

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

- - - - - x
:
NORTHEAST NEIGHBORS FOR : Docket Number: CAB-1942-11
RESPONSIBLE GROWTH, ET AL., :
Plaintiffs, :
:
vs. :
:
APPLETREE INSTITUTE FOR :
EDUCATION AND INNOVATION, :
ET AL., :
Defendants. :
: Tuesday, March 29, 2011
- - - - - x Washington, D.C.

The above-entitled action came on for a hearing
before the Honorable GEOFFREY M. ALPRIN, Senior Judge, in
Courtroom Number JIC.

APPEARANCES:

On Behalf of the Plaintiff:

DONALD R. DINAN, Esquire
RONALD A. GOODBREAD, Esquire
Washington, D.C.

On Behalf of the Defendant:

JASON J. MENDRO, Esquire
Washington, D.C.

On Behalf of the District of Columbia:

ANDREW J. SAINDON, Esquire
JAY SURABIAN, Esquire
Office of the Attorney General
For the District of Columbia

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Board of Zoning Adjustment
District of Columbia
CASE NO.18239
EXHIBIT NO.18B51

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P R O C E E D I N G S

DEPUTY CLERK: Your Honor, recalling the following case. In the matter of:, case number 2011-CA-1942, In the matter of: Northeast Neighbors for Responsible Growth, Incorporated, et al., versus AppleTree Institute for Education and Innovation, Incorporated, et al. Will parties and counsel please identify yourself. Please state and spell your first and last names for the record.

MR. DINAN: Donald Dinan for the plaintiffs.

THE COURT: Good morning, Your Honor.

MR. MENDRO: Good morning, Your Honor. Jason Mendro, M-E-N-D-R-O, from the law firm of Gibson, Dunn on behalf of AppleTree.

THE COURT: Good morning.

MR. SAINDON: Good morning, Your Honor. Andrew Saindon, S-A-I-N-D-O-N, and I'm with the Office of the Attorney General for the District of Columbia, and with me is Jay Surabian, S-U-R-A-B-I-A-N, also from my office.

THE COURT: Could you spell that again?

MR. SAINDON: Sure.

MR. SURABIAN: S-U-R-A-B-I-A-N.

THE COURT: S-U-R-A-B-I-A-N. Good morning, gentlemen.

MR. SAINDON: Good morning.

1 MR. SURABIAN: Good morning.

2 THE COURT: And all these folks back here? Mr.

3 Jorgens is a plaintiff.

4 MR. JORGAN: Good morning, Sir.

5 THE COURT: I know. I read that. I read him.

6 MR. DINAN: Your Honor, with me is Ashley Haun,

7 our associate. That's H-A-U-N.

8 THE COURT: Good morning.

9 MS. HAUN: Good morning, Your Honor.

10 MR. ILER: My name is Gus Iler. I'm an

11 associate at Gibson, Dunn and Crutcher with Mr. Mendro.

12 MR. GOODBREAD: Ronald A. Goodbread on behalf of

13 Eileen Blinick on collateral issues.

14 THE COURT: Good morning.

15 MR. GOODBREAD: Good morning, Sir.

16 THE COURT: Anybody else we missed?

17 MR. MENDRO: Also with me today, Your Honor, is

18 Russ Williams a representative from AppleTree.

19 THE COURT: All right. Where is Mr. Williams?

20 MR. WILLIAMS: Good morning, Sir.

21 THE COURT: Good morning. Well, it's a lot of

22 material and it's got a long history this case. I've read

23 most of it and am familiar with the issues. What I'd like

24 to do in this TRO hearing is hear in order from Mr. Dinan

25 and anybody else that he, within reason that he feels

1 appropriate for me to hear from for the plaintiffs, and
2 then I guess Mr. Mendro and anybody from AppleTree that he
3 feels is appropriate to hear from, and then from the
4 Attorney General's Office through Mr. Sidon, Saindon or
5 anybody else that he feels is appropriate. I may have
6 questions as we go along but you're all used to that. Mr.
7 Dinan.

8 MR. DINAN: Yes, Your Honor. Your Honor, as you
9 said this case has been around for a long time and indeed
10 AppleTree originally filed for the permit on this property
11 on February 9th, 2006. This led to a series of
12 activities. First the zoning administrator in April of
13 '06 ruled that AppleTree failed to meet the zoning, the
14 BZA reversed that on, what's known as the 1958 exemption
15 on August 6th, 2007. The BZA denied the stay in September
16 of '07. The Court of Appeals dismissed an appeal upon a
17 motion in November of '07, and all of this culminated with
18 the last appeal being dismissed on December 13th, 2008,
19 and that was BZ appeal 17769, and that December 18th, 2008
20 is a very key date.

21 On a parallel track there was regulatory change.
22 In February 13th, 2006, the zoning commission defined
23 charter schools as public schools. That was 11-DCMR-
24 401.3. What this meant that the current site would be a
25 non-conforming use if defined as a public school.

1 However, AppleTree successfully argued the 1958 exemption
2 because the building was there before 1958. On September
3 14th, 2007 this loophole was closed through a text
4 amendment. AppleTree, however, was able to successfully
5 maintain that since the BZA had ruled in August of '07
6 that the September '07 did not apply, the decision had to
7 be made as the rule says they were at that time.

8 Again, the key point here is that if the permits
9 for any reason expire, then this is a non-conforming use
10 under the text amendment because it would now, the
11 application for a new permit would be under the new law.
12 The original permit, permit 89587, was issued on October
13 26th, '07, that's Exhibit D to our complaint, and on
14 November 15th, 2007, D.C. proposed to revoke it based on
15 environmental and other issues. AppleTree appealed. They
16 won. The, and this culminated that 89587 was issued non
17 pro tunc on April 28th, 2008. However, AppleTree did not
18 begin construction.

