 3130.5 ensures that a permit holder’s opponents cannot simply run out the clock on its permit through frivolous litigation.

Under Section 3130.5, the two-year deadline to begin construction under Section 3202.4 was tolled until the conclusion of the numerous legal challenges to the Board’s order to issue AppleTree’s Permit. These challenges, as discussed, included appeals by AppleTree’s opponents to the D.C. Court of Appeals and back to the Board itself.⁶ *See supra* Part II. The D.C. Court of Appeals did not dismiss the opponents’ challenge until November 8, 2007, *see* Order Dismissing Pet. for Rev., No. 07-AA-943 (D.C. Nov. 8, 2007) (Ex. 37), and the Board did not dismiss the duplicative appeal before it until December 28, 2008, *see* BZA Appeal No. 17769 of ANC-6A,

⁶ The Board is “a court of competent jurisdiction” for purposes of Section 3130.5. As a tribunal capable of staying and amending orders, rehearing arguments, and granting subsequent appeals, the Board has as much authority to alter or affirm its orders as any court. Proceedings before the Board, moreover, are no less disruptive to a permit holder’s ability to begin construction than appellate proceedings before a court. Indeed, the Board directly warned AppleTree that “a landowner who proceeds to erect a building while the issuance of a building permit is on appeal does so at his own risk.” BZA Appeal No. 17532-B of AppleTree Instit. for Educ. Innovation, Inc., at 2 (Sept. 5, 2008) (Ex. 33).

at 8 (Ex. 5). The two-year time limitation of Section 3202.4 thus could not even have begun to run on AppleTree's Permit until December 28, 2008.

Notably, appellant NNRG *concedes* in its brief that the deadline of Section 3202.4 was tolled until December 2010 for AppleTree's permit. *See* NNRG Br. at 4. In light of this concession, NNRG is left with no choice but to baldly misstate what Section 3202.4 says, indefensibly asserting that the regulation required AppleTree to *complete* construction by that tolled deadline, rather than merely *begin* construction. *See id.* This assertion is striking because it follows only two sentences after NNRG quotes the requirement of Section 3202.4 that a "permit holder shall *begin* construction work within two (2) years of the date on which the permit is issued." *Id.* at 3 (quoting 11 D.C.M.R. § 3202.4).

Under the only permissible reading of Section 3202.4, as tolled by Section 3130.5, it is obvious that AppleTree timely began "construction work" sufficient to vest its right to complete construction. 11 D.C.M.R. § 3202.4. The Zoning Regulations do not define the terms *construction*, *work*, or *construction work*. But they do state that "[w]ords not defined in this section shall have the meanings given in Webster's Unabridged Dictionary." 11 D.C.M.R. § 199.2(ε). That dictionary defines *construction* as "the act or art of" "build[ing] or form[ing] by putting together parts." *Random House Webster's Unabridged Dictionary* 436 (2d ed. 2001). And it defines *work* as "exertion or effort directed to produce or accomplish something." *Id.* at 2188. The regulatory term "construction work," therefore, denotes effort directed to produce or accomplish building.

AppleTree plainly exerted such effort on its school before December 28, 2010. As early as January 11, 2010, it began work in support of renovation efforts at the preschool, and by December 10, 2010, its contractor began demolition work. *See* McCarthy Affidavit ¶¶ 18–19

(Ex. 1).⁷ Before then, AppleTree spent nearly \$200,000 on architectural, engineering, and maintenance costs, and paid more than \$178,000 in property taxes and insurance fees. *See id.* ¶¶ 22–23. There thus is no question that AppleTree began work as required under Section 3202.4, ensuring its right to finish building its preschool.⁸

In any event, Appellants cite no basis for overturning the discretion DCRA exercised in confirming the Permit’s validity. As explained above, DCRA has power to uphold a Permit that does not comply completely with the Zoning Regulations, and Appellants can make no argument against the exercise of that power. *See supra* Part III.B.1. Appellants’ argument fails for this independent reason.

3. Section 3130.3 Of The Zoning Regulations Is Inapplicable To The Permit

Appellant ANC-6A does not assert in its statement of appeal that DCRA’s decision to withdraw the Revocation Notice violated Section 3130.3 of the Zoning Regulations. It thus has

⁷ Appellant NNRG is mistaken in asserting that “no construction was begun on the structure . . . until February 24, 2011.” NNRG Br. at 3. Indeed, as the members of NNRG and ANC-6A pursuing this appeal well know, AppleTree first received notice of the Revocation Notice and its associated Stop Work Order when Commissioner David Holmes delivered them to its construction foreman working at the preschool on December 22, 2010. *See* McCarthy Affidavit ¶¶ 20, 25 (Ex. 1).

