

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

JANUARY 9, 2007

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:00 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice-Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

JOHN PARSONS	Commissioner (NPS)
--------------	--------------------

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Specialist
ESTHER BUSHMAN	General Counsel

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

Board of Zoning Adjustment
District of Columbia
CASE NO.18239
EXHIBIT NO.18B20

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:
LORI MONROE, ESQ.

The transcript constitutes the minutes
from the Public Meeting held on January 9,
2007.

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 by Mr. Etherly. Also in support of the motion
2 Mr. Griffis, the Chair, Mrs. Miller, the Vice
3 Chair, and Mr. Mann.

4 CHAIRPERSON GRIFFIS: Good. Thank
5 you very much, Mr. Moy. Let's move ahead
6 then.

7 MR. MOY: I believe the next case
8 for decision, Mr. Chairman, is the appeal case
9 which is Appeal No. 17532 of AppleTree
10 Institute for Education Innovation, Inc.,
11 pursuant to 11 DCMR 3100 and 3101, from the
12 administrative decision of the Zoning
13 Administrator, Department of Consumer and
14 Regulatory Affairs to require BZA special
15 exception approval for a proposed addition for
16 a public charter school.

17 The Appellant alleges that the
18 Zoning Administrator erroneously relied upon
19 the Zoning Commission's February 13, 2006,
20 emergency rulemaking to require additional on-
21 site parking spaces. The subject property is
22 located in the R-4 District at premises 138

1 12th Street, N.E. That's in Square 988, Lot
2 820.

3 On November 21, 2006, the Board
4 completed public testimony, closed the record,
5 and scheduled its decision on January 9, 2007.
6 The Board requested the following -- rather,
7 the Board requested a number of post-hearing
8 documents including proposed findings of fact
9 and conclusions of law. All these documents
10 were filed timely and staff has identified two
11 potential preliminary matters and I'll raise
12 those as I go through the filings.

13 The first filing is a letter from
14 ANC-6A to document their voting for great
15 weight and that is identified as Exhibit 31 in
16 your case folder. We also have a filing from
17 the Northeast Neighbors for Responsible
18 Growth, party in opposition, identified as
19 Exhibit 32.

20 In this filing the opposition
21 party also included copies of certificate of
22 occupancy which the Board did not ask for

1 other than from DCRA and I'll leave that for
2 the Board to define rather broadly or narrowly
3 for acceptance into the record.

4 There is also a filing of the
5 appellant in response to the intervenors reply
6 brief. That is identified as Exhibit 33. We
7 also have the proposed findings of fact and
8 conclusions of law from the appellant, from
9 the party in opposition. Those are identified
10 as Exhibit 35 and Exhibit 36 respectively.

11 Finally, Mr. Chairman, we have a
12 potential preliminary matter which is the
13 motion to enlarge time to accept DCRA's
14 proposed findings of fact and conclusions of
15 law to submit on January 8, 2007. That should
16 be Exhibit 37. Of course, the draft proposed
17 order which is Exhibit 38 from DCRA. Does
18 that make any sense, any of this, Mr.
19 Chairman?

20 CHAIRPERSON GRIFFIS: Total sense.
21 However, what is your first preliminary
22 matter?

1 MR. MOY: Exhibit 32 which is the
2 filing from the Northeast Neighbors for
3 Responsible Growth.

4 CHAIRPERSON GRIFFIS: Right.

5 MR. MOY: I only raise that
6 because the Board requested, or rather allowed
7 DCRA to file additional certificates of
8 occupancy to demonstrate previous use. Only
9 DCRA and the party in opposition did likewise
10 so I leave that to the Board whether that was
11 your intent or not --

12 CHAIRPERSON GRIFFIS: Right.

13 MR. MOY: -- to allow from other
14 parties.

15 CHAIRPERSON GRIFFIS: I'll hear
16 from other Board members but I thought we kind
17 of sent them out to find whatever they could
18 in that respect. There is no reason I would
19 say to preclude that Exhibit 32 from coming in
20 unless others have different opinions. Not
21 noting any different opinions I'll move that
22 in.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 The second is a bit more of
2 concern to me in terms of the motion to
3 enlarge time. Let me just hear comments on
4 that. It was delivered to us actually
5 yesterday. Let's briefly get into that.