19 Now we get to the issues, the extensions of the
20 permits. On October 21st, 2008, AppleTree applied for an
21 extension of its permit. The statute, the regulations
22 clearly provide that you have, the permit is good for one
23 year. You can apply for three six month extensions.
24 Applications have to occur before the expiration of the
25 permit or the extension there of. This was the extension,

1 on the face of it, this is Exhibit E, of 89587. It is for
2 one year. Again, DCMR, 12 DCMR 105.5 says it can only be
3 for up to six months. Therefore, it is our contention
4 that this extension is void on its face.

5 Second, the permit, they signed an extension of
6 this extension, the second extension on September 21st,
7 2009. Again it was for one year. Again because it was
8 not up to six months we contend it was void on its face.
9 Even if one was to somehow or another construct that the
10 original extension on October 21st should be read to mean
11 six months, the second extension would then be out of time
12 because the six months had lapsed and they had not asked
13 for an extension. Then we get to the third exception. On
14 September 17th, 2010, that's Exhibit G, again it's for one
15 year not six months, void and/or out of time.

16 The regulations are clear, 105.5 that the
17 extensions can only be for six months. The extensions
18 that were issued for a year were contrary to the, on the
19 face to the regulations, and this Court should find as for
20 the purposes of this hearing in the plaintiff's favor on
21 the likelihood of success on the merits. Indeed, we get
22 the curious situation where on December 3rd, 2010, DCRA
23 proposed revocation saying exactly what I've just said.
24 However, on February 24th DCRA withdrew the revocation and
25 plaintiffs can find no documents on the website, perhaps

1 the Attorney General can give us some light here, that
2 shows that any of the provisions of 12 DCMR 105.6.1, which
3 covers appeals of revocations, were met. There is no
4 appeal. There is no pleading. There is nothing. The
5 ruling just comes out. Construction began, allegedly
6 began on February 28th, 2011.

7 As for jurisdiction, this is really a primary
8 jurisdiction case of the law is clear that this Court has
9 jurisdiction to issue an injunction. We cite President
10 Directors of Georgetown v. Diavitus, 470 A2d 1248, also
11 D.C. Code, Section 6-641.09, as directly on point that
12 this Court has jurisdiction. For that reason the
13 exhaustion arguments are of no moment because exhaustion
14 would only apply if the claims are original cognizable.
15 Here they are not by statute. The issues of -- is there
16 preclusion -- either issue preclusion -- clarital
17 (phonetic) stop or claim on a preclusion.

18 From this timeline we can see that that is not
19 and cannot be the case because this cause of action rises
20 out of the extensions of the permits, a cause of action
21 that did not exist in the previous case that the
22 plaintiffs had before the BZA. That we would note that
23 the plaintiffs are clearly not in privity with the ANC.
24 On standing, the plaintiffs clearly have standing. Eileen
25 Blinick, one of the plaintiffs, is the adjacent landholder

1 who is being specially damaged through the jurisdiction.
2 Even the District, the Government admits that if you are
3 being specially damaged, that's in their memo at 15, that
4 you would have jurisdiction. Further, Friends of Tildon
5 Park v. D.C., 806 A2d 1201, that neighborhood associations
6 have standing in cases like this.

7 Going to the immediate and irreparable harm.
8 The immediate irreparable harm falls on two main prongs.
9 First the harm to the adjacent land owner, Eileen Blinick,
10 because of construction that's going on in violation of
11 the permit. Second, the specific harm to the residents of
12 the 1200, of the 200 block of 12th Street, Southeast,
13 which would have, putting a use like this, a non-
14 conforming use like this in that residential block,
15 because of the effect of traffic and congestion, et
16 cetera, would have a drastic effect on the quality of the
17 lifestyle that they have, the quiet enjoyment of the
18 property and the, the value of the property.

19 The law as I've cited clearly states that if
20 there is no permit the Court should issue an injunction.
21 The harm that the District talks about, generalized harm
22 not being cognizable, all those cases that they cite are
23 eminent domain taking cases. We would argue that that is
24 not persuasive here. Here we have a non-conforming use
25 and a building being built on, in, or without a permit, on

1 invalid permits. I would point out that the, when we get
2 to the equities, but I would point out that the harm that
3 would occur actually flows into the equities, that this
4 argument of, well, maybe the harm to the, we can
5 understand the immediate and irreparable harm to Blinick
6 and I think that's all we need to prove today, but to say,
7 well, the harm really won't happen to the residents until
8 they open the building leads to sort of this conundrum
9 that you're going to build a school and then say, oh you
10 shouldn't have built it so I'm going to close it down.

11 THE COURT: It's happened before in the
12 district.

13 MR. DINAN: It has. It has, but we would argue
14 that given the balancing test that this Court is to use,
15 because the likelihood of success is so huge that in this
16 case the harm, that we meet the immediate irreparable on
17 the effect on the neighbors, we would argue that we,
18 regardless of that, meet the immediate irreparable harm to
19 Blinick whose building, and she's available to testify,
20 who is already suffering damage to the building.