⁸ Appellant NNRG also argues without support that Section 3202.4 requires AppleTree to comply with “the present version of the Municipal Regulations” because each extension of its permit represented an “amendment of the permit” that needed to meet the Zoning Regulations in effect on the date of the amendment. NNRG Br. at 4 (alluding to 11 D.C.M.R. § 3202.4(b)). This argument misstates the distinction between an *extension* of a permit and an *amendment* of a permit. Section 105.3.3 of the Construction Codes defines an “amendment to [a] permit” as a “revision of a building permit, accompanied by . . . revised plans or documents” that show a change in the building plan. 12 D.C.M.R. § 105.3.3. This is markedly different from an “extension of [a] permit,” defined in Section 105.5.1 of the Construction Codes, which merely extends the time to build under an established building plan. 12 D.C.M.R. § 105.5.1. The definition of an “amendment to a permit” makes clear that it is distinct from the “extension provisions of Section 105.5.1 [that] apply to [an] original building permit.” NNRG’s argument thus fails. AppleTree’s permit extensions were not amendments that required it to “comply with the provisions of [the Zoning Regulations] in effect on the date the permit is amended.” 11 D.C.M.R. 3202.4(b).

waived any complaint to that effect. *See* 11 D.C.M.R. § 3112.10; BZA Appeal No. 17444 of Kuri Bros., Inc., at 11 n.5 (Apr. 3, 2007) (noting the Board will not address arguments an appellant “do[es] not discuss” in its filings).

Appellant NNRG, however, does claim that DCRA’s decision to extend AppleTree’s Permit ran afoul of Section 3130.3. The Board should dismiss this claim. Section 3130.3 applies only to applications for zoning *variances* granted by the Board, not to permits—like AppleTree’s—authorized by a successful appeal of a zoning decision.

The Board has jurisdiction over two types of actions. First, it has “original jurisdiction to grant variances” from the Zoning Regulations. 11 D.C.M.R. §§ 3100.1, 3103.2. Second, it has jurisdiction to “hear and decide appeals” alleging agency error “in the administration or enforcement of the Zoning Regulations.” 11 D.C.M.R. § 3100.2. These actions have distinct sets of rules and procedures. *Compare* 11 D.C.M.R. § 3112 *with* 11 D.C.M.R. § 3113.

Section 3130.3 codifies a rule that applies only to Board orders granting variance applications. It requires “[t]he erection or alteration approved in [a] permit” authorized by the Board to begin “within six (6) months after the date of the issuance of the permit” and “proceed to completion in accordance with [the permit’s] terms.” 11 D.C.M.R. § 3130.3. This requirement expedites construction of variance projects, denying them the longer construction-initiation time frame allotted to projects that comply with the Zoning Regulations. *See* 11 D.C.M.R. §§ 3202.4, 3130.5. An expedited time frame for a variance project is necessary to ensure that it begins while the “extraordinary or exceptional situation or condition” on which the Board based its authorizing variance is unchanged. 11 D.C.M.R. § 3103.2. Allowing a longer time frame for variance projects could risk a change in conditions that might cause a granted variance to “impa[ir] the intent, purpose, and integrity of the zone plan. . . .” *Id.*

The concerns addressed by Section 3130.3 are not present in projects like AppleTree's, which the Board approves under its appellate jurisdiction. Authorization of these projects does not hinge on an "extraordinary or exceptional situation or condition," but rather stems from the Board's determination that the projects satisfy the Zoning Regulations, generally as a matter of right. *Id.*; BZA Appeal No. 17532 of AppleTree Inst. for Educ. Innovation, Inc. (Ex. 3). For this reason, permits approved through appeal to the Board—just like those approved in the first instance by DCRA—receive the benefit of the longer construction-initiation requirements provided in the Zoning Regulations. *See* 11 D.C.M.R. §§ 3202.4, 3130.5. There is no worry that a short-term change in project status or neighborhood surroundings will cause them to conflict with the zoning plan.

The Board's references to Section 3130.3 confirm its limited application to variances. The Board and Zoning Commission have discussed Section 3130.3 in only two orders. *See* Zoning Comm'n Order No. 06-43A (July 27, 2009); BZA Application No. 17562-A of W Street, S.E. 38-42-43, L.L.C. (June 23, 2009). Each of these orders involves a request by a variance recipient for a waiver of Section 3130.3. *See id.* In Order No. 06-43A, the Zoning Commission acknowledged the applicability of Section 3130.3 to a variance received by American University, but then waived its application because there was "no substantial change in any material facts that would undermine the Commission's justification for approving the special exception." Zoning Comm'n Order No. 06-43A, at 3. Likewise, in Application of W Street, S.E., the Board waived application of Section 3130.3 after concluding that continuance of the variance "would not prejudice any party." BZA Application No. 17562-A of W Street, S.E., at 5. The handful of other Board orders that mention Section 3130.3 merely list it as a provision applicable to a granted variance. *See, e.g.,* BZA Application No. 17149 of Sidwell Friends School (Oct. 5,

2004); BZA Application No. 16654 of Sibley Memorial Hospital (Jan. 16, 2001); BZA Application No. 16593 of St. Luke's Episcopal Church (Sept. 5, 2000); BZA Application No. 16582 of Gallaudet University (July 5, 2000). No order approving a permit under the Board's appellate jurisdiction—including the order authorizing AppleTree's Permit—mentions Section 3130.3. *See* BZA Appeal No. 17532 of AppleTree Inst. for Educ. Innovation, Inc. (Ex. 3). And no known Board order revokes a granted variance or permit for failure to comply with Section 3130.3.

