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November 21, 2005

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04753-00001

Mr. Bill Crews
Zoning Administrator
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Room 2000
Washington, D.C. 20002

Re: Public Charter School at 138 12th Street, N.E.

Dear Mr. Crews:

On behalf of the AppleTree Institute for Education Innovation, I am responding to the November 2, 2005 letter to you from Advisory Neighborhood Commissioner Cody Rice, as well as the November 14, 2005 letter to you from Advisory Neighborhood Commission Chair Joseph Fengler. Because Mr. Fengler's letter simply quotes excerpts from Mr. Rice's letter, this letter is directed to the points first made by Mr. Rice.

As you will recall from AppleTree's letter dated October 28, 2005, AppleTree recently purchased the property at 138 12th Street, N.E. for use as a public charter school serving preschool and pre-kindergarten children, ages 3-4. Some of the neighbors, apparently opposed to the locating of such a school in their community, have tried to block this project by a variety of means. One of their tactics involves the use of the Zoning Regulations.

Mr. Rice's core contention is that a public charter school is not a "public school" for zoning purposes, and thus that the AppleTree public charter school cannot develop and occupy its property "by right." The arguments advanced in support of this contention, however, are completely unpersuasive.

First, Mr. Rice invokes the definition of "school, public" in the Zoning Regulations, which refers to a building "operated and maintained by the District of Columbia Board of

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Board of Zoning Adjustment
District of Columbia
CASE NO.18239
EXHIBIT NO.18B10

GIBSON, DUNN & CRUTCHER LLP

Mr. Bill Crews
November 21, 2005
Page 2

Education.” 11 DCMR § 199 (2005). Because AppleTree is a non-profit organization, and is not the Board of Education, Mr. Rice argues that “at least for zoning purposes, the proposed use is not a public school.” 11/02/05 Letter at 1.

Mr. Rice simply ignores the fact that the regulatory definition was adopted in 1958, and last amended in 1968. At that time, all public schools were operated and maintained by the Board of Education. But times have changed. Since then, both Congress and the D.C. Council have enacted laws authorizing the creation and operation of public charter schools. The mere fact that the zoning regulations have not caught up with these legislative changes is no reason to ignore them. Yet Mr. Rice does just that: Although AppleTree made precisely this point in its October 28 letter, Mr. Rice has provided no response to this fact.

Mr. Rice does point out, correctly, that there are *two* charter school regimes in the District of Columbia. 11/02/05 Letter at 2. Yet a careful consideration of the statutes leads to the conclusion that both kinds of charter schools—*i.e.*, those chartered by the Board of Education *and* those chartered by the Public Charter School Board—are “public schools.”

Subtitle IV of Title 38 of the District of Columbia Code is entitled “Public Education — Charter Schools.” The heading alone is substantial evidence that D.C.’s elected officials consider charter schools to be institutions of *public* education—*i.e.*, public schools. And under this heading there are two chapters authorizing charter schools: Chapter 17, which was enacted by the D.C. Council and applies to schools chartered by the Board of Education; and Chapter 18, which was enacted by Congress and applies to schools chartered both by the Board of Education and by the Public Charter School Board.

There can be no serious dispute that schools chartered by the Board of Education under Chapter 17 are “public schools” for all pertinent purposes, because the statute says exactly that: “A charter school shall comply with all the terms and conditions of its charter *and shall be considered a public school for all purposes* except as otherwise provided in this subchapter.” D.C. Code § 38-1702.05(a) (emphasis added); *see also* § 38-1701-01(14) (“For the purposes of this subchapter, the term . . . ‘[p]ublic school’ means either a public school under the authority and control of the Board *or a charter school*”) (emphasis added). Since nothing in Chapter 17 provides that schools chartered by the Board of Education should *not* be considered public schools for zoning purposes, it necessarily follows from the statutory language that they are.

The only real question, then, is whether schools chartered under Chapter 18 should be treated *differently* than schools chartered under Chapter 17. The answer is no. Chapter 18 applies to all charter schools in the District of Columbia, including those chartered by the Board of Education. The D.C. Council’s decision in Chapter 17 that such schools are “public schools” is equally applicable to schools chartered by the Public Charter School Board. Congress did not distinguish between chartering authorities in Chapter 18 with regard to the public nature of the charter school.