6 Ms. Miller.

7 MS. MILLER: I don't have a
8 problem accepting that into the record because
9 it's a consent motion and it was supported by
10 good cause for filing late in that I believe
11 the attorney was ill and no parties have
12 claimed prejudice as a result.

13 CHAIRPERSON GRIFFIS: Did you have
14 time to review it or read it?

15 MS. MILLER: I did.

16 CHAIRPERSON GRIFFIS: Others?

17 MR. MANN: I'm not particularly
18 concerned about the fact that it was delivered
19 as of yesterday. If it had been this morning
20 that might have been a different situation.

21 CHAIRPERSON GRIFFIS: Perfect.

22 Mr. Etherly, any concerns?

1 MR. ETHERLY: No objections.

2 CHAIRPERSON GRIFFIS: Good. We
3 take it as a consensus then and we'll also
4 accept that into the record. So we have the
5 record full, Mr. Moy, I don't think there are
6 any other preliminary matters then attended to
7 that and we can move ahead with our
8 deliberations. Is that correct?

9 MR. MOY: Yes.

10 CHAIRPERSON GRIFFIS: Thank you.
11 Then let's do. To frame this a little bit in
12 my perspective, all appeals have their
13 complications and difficulties. This appeal
14 in particular I feel, although we are put into
15 the shoes of the Zoning Administrator, I feel
16 badly that the Zoning Administrator had to
17 look at this in many respects but the fact
18 meaning we had a text amendment that was
19 implemented.

20 There was an application that was
21 a permit, let's say. It obviously had to come
22 in under review of that new text. As the

1 Board members know, not often when you write
2 things are things perfectly clear or, in fact,
3 specifically set.

4 I guess my concern, just to put it
5 on the record, is I feel as though we are
6 testing the changes in the zoning regulations
7 based on a specific instance. Sometimes that
8 works well. I don't think that worked
9 particularly smoothly in this case.

10 Let me also say in assessing, as
11 we'll get into the details, fundamentally
12 reading the regulations now over and over
13 again and how it deals with the public schools
14 and it deals with public schools and
15 residential areas, I think it was an excellent
16 update of our regulations to include public
17 charter schools in the definition of public
18 schools.

19 I would add to my own assertion
20 and analysis of the regulations in its direct
21 reading that, in fact, DCMR Title 11 deals
22 differently with public schools than it does

1 with other structures or uses in a residential
2 area and, in fact, is less restrictive. That
3 is shown in numerous ways.

4 However, dramatically in ways of
5 height which it is allowed to be far in excess
6 of that of a matter of right residential
7 structure. That is one element that was
8 changed by the Zoning Commission but it was
9 not changed in terms of its less restrictive
10 nature. Although it went from 90 feet in two
11 of the zoned districts to 60 feet, of course,
12 the matter of right height is 40 feet.

13 My point being as I looked at this
14 in the very beginning and now will get into
15 this deliberation, I looked at the zoning
16 regulations as being less restrictive in its
17 designation and forming, massing of public
18 schools in the residential districts. That
19 being said, I'll open it up to others to begin
20 direct deliberation on the appeal element.

21 Ms. Miller.

22 MS. MILLER: Okay. The appellant

1 in this case appealed basically on four
2 grounds. I want to start with whether or not
3 they were exempt from 206.1 pursuant to 401.1.
4 Then I guess I should -- let me back up.

5 I think the error alleged is that
6 the ZA required BZA approval for AppleTree,
7 which is a charter school, enlargement and use
8 as a charter school as a special exception
9 pursuant to 206.1 and required AppleTree to
10 provide 10 parking spaces on site.

11 I think, as you were saying, this
12 came about because Zoning Commission enacted
13 on an emergency basis 206.1 which said use as
14 a public school that does not meet the
15 requirement of Chapter 4 of this title, or as
16 a private school shall be permitted as a
17 special exception in an R-1 district if
18 approved by the Board of Zoning Adjustment.
19 Charter schools have been determined to be
20 public schools.