The purpose and application of Section 3130.3 thus make clear that it does not apply to AppleTree's Permit. The claim by NNRG to the contrary must fail.

4. The Permit Is Valid Under Section 206 Of The Zoning Regulations

Appellant NNRG makes a new argument at the end of its brief that issuance of AppleTree's Permit failed to comply with an old filing requirement for charter schools under Section 206 of the Zoning Regulations. *See* NNRG Br. at 5–6. NNRG acknowledges that this requirement expired on *February 13, 2006*. Its argument thus hinges on its inexplicable and false assertion that AppleTree's "permit was issued on *February 9, 2006*. . . ." *Id.* at 5. As is obvious from the face of AppleTree's permit, and as NNRG readily admits in its very same brief, AppleTree's permit was actually "issued on *October 26, 2007*." *Id.* at 2. NNRG's Section 206 argument accordingly fails under even its own account of the law.

C. Equity Ensures AppleTree's Right To Complete The Preschool

These appeals display a considerable degree of *chutzpah*: having tied up AppleTree's project for years with their administrative, legislative, and judicial maneuverings—in all of which AppleTree has ultimately prevailed—Appellants now claim that AppleTree started construction *too late*. That dog won't hunt.

1. The Construction Deadlines Were Tolled During Appellants' Persistent Obstruction Of The Project

A long line of cases establishes that equity tolls deadlines for construction during periods when a property owner is prevented from pursuing its project due to litigation or regulatory actions. *See, e.g., Fromer v. Two Hundred Post Assocs.*, 631 A.2d 347, 353 (Conn. App. Ct. 1993) (“The regulatory process is not designed to be a spider’s web, snaring one who follows all the regulations and statutes, obtains all the necessary permits, and successfully defends a series of appeals, but then loses his right to proceed because the passage of time has caused the permits to expire”); *City of Bowie v. Prince George’s Cnty.*, 863 A.2d 976, 990 (Md. 2004) (concluding that principles of equity require tolling of the time period within which a developer must take further action when litigation impedes the developer’s progress); *City of Cranston v. Carpionato*, 340 A.2d 134, 137 (R.I. 1975); *Nat’l Waste Managers, Inc. v. Anne Arundel Cnty.*, 763 A.2d 264, 277–80 (Md. Ct. Spec. App. 2000) (collecting cases in which courts equitably tolled time periods on permits and similar zoning actions). Such equitable tolling allows the construction to be completed despite intervening changes to the zoning laws. As the Vermont Supreme Court explained, “where a valid permit is issued for a specified period, and where actual construction is delayed by litigation . . . past that time, a permittee otherwise proceeding in good faith is entitled to reissuance of that permit, even where the zoning was meanwhile changed so that the project is nonconforming.” *Presault v. Wheel*, 315 A.2d 244, 247 (Vt. 1974).

The delays faced by AppleTree with respect to the construction of the preschool did not result from AppleTree sitting on its Permit. Rather, AppleTree has “spent a substantial amount of time sitting and standing in courtrooms” to defend its Permit. *Preseault*, 315 A.2d at 247. Although AppleTree purchased the property on which it is building its preschool in mid-2005, its opponents delayed AppleTree from obtaining a construction permit until October 26, 2007. *See*

Ex. 38. AppleTree's opponents then succeeded in persuading DCRA to issue a notice of revocation on November 15, 2007. It was not until April 28, 2008 that DCRA withdrew that notice and confirmed once again that the Permit was, and always had been, valid. *See* Ex. 40.

By that time, however, opponents of the preschool had initiated other proceedings that forestalled AppleTree's construction. On August 24, 2007, self-described members of NNRG petitioned the D.C. Court of Appeals to review this Board's July 25, 2007 order confirming that AppleTree satisfied the Zoning Regulations. *See* Pet. of Joseph Jorgens III, et al., No. 07-AA-943 (D.C. Aug. 24, 2007) (Ex. 53). They also moved to stay the Board's decision to prevent AppleTree's work. *See* Mot. of Joseph Jorgens III, et al., No. 17532 (D.C. BZA Sept. 7, 2007) (Ex. 31). The very next month, AppleTree's opponents initiated yet another challenge to the Permit before the Board, arguing that DCRA had erred in concluding that AppleTree's project satisfied certain environmental regulations and the same zoning regulations that the Board had just reviewed. *See* BZA Appeal No. 17769 of ANC-6A, Statement of Applicant at 1 (Dec. 24, 2007) (Ex. 39). That duplicative Board action further delayed AppleTree's construction until the Board issued an order confirming again that AppleTree satisfied all requirements within the Board's jurisdiction. *See* BZA Appeal No. 17769 of ANC-6A, at 8 (Ex. 5). That confirming order took effect on December 28, 2008—the first date on which AppleTree was able, as practical matter, to begin work and seek needed financing.