Mr. Bill Crews
November 21, 2005
Page 3

Mr. Rice points out that the definitions provided in Chapter 18 state that “[t]he term ‘District of Columbia public school’ does not include a public charter school.” D.C. Code § 38-1800.02(12)(B). It is important to note that this does *not* say that a public charter school is not a “public school”; rather, it says that a public charter school is not a “*District of Columbia* public school”—that is, a public school overseen by the District of Columbia Board of Education. One purpose of Chapter 18 was to set up an educational *alternative* to the Board of Education-run system. The definition makes that clear. Indeed, if Congress had intended for public charter schools not to be treated as public schools at all, it could have said so; instead, it subjected public charter schools to some regulations applicable to public schools (such as the civil rights laws) while exempting them from others.

Second, Mr. Rice asserts that there are “sound” public policy reasons not to treat public charter schools as public schools. In general, he is simply disagreeing with the judgment already made by Congress and the D.C. Council to establish a charter school system as an alternative to traditional public schools. The zoning authorities cannot rely on such policy arguments to disregard the clear commands of elected officials. In any event, Mr. Rice’s policy concerns are misdirected.

Mr. Rice asserts that the Board of Education “has generally selected larger sites.” 11/02/05 Letter at 1. Even if true, this is irrelevant: The charter school law was designed to allow *flexibility* in education, including the siting of educational facilities. Public charter schools are expressly given the authority “[t]o acquire real property for use as the public charter school’s facilities, from public or private sources.” D.C. Code § 38-1802.04(a)(2). If Congress had seen fit to regulate the size of such properties, it could easily have done so; but it did not. Rather, the express congressional authorization for public charter schools to acquire property from “private sources” would, if anything, seem to contemplate that such schools would be located in smaller, neighborhood locations.

Mr. Rice next points out that the members of the Board of Education are elected, whereas the members of the Public Charter School Board are not. 11/02/05 Letter at 1. But this is a policy decision that was made by Congress. Congress wanted to *insulate* public charter schools from the pressures faced by elected officials. *See, e.g.*, D.C. Code § 38-1802(j)(1) (“except for officers or employees of the eligible chartering authority with which a petition to establish a public charter school is filed, no governmental entity, elected official, or employee of the District of Columbia shall make, participate in making, or intervene in the making of, the decision to approve or deny such a petition”). But Mr. Rice is wrong to suggest that the chartering officials are unaccountable to the electorate. To the contrary, they are appointed by the Mayor, an elected official, from a list prepared by the Secretary of Education, in accordance with criteria specified by Congress. D.C. Code § 38-1802.14(a)(1).

Mr. Rice’s final policy argument is that Board of Education schools have enrollment boundaries, but public charter schools do not. 11/02/05 Letter at 2. Once again, Mr. Rice is

GIBSON, DUNN & CRUTCHER LLP

Mr. Bill Crews
November 21, 2005
Page 4

simply arguing with a policy decision made by Congress: "Enrollment in a public charter school shall be open to all students who are residents of the District of Columbia" D.C. Code § 1802.06(a). Congress intended that educational opportunities provided would be enhanced by fostering an environment in which all families have equal opportunity to enroll their children in new, and often times innovative (*e.g.* outward bound elementary curriculum, school-wide focus on public policy, etc.) public charter schools. Further, a lottery system for selected students only comes into play when a public charter school has sufficient applicants for full enrollment. Otherwise, children are enrolled in public charter schools on a first-come, first-served basis.

Third, Mr. Rice states that neither the Zoning Commission nor the Board of Zoning Adjustment (BZA) has formally addressed the question whether public charter schools are, as their name indicates, public schools. 11/02/05 Letter at 2. AppleTree acknowledged as much in its October 28th letter, pointing out the likely reason was that no one previously has seriously challenged the status of public charter schools as public schools. Indeed, today there are 52 charter schools (on 64 campuses) within the District of Columbia, and Mr. Rice has not identified a single one that has been required to seek a zoning variance or special exception in order to develop or occupy its selected property.

In AppleTree's previous letter, it was pointed out that the Chair of the BZA has stated, on the record, that "[c]harter schools don't come under the zoning regs" because "[t]hey are matter-of-right." BZA Tr. (Apr. 26, 2005), at 114 (attached). Mr. Rice responds that such statements "do not have any formal interpretive standing." 11/02/05 Letter at 2. This response fails to recognize the undisputed fact that the one zoning official who has addressed this issue on the public record has apparently agreed with AppleTree's position. As far as we know, all previous charter school facility projects in the District of Columbia have been treated as "matter of right" for zoning purposes.