21 The first issue presented, or at
22 least I would like to address, is whether

1 AppleTree is exempt from 206.1 pursuant to
2 401.1. That comes into play because 401.3
3 sets forth minimum lot area and minimum width
4 of lot requirements for various structures.

5 The public school was set forth in
6 that chart and there is no dispute that
7 AppleTree does not meet those requirements but
8 401.1 provides an exception to structures
9 meeting those requirements.

10 It says, "Except as provided in
11 Chapters 20 through 25 of this title, in the
12 case of a building located May 12, 1958, on a
13 lot with lot area or width of lot or both,
14 less than that prescribed in 401.3 for the
15 district in which it is located, the building
16 may not be enlarged or replaced by a new
17 building unless it complies with all other
18 provisions of this title."

19 If you translate it, I think that
20 means it can be enlarged or replaced provided
21 it complies with other provisions of this
22 title and AppleTree was doing an enlargement

1 here.

2 CHAIRPERSON GRIFFIS: Did you say
3 translated?

4 MS. MILLER: That's the way I
5 interpret it. I think the first question is
6 does AppleTree fall within this exception. I
7 think there is no dispute it was improved
8 before May 12, 1958. There's no dispute that
9 it doesn't meet the lot and -- it doesn't meet
10 the requirements set forth in 401.3.

11 Then the question is does it
12 comply with all other provisions of this
13 title? I think DCRA and the intervenors say
14 that it doesn't comply with the parking and
15 that's when we got into parking. There are a
16 few different issues that skip around.

17 CHAIRPERSON GRIFFIS: I think
18 that's on track.

19 MS. MILLER: Okay. If we go to
20 the parking, the appellant says it does comply
21 with the parking because it has been certified
22 as a contributing structure in an historic

1 district. We have consistently interpreted
2 2100.5 as exempting those buildings from
3 additional parking. Therefore, they say there
4 is no additional parking required and would
5 agree with that. Should we discuss that one
6 first? Do others have differing views on
7 that?

8 CHAIRPERSON GRIFFIS: Why don't --

9 MS. MILLER: There's more to say
10 about it actually.

11 CHAIRPERSON GRIFFIS: Yes, but why
12 don't we start with your discussion on 206 and
13 also 401.

14 MS. MILLER: And then go back to
15 the parking?

16 CHAIRPERSON GRIFFIS: Yes.

17 MS. MILLER: Okay.

18 CHAIRPERSON GRIFFIS: I think they
19 are distinct and they break down into those
20 elements. I appreciate it. That's an
21 excellent outline of your deliberation and
22 analysis. I think I agree. Let me pose what

1 I saw.

2 First of all, hearing the
3 testimony of the Zoning Administrator here
4 before us and in the appeal, it was very
5 apparent there was great concern as there was
6 new text to review and approve or deny permit
7 applications based on the exact intention and
8 the letter of the Zoning Commission.

9 Obviously that is laudable and
10 what should be done. However, now we are
11 faced with stepping back from that instance
12 and looking at it more globally. Again, I go
13 back to my difficulty in reading the
14 regulations and reading the letter and the
15 intent of 401.1.

16 I think as you look at, and we
17 have the markup from the Zoning Commission, of
18 course, of the text and their amendments in,
19 and you look at the extent and the sections of
20 400 that it went into and then 206 and the
21 extent of which it was deliberated and changed
22 in 401.3, the calculation is the same. Yet,

1 401.1 stood as we read it today. The letter
2 and the exact reading and the exact letter of
3 that exempts this application.

4 I don't see how I can move any
5 other direction without reinterpreting which
6 would essentially be rewriting the regulations
7 by a decision in that manner. I obviously
8 can't get into the head of the Zoning
9 Commissioners but in many respects their
10 decisions need to live beyond the persons that
11 talked about it and have to be deliberate, or
12 rather have to be usable in their written
13 form.

14 I think that we are left with
15 401.1 for today as it is written. Therefore,
16 I believe that it is an exemption clause of a
17 lot that is in existence May 12, 1958, and
18 this application, or rather permit, did fit
19 within that parameter. Others?

20 MS. MILLER: Yeah. I just want to
21 add the next argument, I think, of DCRA. The
22 intervenor said even if they fell within the

1 exemption that the Zoning Commission really
2 intended to eliminate that exemption for
3 public schools.