AppleTree then worked vigorously to pursue the “[f]inancing [that] is crucial to construction of . . . every project.” BZA Application No. 17562-A of W Street, S.E. 38-42-43 LLC, at 4. Like many other property owners during the recent recession, AppleTree faced challenges. Although it had applied in early 2009 to the D.C. Council for a Qualified School Construction Bond, Qualified Zone Academy Bond, and City Build Incentive Grant, AppleTree

did not receive financing awards from those programs until late 2010. *See* McCarthy Affidavit ¶¶ 12–14 (Ex. 1); *see also* Exs. 45, 46, 54. The delay of these funds was beyond AppleTree’s control, being due to the obstructive tactics of its opponents coupled with “the serious economic downturn in the District and the nation.” Application No. 17562-A of W Street, S.E., at 4. Ultimately, the District of Columbia awarded AppleTree \$4.5 million to support its preschool, making possible the construction that is nearly finished today. *See* McCarthy Affidavit (Ex. 1) ¶¶ 12–14; *see also* Exs. 45, 46, 54.

In these circumstances, equity compels that AppleTree’s deadline to begin construction be tolled.⁹ A contrary result here would allow the Appellants to “effectuate the remedy [they] seek without any court ever reaching the merits of the case.” *Cardinale v. Ottawa Reg’l Planning Comm’n*, 627 N.E.2d 611, 615 (Ohio Ct. App. 1993); *Presault*, 315 A.2d at 248 (holding that ruling otherwise would “make development a pure gamble; success would depend on the whim of adversaries to litigate or not”). Such an outcome would contravene the policy that a developer who proceeds in good faith should be able to do so with confidence. *See Cardinale*, 627 N.E.2d at 615.

2. AppleTree’s Right To Complete The Preschool Has Vested

As the D.C. Court of Appeals explained in *Speyer v. Barry*:

A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he has, in good

⁹ Indeed, the District of Columbia has argued that “[t]olling should apply here to prevent the lapse of AppleTree’s building permit,” explaining that “the delay here is the result of the numerous lawsuit and appeals, filed by the District, plaintiffs, and others, and the delays inherent in arranging public-private financing for such a project, and not any ‘neglect’ chargeable to AppleTree.” Mem. in Opp. to Pls. Mot. for T.R.O., at 24–25, *Northeast Neighbors for Responsible Growth v. AppleTree Instit. for Educ. Innovation, Inc.*, No. 2011 CA 001942 B (D.C. Super. Ct., Mar. 25, 2011).

faith, made a substantial change in position in relation to the land, made substantial expenditures, or has incurred substantial obligations.

588 A.2d 1147, 1154 (D.C. 1991) (footnote omitted) (quoting *Steuart Petroleum Co. v. Bd. of Cnty. Comm'rs*, 347 A.2d 854, 859 (Md. 1975)); see 4 Edward H. Ziegler, Jr., Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* § 70:20 (4th ed.) (stating majority rule); Mark S. Dennison, *Zoning: Proof of Vested Right to Complete Development Project*, 35 Am. Jur. Proof of Facts 3d 385 (updated 2011). The D.C. Court of Appeals has held that the Board may not enforce regulations to deprive permit holders of their vested rights on narrow procedural grounds. See *Page Assocs. v. D.C. Bd. of Zoning Adjustment*, 463 A.2d 649, 656 (D.C. 1983) (ruling that restrictive interpretation of grandfathering protection “would make it possible for the Board to act after the fact to divest a party of a vested right by exalting form over substance”).

This is not a close case: AppleTree has conducted every aspect of this construction project in good faith, and the Appellants here have put forth no argument to the contrary. Furthermore, AppleTree made a substantial change in position in relation to the Property. Beginning months before the instant appeal was filed, AppleTree completed extensive renovations of the Property to prepare it for use as a preschool. Construction of the preschool is now just days away from completion. AppleTree has also made substantial expenditures in its efforts to renovate the Property for use as a preschool. To accomplish this, AppleTree has expended nearly \$2 million on construction and over \$300,000 in architectural and engineering expenses. See McCarthy Affidavit ¶¶ 23–24 (Ex. 1).