Fourth, Mr. Rice states that his "proposed solution for the AppleTree project is to recognize the use of the building as a 'child development center' for zoning purposes." 11/02/05 Letter at 2. But Congress has already rejected this proposal. When it was enacted, the charter school law did require that a charter school offering preschool or pre-kindergarten education would be "licensed as a child development center by the District of Columbia Government." D.C. Code § 38-1802.02, Historical and Statutory Notes (quoting former subsection (17)). However, that requirement was *repealed* in 2000 by Public Law 106-552, § 120(c)(2)(A), and replaced with a new requirement that "[a] public charter school which offers a preschool or pre-kindergarten program shall be subject to the same child care licensing requirements (if any) which apply to a District of Columbia public school which offers such a program." D.C. Code § 38-1802.04(18). Since no such licensing requirement applies to D.C. public schools, public charter schools serving 3-4 year olds similarly cannot be required to be licensed as child development centers. The AppleTree school, therefore, does not fit the Zoning Regulations' definition of a child development center. 11 DCMR § 199.

GIBSON, DUNN & CRUTCHER LLP

Mr. Bill Crews
November 21, 2005
Page 5

Mr. Rice states that "[a]lternatively, the Zoning Administrator could treat all charter schools as 'private schools.'" 11/02/05 Letter at 2. But that is not an option. The D.C. Council has specifically provided that "A private . . . school shall not be granted a charter." D.C. Code § 38-1702.01(d). The issuance of a charter, therefore, necessarily means that a school is *not* a private school. Rather, it is a public school unless Congress or the D.C. Council provides otherwise.

Public charter schools are public schools in every way except their freedom from the bureaucratic requirements of the traditional school system. They are open to and free of charge to D.C. residents, and they are publicly funded and publicly accountable. Each public charter school is organized as a non-profit corporation under D.C. law and is governed by a citizen board of directors, and at least two members must be parents of children attending the school. Each public charter school is overseen by one of the two chartering authorities, which closely monitor the finances and performance of the schools they oversee. See "The Facts About D.C.'s Charter Schools" (FOCUS Oct. 6, 2005) (attached). Mr. Rice's contrary position simply cannot be reconciled with the realities of the charter school movement.

We understand that legal action has been threatened in the event that zoning officials conclude that public charter schools are public schools with "by right" development and occupancy privileges. AppleTree has no need to make, or respond to, such threats. Public charter schools in the District of Columbia are, in fact and law, "public schools" for virtually all purposes, including application of the Zoning Regulations. We are confident that you and other officials will agree with that conclusion. In the unfortunate event that litigation becomes necessary, we are also confident that a court would agree with AppleTree's position. AppleTree wants to teach young children to read and write, not fight lawsuits with the neighbors.

Finally, AppleTree would like to update you regarding AppleTree's attendance at the ANC 6A meeting held at Miner Elementary School on November 10th. At that meeting, AppleTree presented its revised proposal for its school, which responded to the feedback we received from some concerned neighbors at the October 25th ANC6A Economic Development & Zoning Committee meeting. In addition to offering a number of revisions to the original proposal (attached), AppleTree agreed to withdraw its original plans for the school from the HPRB and to cancel its appearance at the November 17th HPRB meeting. AppleTree withdrew these original plans and will submit revised plans to the HPRB this week.

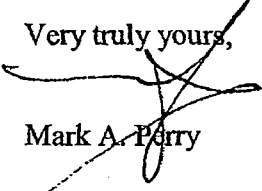
At the November 10th meeting, AppleTree again offered to meet with a group of concerned neighbors in an effort to resolve any outstanding issues. A meeting with a group of the neighbors has been tentatively scheduled for Tuesday, November 29th. We will keep you informed regarding any further developments as they occur.

GIBSON, DUNN & CRUTCHER LLP

Mr. Bill Crews
November 21, 2005
Page 6

We thank you for your attention to this matter. If you have any questions or I can provide any additional information, please let me know.

Very truly yours,


Mark A. Perry

MAP/dl

cc: Councilmember Sharon Ambrose
Councilmember Jim Graham
Councilmember Kathy Patterson
Dr. Patrick Canavan, DCRA Director
Neil Stanley, DCRA Deputy Director
Cody Rice, ANC Commissioner (6A03)
Emily Paulus, Historic Preservation Office