21 Very quickly, Your Honor, on the equities, the,
22 AppleTree argues in their papers that somehow or another
23 they're going to get in trouble with their construction
24 bonds or their loans. I think the law is very clear that
25 you can't create your own injury. Also, they actually

1 often have no proof that the money the City, first of all
2 the money the City Council gave them wasn't site specific.
3 They talk about alleviating pressure on the schools.
4 That's really a false premise. The charter schools are
5 filled by lottery. So, whether children from the
6 neighborhood would go or not go it doesn't alleviate the
7 pressure on the adjoining school. Further --

8 THE COURT: Well, not very much. It might
9 alleviate it to some extent.

10 MR. DINAN: Well, it might to some extent. The,
11 but then the other school is part of the lottery and it
12 could come in, that could increase a bit, and further,
13 whereas, so really the imposition of the stay we would
14 submit is not really going to cause any immediate harm to
15 AppleTree because we don't see how they can possibly be
16 open by the middle of August for this school year. I mean
17 they're already talking about --

18 THE COURT: They say they can.

19 MR. DINAN: Well, they do but --

20 THE COURT: That is, if I deny this.

21 MR. DINAN: If you deny it.

22 THE COURT: That's right.

23 MR. DINAN: But, you know, they also say that
24 they can't, even by their admission they can't start doing
25 the underpinning work and taking the cellar down two feet

1 until April 15th because of the 30 day notice provision,
2 and it's just not believable that you're going to do that
3 kind of work in the basement of the building and have it
4 ready in what's going to be, let's see one, two, three,
5 four months. Also, we don't see any evidence that they're
6 even advertising for students in the lottery, which is
7 beginning.

8 THE COURT: Well, it's because among other
9 things I would think that you and your clients have
10 challenged this now for five years, right.

11 MR. DINAN: Yes, Your Honor.

12 THE COURT: That's why they, I mean, that's one
13 of the reasons why they haven't, I assume. We'll find out
14 in a few minutes.

15 MR. DINAN: And then, Your Honor, on the final
16 prong, the, the public interest. Again, because we feel
17 that our case is so strong on the merits that the public
18 interest where it lies is the buildings not be built in,
19 without building permits and in violation of the law, and
20 I would conclude by stating that this type of use has now
21 been prohibited in the District of Columbia in an R4 zone.
22 There are none of these schools in an R4 zone of this
23 nature that exist. In the future none can exist.

24 So, here you have this one only, on a loophole
25 in a grandfather clause and that in looking at the

1 equities that this particular use, that it's the policy of
2 the District of Columbia that this use should not be
3 allowed because of the harm that it does to the fabric of
4 the neighborhood and the residents.

5 THE COURT: Then why are the mayor, the Council,
6 the ANC, at least now, they might have taken different
7 positions earlier, supporting this, the opening of this
8 school?

9 MR. DINAN: Well, I would argue that the mayor
10 and the Council have not acted in a way to, and have not
11 said, and I don't think there's any evidence that they've
12 said that they are for the opening of the AppleTree
13 charter school on this site. They have clearly said that
14 they, that the policy of the city, that they are for the
15 charter school movement and that they support AppleTree
16 efforts as shown by the fact that they gave the --

17 THE COURT: Right.

18 MR. DINAN: -- the money, but that money could
19 be used anywhere. In fact the council member for the
20 area, Tommy Wells, has been trying to get AppleTree to
21 stop at this site and has offered them an alternate site
22 right around the corner.

23 THE COURT: Well, that would be challenged, too,
24 by people like you, for five years, wouldn't it?

25 MR. DINAN: No.

1 THE COURT: Why not? Tell me why not?

2 MR. DINAN: Well, Your Honor, why not and in
3 fact Mr. Jorgens can testify, and this gets to the ANC If
4 you actually read the ANC letter they don't say they
5 support the school at this site. They say they support
6 the charter school movement. Nobody, or at least
7 plaintiffs are not against AppleTree. They're not against
8 the charter school. What they are against is the school
9 on that block where it doesn't fit and the harm that it's
10 going to do. They would, and Mr. Jorgens can testify to
11 that, welcome a charter school, welcome an AppleTree
12 school, and I'll use the alternate site offered by Mr.
13 Wells and by the ANC, David Holmes, the chairman of the
14 ANC, right around the corner, the Murray school, which is
15 surplus school, which is already built out as a school,
16 has a playground, has parking, has a drop off zone.
17 Nobody's against that.

18 This is not a NIMBY case. This is not that we
19 want to stop, the plaintiffs want to stop having the
20 school, it's not anti-charter movement. It's not an anti-
21 school movement. It's not an anti-children movement.
22 They would welcome it. The neighborhood would welcome it.
23 Capitol Hill has more charter or as many charter schools
24 if not more than any place in the city, and people are
25 very happy for that. It's one of the things that's, I

1 live on Capitol Hill. It's helped Capitol Hill become one
2 of the more desirable neighborhoods.

3 The issue here, and we shouldn't mistake what
4 the issue is, is this building wedged into a residential
5 block that abuts to 19th century town homes on a narrow
6 residential street where there's hardly any room for the
7 traffic to get by. That's the issue. The site. Not the
8 use. Not the existence, and so, no, people aren't going
9 to fight if they move around the corner, and again I would
10 argue as shown by the fact of Mr. Wells trying to get them
11 to move, and Mr. Wells is on the record of supporting the
12 residents. That Mayor Fenty was on the record as
13 supporting the residents. I don't believe Mayor Gray has
14 taken a position, but there is no evidence that the City
15 Council and the mayor want the school built at this point.
16 What they want to do is support generally charter schools
17 and support specifically AppleTree. The neighborhood is
18 in support of that.

19 Now, Your Honor, and I guess here we would ask
20 Your Honor's pleasure. We have three available witnesses,
21 Mr. Jorgens, who would testify to some of the matters that
22 I just mentioned and also to the nature of the community
23 describing the narrowness of the street, putting on the
24 record the narrowness of the street and how two cars can
25 hardly get by, the harm to the property. We also have

1 Eileen Blinick, the adjacent land owner, who would testify
2 as to the immediate harm that's occurring to her house by
3 this construction, and third, we have as an expert
4 witness, Mr. Charles Burger, on the harmful effects that
5 this use would have on the neighborhood and the alternate
6 cites.