AppleTree also has incurred substantial obligations due to its good-faith reliance on its Permit. In anticipation of the preschool’s opening date this fall, AppleTree has hired teachers and staff and entered numerous school service contracts. *Id.* ¶¶ 32–35. It has spent more than

\$15,000 for furnishings, \$10,000 for vendors, \$9,000 for insurance, as well as paid for numerous additional expenses, such as safety equipment, alarms, utilities, janitorial service, food service, audio/video technology, and classroom equipment. *Id.* ¶ 36. It also received 240 applications for disadvantaged three- and four-year-old children who desperately need a place at the school, and it has enrolled 60 of those children. Those children are already learning, and they expect to begin instruction at their new preschool soon. *Id.* ¶¶ 28–31.

AppleTree’s substantial investment in and commitment to the preschool has caused its rights in the Permit to vest, making revocation of the Permit improper.

3. The District Of Columbia Is Estopped From Preventing The Completion Of The Project

The doctrine of equitable estoppel bars enforcement of the current Zoning Regulations against AppleTree. Six factors are required to qualify for the protection of this doctrine:

- (1) expensive and permanent improvements,
- (2) made in good faith,
- (3) in justifiable and reasonable reliance upon,
- (4) affirmative acts of the District government,
- (5) without notice that the improvements might violate the zoning regulations; and
- (6) [that the] equities strongly favor [AppleTree].

Economides v. D.C. Bd. of Zoning Adjustment, 954 A.2d 427, 444 (D.C. 2008). Although this doctrine has traditionally not been favored to apply in zoning cases where there is a public interest in enforcement of the zoning laws, “it is accepted that in certain circumstances an estoppel may be raised to prevent enforcement of municipal zoning ordinances.” *Saah v. D.C. Bd. of Zoning Adjustment*, 433 A.2d 1114, 1116, 1117 n.3 (D.C. 1981) (zoning authority estopped from denying petitioner a variance where permit was improperly issued and later cancelled).

This is such a case. AppleTree clearly satisfies the first five requirements for the doctrine of equitable estoppel to apply. It reasonably and justifiably relied upon the permit issued by the

District government to make extensive improvements to the Property. It also had no notice that the improvements for which a valid Permit was issued might violate future zoning regulations.

The equities also strongly favor AppleTree. AppleTree has completed every aspect of its construction by the book. Moreover, like the petitioner in *Saah*, AppleTree has expended significant amounts of money and effort on this project, both at the construction site and before the Board and courts in litigation over the project. If estoppel did not bar DCRA from revoking AppleTree's permit in this case, AppleTree would be compelled to abandon, and perhaps dismantle, a nearly-completed preschool. It also would be forced to dismiss the enrolled students it is already teaching, whom it cannot continue to teach in temporary classrooms. This very possibly would leave those students without a learning opportunity for the remainder of the year, putting them even farther behind at this critical stage in their educational development. *See* McCarthy Affidavit ¶ 37 (Ex. 1). Moreover, if AppleTree is forced to dismiss its students, it will lose the D.C. Uniform Per Student funds that it uses to repay its Qualified School Construction Bond. Default on this Bond would wreak havoc on AppleTree's finances, costing it and the District millions of dollars and jeopardizing several other school projects. *See id.* ¶¶ 38, 40–41.

Where, as here, the public's interest in enforcing the zoning law is minimal, equity "will not require a wasteful act." *Saah*, 433 A.2d at 1117 n.3. Unlike *Beins v. D.C. Bd. of Zoning Adjustment* where the construction at issue constituted a "manifest illegality" under the Zoning Regulations, AppleTree's intended use of the Property as a preschool was proper under the Zoning Regulations when the valid Permit issued. 572 A.2d 122, 128 (D.C. 1990). Indeed, the Property had been used for non-residential purposes at least since the enactment of the Zoning Regulations. The enforcement of an amendment to the Zoning Regulations that was not even

proposed until after AppleTree received its valid Permit and began work on the Property thus implicates minimal public interest. The equities clearly favor AppleTree.

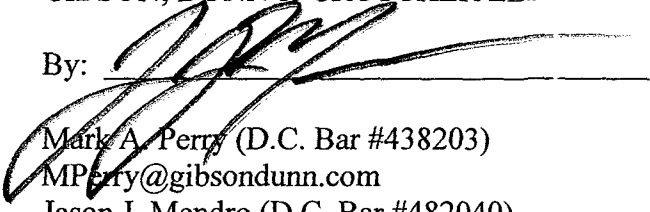
**IV.
CONCLUSION**

The appeals should be dismissed.

Respectfully submitted,

DATED: September 14, 2011.

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**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

ADVISORY NEIGHBORHOOD COMMISSION 6A;
NORTHEAST NEIGHBORS FOR RESPONSIBLE
GROWTH,

Appellants,

v.

APPLETREE INSTITUTE
FOR EDUCATION INNOVATION, INC.,
Appellee.