4 CHAIRPERSON GRIFFIS: Right.

5 MS. MILLER: And it's not written
6 anywhere so we had to look within the record
7 as to what is the evidence in the record. I
8 agree with you that the evidence, I think, is
9 to the contrary that they did this rulemaking
10 twice. They amended the regulations that
11 surrounded this particular regulation so it
12 was basically in their face in the text.

13 Also not only was it in the text
14 that they were looking at but there was
15 attached to, I think, the appellant's pleading
16 e-mails that show that this precise issue was
17 brought to the Office of Planning's attention
18 before the second reading and no change was
19 made.

20 I think it's hard for us to just
21 leap to the conclusion that -- well, I think
22 the Zoning Administrator said this must have

1 been an oversight. I think that is a big leap
2 for us and I don't think it's appropriate
3 under proper statutory construction.

4 CHAIRPERSON GRIFFIS: Excellent.

5 MR. MANN: I also think it's
6 fairly easy to agree with that position. It
7 just seems like it is bolstered by the fact
8 that even the definition of public school was
9 changed which means that there were certain
10 attention to detail paid that seems like it
11 would have been, I don't know, almost
12 impossible to believe that an oversight was
13 made that 401.1 couldn't have been changed as
14 well.

15 CHAIRPERSON GRIFFIS: Right.
16 Good. Okay. Anything else on that aspect
17 then? Let's move into the last piece of that,
18 of course, which is unless it complies with
19 all other provisions of this title which gets
20 into the parking provisions and whether it
21 was, in fact, in compliance with all of the
22 other provisions.

1 This, again, is a very complicated
2 one only because of the fact of the
3 regulations change the designation of use that
4 may have been consistent with a property that
5 existed before the regulations were
6 enforceable, meaning the designation of this
7 -- well, I would say to begin with I believe
8 it is my deliberation that one of the findings
9 of fact is that this building was not built as
10 a residential and it is a different form and
11 mass than the surrounding residential.

12 As we look at the history of its
13 use in the past C of Os it was up to the date
14 clearly not residential but was designated,
15 although not on the actual C of O we could
16 find that it would fit within the designation
17 of la private club which would be an allowable
18 use in the R4 district. What was the parking
19 requirement? What was actually provided and,
20 therefore, what would be necessitated in the
21 provision of the now as proposed charter
22 school?

1 We had in the presentation
2 differing views of it. I was not so persuaded
3 by the Zoning Administrator in saying what the
4 Zoning Administrator needed to do was go in
5 and see how many legally fit on the site. I
6 think, again, it's a difficult position to be
7 in as we aren't looking at, one, a striped or
8 even counted parking positions in the C of O,
9 for one, or even in the existing condition.

10 However, there are a couple of
11 things that led me to believe that we wouldn't
12 go and redesign it to maximize the legal
13 spaces because, one, when it was originally
14 built there was a structure, an accessory
15 structure that was not used for parking which
16 was removed. There was an original assumption
17 that the entire area wasn't parked.

18 There was a chain link fence with
19 an opening that obviously would make it
20 difficult as we saw in some of the diagrams to
21 do a total of upwards of 10 spaces or nine.
22 There is an egress there that was accommodated

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 down. There are obviously egress areas. Then
2 there are drive isles and the like. What we
3 are charged with, of course, is to look at
4 what should have been the exact spaces that
5 would have been provided. I'll open it up for
6 people's discussion on that.

7 MS. MILLER: This was basically I
8 thought very messily presented. I think the
9 question here was the regulation says no
10 additional spaces and the question was what
11 was there before? How many would be -- what
12 would be additional? I don't think the Zoning
13 Administrator had really properly determined
14 what was there before.

15 We have discussed the question of
16 it isn't just what may have been required for
17 the use that was allowed because spaces may
18 have been credited. I think it looked to be
19 that case that the previous use may not have
20 been able to fit the amount of spaces that
21 were required as well.

22 I think what we ended up doing was

1 looking and seeing how many spaces would
2 actually fit there. I believe the appellant
3 has said three. It wasn't that they weren't
4 willing to provide more but that more did not
5 fit there.