7 THE COURT: Those arguments I assume were
8 presented to the BZA, though, weren't they?

9 MR. DINAN: On the, well, not specifically, Your
10 Honor, in the sense that, when I say not specifically, in
11 the sense that you didn't have immediate irreparable harm
12 aspect to me. Clearly, before the BZA, arguments were put
13 forth on the harm to the neighborhood. The BZA's ruling
14 however was purely on a matter of law saying the building
15 was built before 1958. The 1958 grandfather clause is in
16 effect and therefore it is a conforming use and the permit
17 would be valid.

18 THE COURT: Well, your position is that that's
19 an erroneous decision?

20 MR. DINAN: No. For the purposes of our, for
21 today we would take that that decision at that time was
22 correct. The subsequent decisions, and this is for the
23 purpose of argument today, we would take the subsequent
24 decisions that the text amendment did not apply because
25 the BZA ruling was in August, the text amendment didn't

1 come in until September, and it's the zoning law as it
2 exists at the time of the exemption. That's why I said
3 that the key date is December 18th, 2008, when the last
4 appeal ended, thus there could be no tolling after that,
5 and then permit 89587, October 26th, 2007.

6 When that was re-issued non pro tunc on April
7 28th, 2008, for the purposes of today we would state that
8 they could have started building then but they didn't, and
9 then the permit expired and it expired and they didn't do
10 it right to get the extensions. The extensions were void
11 because of their one year. DCRA revoked their permits on
12 that ground, and then through some mystery proceeding
13 revoked the revocation. They're also void is our count
14 one, 11 DCMR 3130 they didn't begin building in six months
15 after the BZA ruling. We may hear that the BZA ruling
16 didn't issue the permit but the BZA order itself
17 references that the board authorized the permit under 3130
18 and that's BZA decision 17769 at two.

19 On count two, the 105.5, that's the six month
20 extensions, which we discussed, and then the Government
21 comes forward with an additional argument, which is 11
22 DCMR 3202.4(A), which says that you have two years to
23 build after the permit is issued and the Government cites
24 that under, in the Government's analysis the end of the
25 tolling is December 18th, 2008. I think the Court has to

1 give cognizance to the Government on that as the agency
2 with the special expertise. When you look at the calendar
3 they're out of time on all three of these statutes.
4 They're out of time on 3130. The 105 extensions were
5 invalid on their face and then the second and third
6 extension were out of time and they're out of time on the
7 3202 cited by, by the Government, the two years have ran.

8 And what is not mentioned in the briefs is that
9 on 3202 you, after two years goes by you can apply for an
10 extension but the application has to meet the current
11 zoning laws. They can't meet the current zoning laws.
12 What they should do, and this is why, in looking at the
13 equities that they should not be able to cry about their
14 bonds, et cetera, is that they should go back to the
15 zoning commission, apply for the permit, for the variance
16 and the zoning commission would rule and say yes this
17 amounts to merits of variance or no it doesn't, instead of
18 trying to continue to jam the square peg in the round hole
19 of the loophole, which has been closed, on the
20 grandfather, which has been removed and then these
21 extensions, these permits which are void on their face.
22 The statute says six months. It's one year.

23 THE COURT: Okay. Well, let's table the
24 question of hearing any testimony until I hear from the
25 other gentlemen here. Mr. Mendro.

1 MR. MENDRO: Thank you, Your Honor. Again, my
2 name is Jason Mendro. I'm here today on behalf of
3 AppleTree. Mr. Dinan just spoke at some length about the
4 protracted history of the litigation in this case. This
5 is the latest tactic now in about what has stretched out
6 to be roughly a half decade of vexatious litigation
7 focused exclusively on stopping the construction of a
8 single preschool in Northeast Washington, D.C. A
9 preschool that would provide free pre-literacy education
10 to three year olds and four years old from needy families.

11 Although you'd never know it from reading the
12 plaintiff's papers on submission, we've all been here
13 before. Four years ago Judge Morin heard what is an
14 earlier version of this very same lawsuit and he dismissed
15 it. It's a lawsuit that's brought by one of the same
16 plaintiffs, NNRG, by the same counsel asserting the same
17 conjectural injuries that are before the Court today.

18 In fact, Your Honor, on at least three occasions
19 tribunals in the District of Columbia have rejected the
20 type of preliminary relief that the plaintiffs are seeking
21 here today. The first time was in the case by NNRG before
22 Judge Morin. The second time involved an appeal by the
23 very same plaintiffs that are in this case, Ms. Blinick
24 and Mr. Jorgens, of the BZA decisions holding that
25 AppleTree has satisfied every single one of the applicable

1 zoning regulations. That appeal was made to the D.C.
2 Court of Appeals, which is in fact the only tribunal that
3 has jurisdiction to hear that type of challenge and the
4 same plaintiffs asked the D.C. Court of Appeals to stay
5 the BZA's ruling.

6 The Court of Appeals denied that request, which
7 is in a sense very similar to this request and has the
8 same requirements that plaintiffs need to meet today. The
9 plaintiffs also asked the BZA to stay its decision. The
10 BZA denied that request observing in an order that the
11 plaintiffs failed to meet any of the four requirements
12 necessary to get preliminary relief, and the plaintiffs
13 failed to meet those requirements today. First,
14 plaintiffs have to prove or have to at least make a
15 showing that they have a likelihood of success on the
16 merit, it has to be a substantial likelihood.

17 THE COURT: Well, I gather from what Mr. Dinan
18 has said that the extension issue is their big point on
19 that, on that question. So, why don't you address that?