BZA APPEAL NOS. 18239 & 18241

APPENDIX

CHRONOLOGY OF SIGNIFICANT EVENTS – APPLETREE PRESCHOOL

AppleTree Institute for Education Innovation, Inc. (“AppleTree”) has worked for more than five years to develop 138 12th Street, N.E. (the “Property”) for use as a public charter school that will provide pre-literacy education to underprivileged three- and four-year-old children. It has received and defended all necessary permits, gained funding, and labored to renovate the Property. The outline below summarizes AppleTree’s permit history and construction efforts.

- July 2, 2005: AppleTree purchases the Property after Department of Consumer and Regulatory Affairs (“DCRA”) officials state that the Property is suitable for use as a public charter school.
- December 15, 2005: The Historic Preservation Review Board approves AppleTree’s plans for the Property.
- December 16, 2005: The Office of Planning responds to opposition from Advisory Neighborhood Commission 6A (“ANC-6A”) to AppleTree’s plans by announcing it will draft zoning amendments to prevent use of the Property as a school. The Zoning Commission eventually adopts these “emergency” amendments.
- February 2, 2006: Northeast Neighbors for Responsible Growth (“NNRG”) files a lawsuit against the District of Columbia in D.C. Superior Court, seeking to enjoin the District from issuing a building permit to AppleTree.
- February 9, 2006: AppleTree files a building permit application for the Property with DCRA (File Job No. 3758-A 2006).

- April 28, 2006: The Zoning Administrator denies AppleTree's permit application based on his interpretation of the emergency amendments. AppleTree appeals to the Board of Zoning Adjustment ("BZA").
- June 6, 2006: D.C. Superior Court dismisses NNRG's lawsuit on numerous grounds.
- March 24, 2007: AppleTree pays DBF Associates for architectural, engineering, and abatement work at the Property. AppleTree previously obtained all necessary engineering, topographic, and environmental studies.
- July 25, 2007: The BZA reverses the Zoning Administrator's denial of AppleTree's permit application, holding that AppleTree's requested permit complied with all Zoning Regulations.
- August 17, 2007: The BZA denies ANC-6A's motion for reconsideration after a public hearing.
- August 24, 2007: AppleTree files a building permit application with backpage approvals for the Property (File Job No. 3758-A 2006).
- October 26, 2007: DCRA issues AppleTree Building Permit No. 89587 (the "Permit"). The associated Building Plan Review Status notes that the following disciplines approved AppleTree's application: Environment, Electrical, Elevator, Fire, Mechanical/Plumbing, Structural, Zoning, and Historic.
- November 8, 2007: The D.C. Court of Appeals dismisses a petition for review filed by ANC-6A residents challenging the BZA's decision to uphold the Permit.
- November 15, 2007: DCRA issues a notice to revoke the Permit in response to concerns raised by ANC-6A Commissioner David Holmes regarding possible environmental and zoning violations at the Property. AppleTree appeals this revocation notice to the Office of Administrative Hearings ("OAH").
- December 24, 2007: ANC-6A appeals DCRA's issuance of the Permit to the BZA. The appeal challenges the DCRA's decision "to grant Zoning and Environmental Disciplines contained in the Building Plan Review Status Tracking Number 3758 A 2006."
- March 23, 2008: At DCRA's request, AppleTree completes an additional environmental study of the Property, paying ECS Mid-Atlantic, LLC to perform a Ground Penetrating Radar study at the Property. This study finds no environmental violations at the Property.
- March 28, 2008: The D.C. Department of the Environment ("DDOE") completes its review of the additional environmental study of the Property. DDOE informs DCRA that it "[d]oes not have any environmental objection to allowing construction of the project to move forward."