6 I don't think there was evidence
7 in the record that the previous use had more
8 than three spaces. I think there was only
9 evidence that looking at a chart the previous
10 use might have been required to but that may
11 have been waived and credited.

12 CHAIRPERSON GRIFFIS: Good. I
13 think it is somewhat complex in its lack of
14 specific facts. I don't disagree that the
15 Zoning Administrator should have looked at
16 this and saying how did it comply with the
17 previous use and maximize the parking.

18 However, then we had anecdotal
19 testimony and some evidence that they could
20 stack parking in it. They could fill the
21 entire area and park it up. That to me was
22 fine. However, that wouldn't go to satisfy

1 the required parking so we had to step back
2 from that.

3 It's an interesting piece that I
4 think one of the briefings put in there the
5 illustration of you wouldn't count -- this
6 isn't exact but they give you the illustration
7 you wouldn't count the parking if you were
8 parking the entire front yard. I thought,
9 wow, that opens up a Pandora's Box because, of
10 course, we don't allow parking in the front
11 yard.

12 It held some truth to me in my
13 thought process because it isn't like we would
14 just go and look at the existing condition and
15 see how many were dumped there but rather how
16 it would have -- in review and issuance of a
17 C of O how it would have complied. Based on
18 the history obviously we have the potential
19 for some grandfathering.

20 So I am in agreement with you as
21 we looked at the logical layout, the existing
22 condition that the assessment of three that

1 were provided would be a correct calculation
2 on the existing lot. Others? I think that
3 goes to the two instances which, again, are
4 the substance of what we are talking about
5 here.

6 One is the addition to the
7 structure. The other is the use change. Both
8 of those are factored into looking at is there
9 more parking required. I think each is
10 addressed in looking at the previous
11 condition. The requirement for the private
12 club and then the requirements for a charter
13 school and how it is calculated based on the
14 existing condition and then the provision of
15 free parking. Others?

16 MS. MILLER: I'm just not sure if
17 I follow your last point because my
18 understanding of 2100.5 I believe is not
19 affected by the change in use. No additional
20 parking would be required because it's an
21 historic structure regardless of its use.

22 CHAIRPERSON GRIFFIS: Right.

1 MS. MILLER: You're saying its use
2 is just affected by 206.1?

3 CHAIRPERSON GRIFFIS: No. What
4 I'm saying is both of those elements were
5 addressed by the Zoning Administrator and had
6 to have been addressed in its first review and
7 whether it would be in accordance with the
8 regulations. I agree with you that 2100
9 addresses each of those whether it be use
10 change and/or the addition to the structure.

11 Okay. What else?

12 MS. MILLER: If we find, which I
13 would, that AppleTree is exempt pursuant to
14 401.1, then we don't need to reach the other
15 issues that were raised but not really fully
16 addressed at the hearing with respect to the
17 actions of the Zoning Commission such as
18 whether the emergency rules were in effect or
19 whether there actually was an emergency.

20 I would suggest we don't even
21 reach that because if we find that they're
22 exempt even if they were in effect. We're

1 assuming they were in effect.

2 CHAIRPERSON GRIFFIS: Agreed.

3 Other elements?

4 MR. ETHERLY: If I might, Mr.
5 Chair, as we move into deliberation, could I
6 inquire what then would be your parking
7 number? I think I'm inclined to follow your
8 argument but perhaps I'm just following up on
9 Mrs. Miller's question of, let me just make
10 sure I understand you, what would your parking
11 number be.

12 CHAIRPERSON GRIFFIS: The parking
13 number would be the maintenance and provision
14 of three spaces. There were arguments in
15 every direction on that. There were arguments
16 that it should be reviewed and required to
17 maximize the amount that you can or was put
18 there. There was the other extreme which
19 said, "Look, yeah, there's nothing striped.
20 There's nothing saying parking. There's no
21 parking sign. Then we have no parking."

22 I don't agree with either of

1 those. I think there is a rationale in
2 between and that rationale in between does go
3 to looking at how it could be parked in
4 accordance with the size of drive isles, but
5 also in accordance with the structure that is
6 currently there. I add the chain link fence
7 as one of the structures there because, if I'm
8 not mistaken, there is evidence in the record
9 that shows that was a permanent construction.