20 MR. MENDRO: Well, the extension issue, because
21 a point if they survive the procedural defects, the many
22 procedural defects in the complaint, including the fact
23 that the Court lacks subject matter jurisdiction over this
24 controversy at all. Challenges to BZA decisions have to
25 go to the D.C. Court of Appeals. There was such a

1 challenge in this case. The plaintiffs dismissed their
2 own challenge in front of the D.C. Court of Appeals and
3 relinquished any right they had to challenge the BZA's
4 decision. Challenges to permitting issues have to be
5 raised before DCRA. Those challenges then can be
6 litigated through the Office of Administrative Hearings
7 and anybody who is aggrieved by a decision of the Office
8 of the Administrative Hearings then has resort exclusively
9 to the D.C. Court of Appeals but not his Court. So, for
10 that reason and for a host of other reasons that are set
11 forth in our brief, we don't even get to the extension
12 issue.

13 THE COURT: I'd like you to. You have filed a
14 motion to dismiss.

15 MR. MENDRO: That's correct, Your Honor.

16 THE COURT: Which I actually have not read.

17 MR. MENDRO: That motion is on submission.

18 THE COURT: That's right.

19 MR. MENDRO: As far as the extension issue goes,
20 Your Honor, the plaintiffs have not even had a consistent
21 theory about what the deadline is, but one thing that we
22 have heard is that tolling is at least arguably applicable
23 up until the time of the BZA's last decision, which was
24 December 18th of 2008. That decision took effect 10 days
25 later, which was December 28th, 2008, and the construction

1 code is absolutely clear on what the deadlines are for
2 beginning construction. Property owners have 12 months
3 from the time they can begin authorized work. That is
4 work that allows them to proceed with the construction,
5 work that AppleTree could only have conducted beginning in
6 December of 2008. They can then seek three extensions for
7 periods of six months. I'm not sure where two, two years
8 comes from, Your Honor, because the code is unambiguous in
9 providing for 30 months, if all three exceptions, all
10 three extensions are granted. Those extensions can be
11 granted even after a permit expires. There is no question
12 that AppleTree began --

13 THE COURT: What's your authority for that?
14 That's disputed I think.

15 MR. MENDRO: That's in 12 DCMRA 105.5.

16 THE COURT: All right. Let me have it again.

17 MR. MENDRO: 12 DCMRA.

18 THE COURT: 12 DCMR.

19 MR. MENDRO: Section 105.5.

20 THE COURT: Okay, thank you.

21 MR. MENDRO: On every occasion when there was
22 any clarity about whether AppleTree's permit was going to
23 expire, AppleTree went through the appropriate channels to
24 the code official, requested an extension, that extension
25 was granted. AppleTree began construction both within the

1 period that's listed on the face of its last permit
2 extension and within the two year period that began as of
3 December 28th, 2008. So, there is no merit whatsoever to
4 plaintiff's argument. Even if this Court looks past the
5 procedural defects in this complaint, which we submit the
6 Court should not, at a minimum --

7 THE COURT: You mean the jurisdiction issue.

8 MR. MENDRO: The jurisdictional issue, the
9 standing issue, the ripeness issue, the failure to exhaust
10 their administrative remedies before the appropriate
11 agencies. Mr. Dinan said one thing that I do very much
12 agree with, which is that DCRA is the agency with
13 specialized expertise in this area. This is a complex and
14 articulated statute with lots of confusing language about
15 what the deadlines are. It is the exclusive provenance of
16 DCRA to apply those deadlines and to apply the statute.
17 The ANC on December 13th, 2010, just a few months ago, ANC
18 6A filed a challenge to DCRA's decision to allow this
19 permit to stand up. That is the appropriate place,
20 assuming that ANC 6A was within time, to make that
21 challenge, which I, which I submit is the wrong
22 assumption, but even if they were within time DCRA was the
23 place to go. The ANC promptly withdrew that challenge --

24 THE COURT: Do you know why?

25 MR. MENDRO: Because, I do know why. The

1 meeting at which the ANC decided to challenge AppleTree's
2 permit was a meeting that was not attended by the full
3 body of the ANC. The full body of the ANC reconvened
4 after that decision was made and voted as a group to
5 support AppleTree's project. Mr. Dinan has said that the
6 ANC in some obscure way just supports charter schools but
7 not charter schools at this property. The record shows
8 otherwise. The ANC withdrew a challenge specifically to
9 this project, specifically at this time, specifically at
10 this location, 138 12th Street, Northeast and that's
11 because it supports a project there.

12 So, there is no chance that this case is going
13 to survive dismissal much less has there been any showing
14 of any substantial likelihood of success. In addition the
15 plaintiffs have made no showing whatsoever of any
16 irreparable or immediate injury. In fact we submit that
17 the plaintiffs haven't shown any injury that's cognizable
18 at law. The types of injuries that the plaintiffs alleged
19 that they will incur here are the very types of injuries
20 the D.C. Court of Appeals held in the York Apartments case
21 are not cognizable at law, not sufficient for a standing.

22 Mr. Dinan's clients do not have a right to sue
23 for less traffic on their street. They do not have right
24 to quiet enjoyment of their property to the exclusion of
25 the right of other property owners in the area. They have

1 pleaded no specific injury that confers standing to bring
2 this case, and that's another reason why preliminary
3 relief should be denied and another reason why the case
4 should, and I believe will, ultimately be dismissed.

5 The plaintiffs also conceded that there is no
6 chance that any injury if there is injury at all would be
7 immediate. Mr. Dinan I think has just argued that the
8 school won't open for a year or more. He's incorrect
9 about that. The unrefuted facts in this case are that
10 AppleTree intends to open a project this fall.
11 AppleTree's construction contractors have also testified
12 that that's possible and that's going to happen absent the
13 relief that the plaintiffs seek. However, the soonest
14 that there is going to be noise from a preschool or
15 congestion from a preschool traffic or otherwise will be
16 in the fall on anybody's theory in this case and the
17 record is unambiguous about that. So, there is absolutely
18 no immediate harm the neighbors could conceivably face
19 even on their own theory.