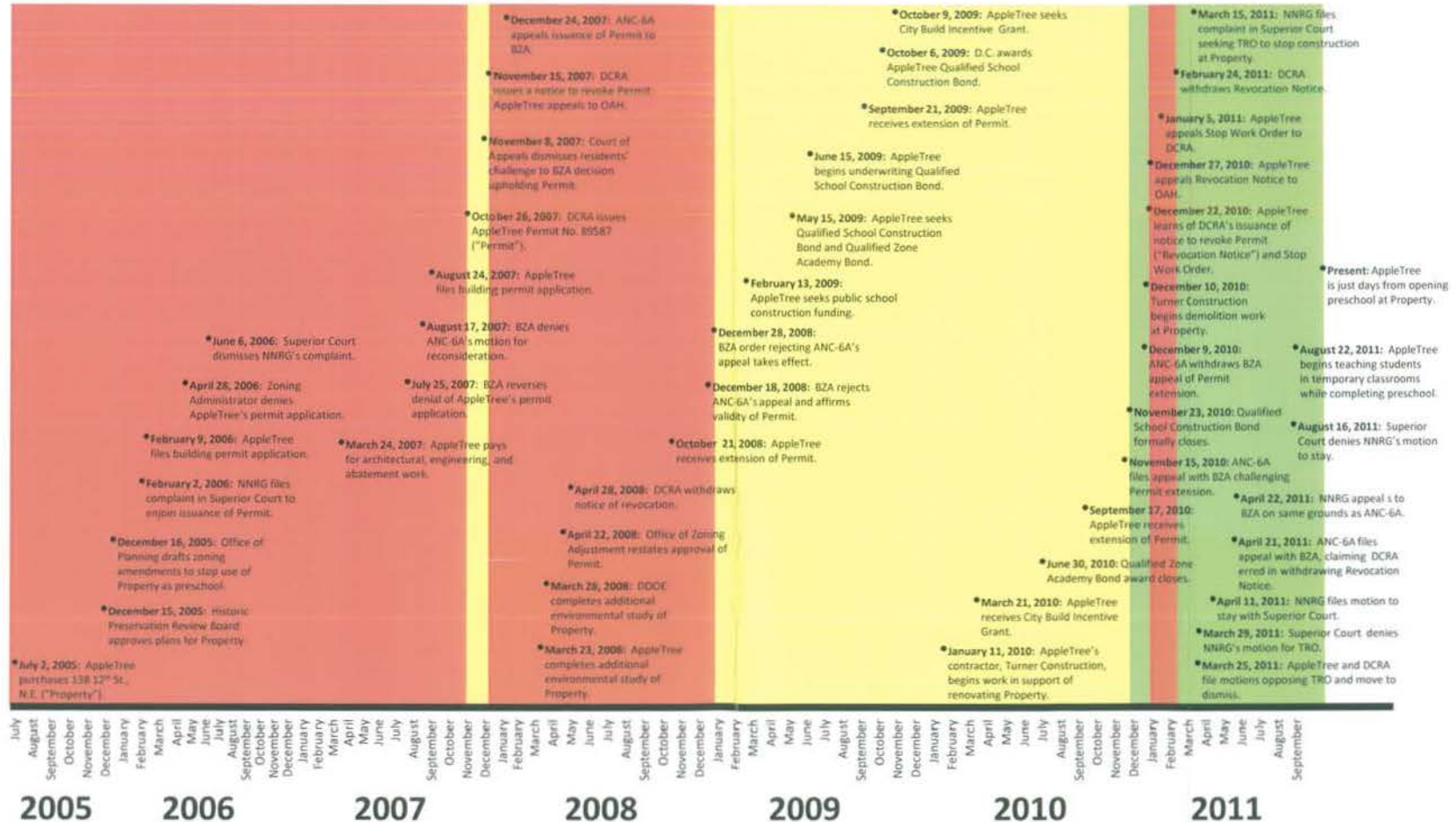
- April 22, 2008: The D.C. Office of Zoning Adjustment concludes its additional review of the Property and restates its approval of the Permit.
- April 28, 2008: Following OAH hearings, DCRA agrees to a settlement with AppleTree and withdraws its notice of revocation, “confirm[ing] the validity of the Permit *nunc pro tunc*.”
- October 21, 2008: AppleTree’s representative pays, in person, for a one-year extension of the Permit. A permit clerk and the Director of the DCRA sign this extension.
- December 18, 2008: The BZA issues its order rejecting ANC-6A’s appeal and affirming the validity of the Permit.
- December 28, 2008: The BZA order rejecting ANC-6A’s appeal takes effect, enabling AppleTree to seek financing and begin construction efforts for the first time since the revocation of its Permit on November 15, 2007.
- February 13, 2009: AppleTree begins meeting with prospective lenders after Congress passes the American Recovery and Reinvestment Act, which funds the construction and renovation of schools.
- May 15, 2009: AppleTree applies for a Qualified School Construction Bond and Qualified Zone Academy Bond funding through the D.C. Revenue Bond Office.
- June 15, 2009: AppleTree begins underwriting for a Qualified School Construction Bond transaction with M&T Bank.
- September 21, 2009: AppleTree’s representative pays, in person, for a one-year extension of the Permit. A permit clerk and the Director of the DCRA sign this extension.
- October 6, 2009: The D.C. Revenue Bond Office, upon resolution of the D.C. Council, awards AppleTree a Qualified School Construction Bond to support its development of the Property for use as a public charter school.
- October 9, 2009: AppleTree applies for a City Build Incentive Grant from the D.C. Office of Public Charter School Financing and Support (“OPCSFS”).
- January 11, 2010: AppleTree’s contractor, Turner Construction, begins work in support of renovating the Property. This work includes the selection of sub-contractors, site visits, and construction-scope activities.
- February 18, 2010: OPCSFS approves a credit enhancement application for AppleTree.
- March 12, 2010: M&T Bank gives AppleTree an Approved Term Sheet for a Qualified School Construction Bond issued by the District of Columbia.