10 All of that is the foundation of
11 previous approvals of which I am not
12 questioning but rather building the foundation
13 and getting to today's existing condition.
14 With that, I was looking at the calculation of
15 what would have been required, what was then
16 provided based on the existence of the
17 structure, and then also based on the historic
18 character of the building.

19 MS. MILLER: I just want to add
20 that in the brief of appellant in response to
21 intervenor's reply brief at page 4 they
22 discuss about how they made a good faith

1 attempt to determine how many spaces could
2 constructively fit on the property. They came
3 up with three spaces.

4 I don't think we had evidence to
5 the contrary. We had evidence that the club
6 might be required to have seven spaces but we
7 don't have any evidence that they actually
8 have seven spaces or seven spaces could
9 possibly fit there. We only heard testimony
10 about stacking sometimes for club nights.

11 CHAIRPERSON GRIFFIS: Right. The
12 architect's testimony that they were assuming,
13 although nothing was marked, striped, or noted
14 in the C of O, that they were assuming that
15 there were three there based on the size,
16 access, ingress, egress of the fencing and the
17 size requirements. Other issues or elements?

18 Mr. Moy, do you have in your
19 possession any --

20 MR. MOY: Yes, sir.

21 CHAIRPERSON GRIFFIS: -- absentee
22 ballots?

1 MR. MOY: I was going to bring
2 that to your attention.

3 CHAIRPERSON GRIFFIS: Excellent.

4 MR. MOY: Carol Mitten, who, of
5 course, has also participated on the case, has
6 filed an absentee ballot with rather
7 substantial comments. I don't know whether or
8 not you would like the staff to read her
9 comments.

10 CHAIRPERSON GRIFFIS: Two things.
11 I would like you not to indicate what her
12 actual vote is, if possible, and then to read
13 any of her comments on her ballot. I think
14 that would be instructive for our own
15 deliberation at this time.

16 MR. MOY: Yes, I can. "The ZA,
17 Zoning Administrator, determined three areas
18 of noncompliance with the zoning ordinance,
19 two related to the issues raised by the
20 appellant in Section 401.1, the area and lot
21 width requirements, and the third related to
22 required parking.

1 As to Section 401.1 the Section
2 does not speak to the use of the property. It
3 appears that the ZA infers that the
4 enlargement permitted by Section 401.1
5 anticipates no change in use. I appreciate
6 that the ZA was sensitive to the Zoning
7 Commission's concern regarding lot area and
8 lot width requirements as they applied to
9 public schools as expressed in the emergency
10 rulemaking.

11 However, the specialized condition
12 addressed in 401.1 was not discussed by the
13 Zoning Commission in approving either the
14 emergency or the subsequent permanent
15 rulemaking. To the extent that 401.1 is
16 ultimately inconsistent with the Commission's
17 intent but remains meaningful on its own
18 terms, then it is the flaw of the Commission
19 interacting the rulemaking, not an area of
20 interpretation for the ZA.

21 The third issue, the parking
22 issue, is the basis for my vote. The BZA

1 heard testimony as to the existing number of
2 parking spaces. The ZA testified that he
3 determined that six compliant parking spaces
4 could have been configured on the property for
5 purposes of establishing the existing number
6 of parking spaces.

7 It is appropriate to adopt this
8 number in the absence of facts to the
9 contrary, specifically an indication on the
10 prior C of O as to the number of existing
11 parking spaces. No such indication on the C
12 of O exist. The ZA consistent with his goal
13 of compliance first would appropriately
14 interpret the existing condition to achieve
15 the greatest degree of compliance for the
16 existing use, i.e., private club.

17 Further, we have testimony from
18 the neighbor, Mr. Foley, that the former user
19 did seek to maximize the amount of parking on
20 the lot using stacking. This reinforces Mr.
21 Crews' conclusion that the maximum number of
22 legal spaces should be assumed in the absence

1 of facts to the contrary.