20 AppleTree, on the other hand, faces a very real
21 risk that if there is any further delay whatsoever in this
22 construction schedule that the project will not be
23 completed by fall in time for 60 three year olds and four
24 year olds to begin school and in time for AppleTree to
25 satisfy the requirements of its various bonds, and if

1 those bonds go into default millions of dollars hang in
2 the balance. The ultimate, the ultimate viability of this
3 project hangs in the balance, the jobs of some dozen
4 employees who would be teaching kids at 138 12th Street
5 hang in the balance, and in addition another one of
6 AppleTree schools, which is currently being built and is
7 tied to the same financing, that project could also be
8 jeopardized.

9 Finally, the plaintiffs have to demonstrate and
10 have failed to demonstrate that the balance of the
11 hardships here weighs in their favor. The balance of the
12 hardships weighs decidedly in favor of AppleTree and in
13 favor of denying the relief that the plaintiffs seek. As
14 we've already discussed, the plaintiffs have shown no
15 cognizable injury whatsoever. As we've already discussed,
16 even a short delay could prevent AppleTree from building
17 this property.

18 The D.C. Council has already voiced its support
19 for this project to the tune of some \$3.5 million. There
20 is no question that the public interest is in favor of
21 upholding the law and upholding the permit the DCRA and
22 the BZA have repeatedly said is valid, have repeatedly
23 said complies with all applicable regulations. The
24 benefit that this construction is going to provide to the
25 community is the benefit of allowing about five dozen

1 young kids who desperately need a chance to catch up on
2 education so that they can start elementary school on the
3 same footing as kids that have had better opportunities
4 that have families with more needs, that is the public
5 interest that AppleTree would serve. That is the public
6 interest that AppleTree intends to serve.

7 The community supports AppleTree's project. The
8 government of D.C. supports AppleTree's project. They
9 support this particular project contrary to the arguments
10 that Mr. Dinan made, and the only interest that the
11 plaintiffs have raised in response is their own self-
12 interest. Their own self-interest to not have to see
13 children out of the windows of their homes, to not have to
14 hear children in school hours Monday through Friday
15 sometime in the future several months from now.

16 THE COURT: That's a little harsh, don't you
17 think?

18 MR. MENDRO: I don't believe it is, Your Honor.

19 THE COURT: I mean, they're arguing traffic and
20 depreciation of property values. You're making it sound
21 as if they just don't like kids. I don't --

22 MR. MENDRO: Well, Your Honor, they don't, I'm
23 sure they don't like traffic and neither do I.

24 THE COURT: I don't think that's a fact.

25 MR. MENDRO: And if there was a cause of action

1 for congestion of traffic I think that there would be a
2 lot of litigation about ingress and egress to and from
3 D.C. on 66. There's no such cause of action.

4 THE COURT: Let me ask you a question.

5 MR. MENDRO: Sure.

6 THE COURT: I think it's in here somewhere, but.
7 What is the capacity of the proposed school? How many
8 kids are we talking, or children are we talking about?

9 MR. MENDRO: We're estimating about 60 children
10 at this time.

11 THE COURT: Okay.

12 MR. MENDRO: And roughly --

13 THE COURT: Full time each day.

14 MR. MENDRO: Full time each day during school
15 hours.

16 THE COURT: Yes.

17 MR. MENDRO: This would provide jobs for between
18 12 and 15 employees. That's the estimate at this time.

19 THE COURT: That's not really something for me
20 to consider. That's for other agencies but --

21 MR. MENDRO: Well, I think --

22 THE COURT: -- but it's interesting to know.

23 MR. MENDRO: It's interesting, but I also think
24 it's relevant to the public interest. We're at a time --

25 THE COURT: Perhaps.

1 MR. MENDRO: -- when people need jobs. We're in
2 a school system that is desperately undermanned that is
3 desperately overcrowded. The D.C. Partnership for Early
4 Literacy Program estimates that AppleTrees efforts save
5 the District approximately \$8.1 million a year. This is
6 something that the mayor's office, the deputy mayor for
7 education, strongly support, and who doesn't support it
8 now are a minority of people in a neighborhood that's
9 represented by an ANC that now favors the project. So,
10 we've got a small minority of people with very thin
11 grounds for objection faced off against the interest of
12 dozens of kids and adults who need jobs in a school area
13 that needs additional schools.

14 The final point that I'd like to make, Your
15 Honor, is that there is simply no emergency here as Mr.
16 Dinan has stated. This has been going on for a half a
17 decade. The only emergency is that the plaintiffs have
18 been suing for five years and losing for five years and
19 now they've lost again. There is nothing new. There is
20 no unexpected event. This is the culmination of several
21 failed attempts to stop this school, and moreover just as
22 a small aside, when presented with the opportunity to come
23 before this Court and argue this motion last week the
24 plaintiffs rejected that opportunity and pushed this
25 hearing off until this week --

1 THE COURT: Five days.

2 MR. MENDRO: -- I think further demonstrates --

3 THE COURT: A five day continuance, that's
4 right.

5 MR. MENDRO: Right, further demonstrating that
6 this is not an emergency. For all of these reasons the
7 motion for preliminary relief should be denied.

8 THE COURT: I don't know that I would accept the
9 last point about, you know, the five days. Lawyers, I
10 don't know what the reason but people do have schedules.

11 MR. MENDRO: Well, it's also been several weeks
12 since the construction resumed and one of the plaintiffs
13 is an attorney that understands how TRO's work.

14 THE COURT: Well, you handle CJA cases, right,
15 Joe?

16 UNIDENTIFIED: I don't have a lot of TRO's
17 there, Your Honor.

18 THE COURT: All right. I'm sorry. It's not a
19 laughing matter. Mr. Saindon.

20 MR. SAINDON: Good morning. Thank you, Your
21 Honor. I don't know that I have much to add to the
22 presentation we've heard this morning. We've laid it all
23 out in our brief. We don't think plaintiffs meet any
24 element of the four-part test required for emergency
25 injunctive relief. Primary jurisdiction lies elsewhere.