- March 21, 2010: OPCSFS awards AppleTree a City Build Incentive Grant.
- June 30, 2010: Qualified Zoning Academy Bond award formally closes, providing the equity required by M&T Bank for the Qualified School Construction Bond.
- September 17, 2010: AppleTree's representative pays, in person, for a one-year extension of the Permit. A permit clerk and the Director of the DCRA sign this extension.
- November 15, 2010: DBF Associates invoices AppleTree for non-design work completed throughout 2010. This work is necessary to the construction process and includes on-site construction activities and administration efforts.
- November 15, 2010: ANC-6A files an appeal with the BZA challenging DCRA's September 2010 decision to extend the Permit.
- November 19, 2010: D.C. Housing Finance Agency issues its final release for the Qualified School Construction Bond to close.
- November 23, 2010: Qualified School Construction Bond financing transaction formally closes. The closing of financing allows AppleTree to begin light demolition and remodeling work for the first time at the Property.
- December 3, 2010: DCRA issues a Notice to Revoke Building Permit No. B1010205 ("Revocation Notice") after David Holmes, the ANC-6A commissioner, alleges that DCRA erred in extending the Permit. DCRA incorrectly addresses the notice to AppleTree, and the notice is returned to DCRA undelivered.
- December 9, 2010: The commissioners of ANC-6A vote 4-3 to withdraw their BZA appeal of AppleTree's extended Permit. The commissioners explain: "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."
- December 10, 2010: AppleTree's contractor, Turner Construction, begins light demolition work at the Property, removing a drop ceiling and certain electrical and ventilation fixtures.
- December 22, 2010: AppleTree becomes aware of the Revocation Notice and associated Stop Work Order when David Holmes, who is not a code official, delivers the documents to AppleTree's contractor at the Property.
- December 27, 2010: AppleTree appeals the Revocation Notice to the OAH, noting, among other things, that it has yet to receive the Revocation Notice by proper personal service or mail.
- January 5, 2011: AppleTree files an appeal of the Stop Work Order with DCRA.

- February 24, 2011: DCRA withdraws the Revocation Notice, confirming that the permit “is valid and has not lapsed, *nunc pro tunc*.”
- March 15, 2011: NNRG, joined by two of its self-described members, files another complaint against AppleTree and DCRA in the D.C. Superior Court, rehashing arguments that the Permit has expired and moving for a TRO to stop construction at the Property.
- March 25, 2011: AppleTree and DCRA file motions in opposition to the TRO and move to dismiss NNRG’s complaint.
- March 29, 2011: The Superior Court denies NNRG’s motion for a TRO, ruling that it does not believe NNRG’s complaint has a likelihood of success on the merits.
- April 11, 2011: NNRG files a motion with the Superior Court seeking to stay its claims and excuse it from responding to AppleTree’s motion to dismiss.
- April 21, 2011: ANC-6A files an appeal with the BZA, claiming that DCRA erred in withdrawing its Revocation Notice and that AppleTree’s Permit had exceeded the allowable number of permit extensions.
- April 22, 2011: NNRG files an appeal with the BZA based on the same grounds as ANC-6A’s appeal.
- August 16, 2011: The Superior Court denies NNRG’s motion to stay its claims, stating that NNRG may no longer “delay [its] duty” to respond to AppleTree’s motion to dismiss.
- August 22, 2011: AppleTree begins offering free, pre-literacy education to 60 three- and four-year olds in temporary classrooms while it completes construction of its new preschool. AppleTree accepted these children from over 240 applicants. Almost all of them are residents of Ward 6, and many of them live within five blocks of the Property. Thirteen teachers and staff work with these students daily.
- September 6, 2011: NNRG files a supplemental brief with the BZA. ANC-6A does not file a brief.
- Present: AppleTree is days from finishing its preschool, having spent almost \$2 million on construction, \$300,000 on architectural and engineering expenses, and more than \$200,000 in property taxes and fees. AppleTree intends to begin teaching its 60 enrolled students at the preschool by the end of September. To that end, it has spent more than \$15,000 for school furnishings and supplies and has entered numerous service contracts.

Timeline of Significant Events – AppleTree Preschool

Obstruction Phase
Financing Phase
Construction Phase



**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

ADVISORY NEIGHBORHOOD COMMISSION 6A;
NORTHEAST NEIGHBORS FOR RESPONSIBLE
GROWTH,

Appellants,

v.

APPLETREE INSTITUTE
FOR EDUCATION INNOVATION, INC.,
Appellee.

BZA APPEAL NOS. 18239 & 18241

CERTIFICATE OF SERVICE

Pursuant to 11 DCMR § 3111, I certify that on September 14, 2011, I caused a correct copy of the foregoing **BRIEF FOR APPELLEE APPLETREE INSTITUTE FOR EDUCATION INNOVATION, INC.** to be served on the following persons by first class mail:

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Northeast Neighbors for Responsible Growth
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