2 Therefore, because the applicant
3 provided only three parking spaces thereby
4 reducing the number of existing parking
5 spaces, which is not permitted under Section
6 2100.5, whatever disagreements there may be as
7 to the interpretation of 2100.5 as it relates
8 to additions greater than 25 percent, there
9 has been no disagreement in my experience on
10 the BZA that the number of legal parking
11 spaces may be reduced from the existing
12 number."

13 CHAIRPERSON GRIFFIS: Excellent.
14 Thank you very much. I think that is well
15 stated. I noted that Mr. Crews actually
16 stated in his testimony, and I wrote the quote
17 in my own notes, that the property "never had
18 six or five spaces on the site but could." I
19 think that is what Ms. Mitten was actually
20 inferring also. There are two elements to
21 that to address that I see.

22 First, there was a permitted

1 construction of that fence which precludes
2 five or six as I see all the layouts and the
3 iterations. I don't disagree that Mr. Crews,
4 the Zoning Administrator, should have looked
5 at how many could have been provided or should
6 have been provided according to the
7 regulations.

8 The stackable, I'm not sure why we
9 are even talking about because unless there
10 was some sort of relief provided by this Board
11 for that, they never would have been able to
12 be counted as complying with the regulations.
13 Again, I go back to trying to establish
14 whether it was striped or wasn't. I find that
15 three seems to be the number -- not seems to
16 be.

17 Three is the logical number based
18 on the size of the surface area, the existence
19 of the egress stairs, the AC units, and the
20 gate most importantly which creates a drive
21 isle. When you have the dimensions that we
22 have, I don't see how you fit nine by 19

1 spaces in anymore than three.

2 Yes.

3 MS. MILLER: I also want to
4 comment that figure of five or six spaces,
5 whatever that was, that was determined after
6 Mr. Crews made his decision on the AppleTree
7 case. If you recall in his letter saying that
8 they needed parking, he said they needed 10
9 spaces in accordance, I think, with the 206.1
10 or whatever, you know, 10 spaces per use as a
11 public school.

12 He didn't say six and that was
13 part of our concern that the day before the
14 hearing when he looked at the property and
15 took pictures and we said, "How could your
16 decision have been based on that number since
17 you made your decision well earlier and you've
18 just taken these pictures."

19 CHAIRPERSON GRIFFIS: Right. I
20 think that is well said. I think it is a
21 difficult burden for the Zoning Administrator
22 to look at existing buildings and trying to

1 assess when it isn't clear on previous ruling,
2 previous permittings, or previous rulings,
3 previous permittings, or previous certificate
4 of occupancy so I agree.

5 MR. MANN: I also agree that three
6 is the correct number. I think that you laid
7 out the physical reasons why that is the
8 appropriate number. I also sort of disagree
9 with some of the comments we just heard on the
10 absentee ballot that implies we should be
11 working towards the maximum number.

12 I don't think that is the
13 direction that we should be heading. I think
14 that is why three in this case is more
15 supportable, particularly given the physical
16 evidence that you have outlined.

17 CHAIRPERSON GRIFFIS: Others?

18 MS. MILLER: I just want to
19 address the ANC report to give them their
20 great weight. I think where the ANC was going
21 was that the use of a charter school should be
22 considered a nonconforming use. I don't

1 believe it is a nonconforming use because use
2 of a public school is allowed in this
3 residential zone and, therefore, the arguments
4 that they made with respect to that failed.

5 It's sort of a nonconforming use
6 as a public school because it didn't meet the
7 lot and width requirements. The ANC has made
8 several arguments based on the fact that they
9 characterize the use in this case as
10 nonconforming because AppleTree didn't meet
11 the requirements set forth in 401.3.

12 CHAIRPERSON GRIFFIS: Right.
13 401.3 doesn't go to use.

14 MS. MILLER: It goes to area,
15 right.

16 CHAIRPERSON GRIFFIS: It goes to
17 the area of the lot and the width in that the
18 use is designated in order to establish what
19 is required for the lot width and the lot
20 area. A public school is a matter of right
21 use. It's an allowable use within the
22 residential zoned district so it's not as if

1 it's a -- the nonconformity of use is not
2 established based upon an area of compliance
3 or noncompliance.