1 Again, as --

2 THE COURT: You don't think I have jurisdiction,
3 that we have jurisdiction in this Court also.

4 MR. SAINDON: That is correct, Your Honor, yes.
5 I mean, obviously if they're challenging, if they claim
6 the permits have expired then they need to go to the OAH
7 first, Office of Administrative Hearings --

8 THE COURT: Right.

9 MR. SAINDON: -- or if there's a zoning problem
10 they go to the BZA, they don't go here. They're barred by
11 preclusion. There are by my count seven different
12 challenges to this construction and various fora. I guess
13 the District's main point is, as far as failure to
14 establish a substantial likelihood of success on the
15 merits, they lack standing. This is the textbook
16 generalized grievance. Nothing specific to these
17 plaintiffs, it affects everybody in the neighborhood. I
18 guess the primary weakness from the District's perspective
19 is the lack of evidence, that plaintiffs have presented
20 simply conclusory declarations, even to the point of when
21 AppleTree began construction. All we have are plaintiff's
22 conclusions. We don't even have in their declarations
23 when AppleTree began or didn't begin construction and
24 that's simply not enough to qualify for emergency
25 injunctive relief. We've set forth our tolling argument

1 to some length, and I think you can read those, Your
2 Honor, and I'd simply rest on our brief, unless you have
3 some specific questions.

4 THE COURT: I may think of some shortly but
5 let's move on. There are other attorneys in the room.
6 Does anybody wish to, Mr. Goodbread, you represent Ms.
7 Blinick, right?

8 MR. GOODBREAD: Yes, on collateral matters. I
9 think that the issues have been very well set forth by
10 counsel for both sides and I commend them for it. There
11 is a concept with the, dealing with the DCRA that is so
12 amorphous. When Franklin Roosevelt first came to
13 Washington and he said wrestling with the State Department
14 was like wrestling with a featherbed. You can knock
15 yourself out and it's still in the same shape as when you
16 started.

17 THE COURT: It's still true as I understand it.

18 MR. GOODBREAD: And that's been my experience
19 here, to argue that there was no immediate or insipient
20 damage to Ms. Blinick because of a six month or one year,
21 or whatever time period you want to apply to it. I think
22 it's disingenuous. The prospect of those damages is still
23 strong. It is still present and it does fulfill that
24 essential element of the four-part test or temporary
25 equitable relief.

1 THE COURT: Okay. Thank you. Is there anyone
2 else? You proposed some testimony. I don't know that I
3 need it. These arguments are pretty fully encompassing
4 and I'm pretty familiar with them now. Not that I don't
5 want to hear from Mr. Jorgens, but --

6 MR. JORGENS: Long winded jury arguments, Your
7 Honor. Your Honor, I --

8 THE COURT: There was an expert you mentioned.

9 MR. DINAN: Yes, he would, he would testify on
10 the harm, the specific harm that would occur to the
11 residents of the 1200, of the 200 block of 12th Street
12 Northeast through the traffic, the congestion, the noise,
13 the safety issue, how are they going to drop these kids
14 off in the middle of the street and the loss of quiet
15 enjoyment and the, and the depreciation of property
16 values.

17 THE COURT: I assume those issues, am I wrong,
18 were gone into before the zoning administrator and the
19 Board of Zoning Adjustment?

20 MR. DINAN: Again, Your Honor, the harm to
21 neighbors on that block is, was presented in AppleTree's
22 appeal. Remember the zoning commission ruled, revoked
23 the --

24 THE COURT: That's right.

25 MR. DINAN: -- the permit before the BZA. The

1 BZA, though, when you read its decision, the BZA doesn't
2 go into the equities. The BZA just rules on the law.

3 THE COURT: But the arguments were presented,
4 they were in the record --

5 MR. DINAN: They were in the record, yes. But
6 it doesn't make the arguments any less true. It's just
7 that they didn't rise to the level of the materiality that
8 the BZA needed to rely on. I mean, the BZA said you're
9 under the '58 exemption and here you go. Those equities
10 would not come in. I mean, if you can build as a matter
11 of right you can build as a matter of right and, you know,
12 and that, and again to go back to the District's argument
13 on the generalized harm, we again state that all the cases
14 the District cites are taking cases. They're not somebody
15 building in violation of the zoning or building without a
16 building permit.

17 Also, the harm is not generalized. We're not
18 talking about the harm to the community or Capitol Hill or
19 Lincoln Park, et cetera. We're talking about the harm to
20 the individuals who live adjacent to this property, on the
21 200 block and in particular Blinick has standing and has
22 immediate irreparable harm. The, her walls are cracking
23 and her bricks are falling out and they even haven't
24 started digging down the two, the two feet below where
25 they're going to have to do huge underpinning to hold

1 those two 19th century houses up or the whole thing's
2 going to cave in. That's clearly immediacy.

3 She clearly has standing and again the harm is
4 to the people in the 200 block, and I don't want to beat a
5 dead horse, and with all respect to my brethren for
6 AppleTree, but an awful lot of things that were put forth
7 in their brief are just conclusory statements. I mean,
8 they say, well, we're going to be in trouble with our
9 bonds or we're going to be in trouble with loans, et
10 cetera. They offer no proof of this. The, oh it's going
11 to jeopardize another school. They offer no proof of
12 this. They say everybody's for it and everybody is for
13 it, the charter school. They're all mistaking the
14 question and trying to put the spotlight on something
15 else.