4 If the building is five feet
5 higher than is allowed in the zoned district,
6 it doesn't make the use that fills it
7 conforming or not conforming. That use can be
8 conforming and the structure can be
9 nonconforming. Actually, it's incredible
10 articulated in our regulations as we look at
11 nonconforming structures with conforming uses
12 and nonconforming uses of conforming
13 structures and vice versa.

14 Okay. What else? Anything else?
15 Is there action proposed by the Board?

16 MS. MILLER: I just want to
17 clarify something. It doesn't take away from
18 what we were saying but they tied this
19 nonconforming use into 401.1 which talks about
20 meeting the requirements of Chapter 20.
21 Anyway --

22 CHAIRPERSON GRIFFIS: Correct.

1 MS. MILLER: Okay.

2 CHAIRPERSON GRIFFIS: I'm glad you
3 braised it and I think we have put it to rest.

4 MS. MILLER: Good.

5 CHAIRPERSON GRIFFIS: Anything
6 else then? Is there a motion?

7 MS. MILLER: I would move to grant
8 the appeal of AppleTree on grounds that it is
9 exempt from 206.1 pursuant to 401.1 and that
10 it is exempt from the additional parking
11 pursuant to 2100.5 and only three spaces are
12 required.

13 MR. MANN: Second.

14 CHAIRPERSON GRIFFIS: Excellent.
15 I'm prepared to support the motion. However,
16 I would have framed the motion a little bit
17 differently and found that it was -- the last
18 piece of it, it was in conformity with the
19 rest of the provisions of the regulations.
20 However, I don't think that is a critical
21 aspect that will be detrimental in terms of
22 the motion moving forward.

1 Speaking briefly to the motion, to
2 reiterate, I think all of this has been well
3 said and I look further in trying to figure
4 out the more current intent and the previous
5 intent of the zoning regulations is how we
6 look at this.

7 I also am looking at kind of
8 proposing the worse case scenarios because
9 that's what we have to do is kind of enlarge
10 what the impact is in many ways just to inform
11 ourselves and then we get to the specifics.
12 You look at it and you say, one, I wonder why
13 we deal with private schools and public
14 schools differently in our regulations but
15 that's a bigger discussion.

16 As we look at public schools we
17 also realize the fact that there are many,
18 many regulatory areas or agencies and elements
19 that go into opening a school and placing a
20 school. I think, one, our own building codes
21 will indicate how many students and teachers
22 will go into structures. That will be a

1 limiting factor.

2 We also have the health
3 requirements in terms of the age of students
4 and the like. Why do I say that? I have
5 great assurance that our zoning regulations
6 play only a small part in making sure that the
7 health and safety is ensured as we go forward.

8 However, the specifics of this, I
9 think, it has already been delivered and
10 directly stated that this, in fact, under
11 206.1 and 401.1 with the new text creations
12 was exempt from that lot or width area
13 requirements.

14 This is a matter of right use and
15 that it did comply with the other provisions
16 within the title. Others? Anything else?
17 Very well. We do have a motion before us. It
18 has been seconded. I would ask for all in
19 favor to signify by saying aye.

20 ALL: Aye.

21 CHAIRPERSON GRIFFIS: Opposed?

22 MR. MOY: Staff would record the

1 vote as four to zero to zero. This is on the
2 motion of Ms. Miller, the Vice Chair, to grant
3 the appeal. Seconded by Mr. Mann. Also in
4 support of the motion the Chair, Mr. Griffis,
5 and Mr. Etherly. As I said earlier, we do
6 have an absentee ballot from Carol Mitten and
7 her absentee vote is to deny the appeal. That
8 would give the resulting vote of four to one
9 to zero.

10 CHAIRPERSON GRIFFIS: Excellent.
11 Thank you very much, Mr. Moy. I believe it is
12 clear on the elements of what Ms. Mitten was
13 denying the appeal on. I appreciate you
14 reading that into the record for our own
15 information and deliberation. Very well. Is
16 there anything else on that case?

17 MR. MOY: That completes that
18 particular case, sir.

19 CHAIRPERSON GRIFFIS: Good. It's
20 my understanding that we have one more small
21 matter before us in our meeting. Is that
22 correct?