16 The issue is not a charter school in Capitol
17 Hill. The issue is not AppleTree. Again, I don't want,
18 the issue is in this building on the 200 block where it's
19 just not going to fit and where it's going to cause all of
20 this immediate harm. Our expert would testify that that
21 harm is going to translate into a 10 to 15 percent loss in
22 property value to each person on that block. The harm
23 won't spread out beyond the block because Capitol Hill is
24 a busy place. In fact everybody in the block says build
25 the school in the school around the corner and, you know,

1 you live downtown, you live downtown.

2 So, what we're saying is, is that a lot of the
3 arguments to AppleTree with respect that they've tried to
4 make, they're trying to misstate the question and not
5 address the direct issue, and on the ANC letter, it's
6 Exhibit 7 to their brief, and I would say if one reads
7 that letter, two things, they support the charter school,
8 they don't support this specific project. Also, in saying
9 about the, withdrawing the request for appeal, this was on
10 December 13th, 2010. The appeal had already been mooted.
11 At that point DCRA had revoked the permit as being
12 expired. So, I just wanted to make those additional
13 arguments.

14 THE COURT: Okay. Thank you, Mr. Mendro, Mr.
15 Dinan rather colorfully, and maybe there's some support
16 for this in the record, I'm not, I'm not sure, made the
17 point that Ms. Blinick's property was already suffering
18 damage and in fact he said at the end that it might fall
19 in on itself. I mean, I don't know about that but that's
20 what he said. What's your response?

21 MR. MENDRO: Well, I certainly don't know. I
22 haven't been in Ms. Blinick's house myself --

23 THE COURT: No, I know that.

24 MR. MENDRO: -- but a crack in the wall is the
25 exact opposite, Your Honor, of irreparable harm. Cracks

1 are very much repairable and it's not the sort of injury
2 that justifies the sort of emergency relief that
3 plaintiffs are seeking today even if it's true.

4 THE COURT: Well, what if something catastrophic
5 did happen as a result of the construction? Would she
6 have a remedy?

7 MR. MENDRO: If something catastrophic happened
8 she might have a remedy. She might have a remedy for
9 property damage or for nuisance or any number of causes of
10 actions that are not before the Court, but she would have
11 to prove that injury and she could be remedied at law.

12 THE COURT: Fair enough. I think that's the
13 correct response. The gentleman in the corner, you had
14 your hand up, or somebody did.

15 MR. WILLIAMS: I was just going to point out
16 that the questions you had raised as it relates to traffic
17 and effect on the neighborhood were raised at a Historic
18 Preservation review board about four and a half years ago
19 and the Historic Preservation review board voted to
20 support the project nine to one. I'm Russ Williams with
21 AppleTree. I was present at that particular hearing and I
22 believe it's in the record.

23 THE COURT: Thank you. Okay.

24 MR. DINAN: Your Honor, Ms. Blinick did join us
25 during the hearing if --

1 THE COURT: Good morning, ma'am.

2 MS. BLINICK: I apologize for being late.

3 THE COURT: There are long lines outside. We
4 understand.

5 MR. DINAN: If for any reason Your Honor wishes
6 to inquire of her.

7 THE COURT: No. You know if I, if I, you know
8 if I lived next door to this proposed school I'd feel
9 exactly as you do. I mean, I understand that. Mr.
10 Jorgens.

11 MR. JORGENS: Insight into the ANC if the Court
12 would like --

13 THE COURT: We've got a few minutes and then I'm
14 going to think about it for --

15 MR. JORGENS: David Holmes, who was our ANC
16 commissioner and is now the chair of our entire ANC, sent
17 me an e-mail in response to my request. What was this
18 vote that Mr. Mendro put in this pleadings from the ANC
19 saying that they withdrew their appeal? He said the vote
20 was on December 9th, four days after Mr. Sabicon (phonetic
21 sp.) revoked the permits. So, they took a vote to
22 withdraw their appeal because of course the permits were
23 already withdrawn. So, why go forward when the appeal on
24 permits no longer existed.

25 I mean, and it sounds like, well, we're against

1 it. We're not against, and at the subcommittee, the
2 economic and zoning subcommittee 10 days ago, they voted
3 unanimously with one abstention to appeal, to recommend to
4 the full ANC to appeal these current invalid extensions.
5 So, that will be going forward. So, the ANC is totally
6 against this project as is the neighborhood, and there's
7 just no disputing that the ANC has been that way but for
8 this letter that they put and they're just withdrawing on
9 a technicality.

10 MR. GOODBREAD: Could I make two quick points,
11 Your Honor?

12 THE COURT: We make our lives on technicalities.
13 Yes.

14 MR. GOODBREAD: Where Ms. Blinick is concerned,
15 first of all, and I emphasize the element of damages. She
16 owns the two immediately adjacent buildings. She lives in
17 one she rents the other.

18 THE COURT: On each side or?

19 MR. GOODBREAD: No, on the one side.

20 THE COURT: Okay.

21 MR. GOODBREAD: And her tenants in the one are
22 experiencing difficulties from just the preliminary work
23 of the AppleTree group who are already there, and it is
24 factoring over into her own residence. Again, it is not
25 realistic for AppleTree or the Government to say, well,

1 let's wait until further damage occurs and you can have
2 remedy at law when we are here reasonably requesting that
3 at least a temporary equitable remedy be imposed by the
4 Court, and finally, on the issue of administrative law and
5 another incarnation I have to read these cases, these BZA
6 type cases and they apply only to --

7 THE COURT: Most of us don't.

8 MR. GOODBREAD: I'm sorry?

9 THE COURT: Most of us do not.

10 MR. GOODBREAD: I know. It turns out I now know
11 more law than I ever knew before having read them, but
12 they apply the standards per regulation. They don't deal
13 with these equities that we're talking about here. They
14 leave that to Courts to decide. They simply make
15 administrative and, in my view, arbitrary decisions and
16 that's what the administrative process is about. To
17 dismiss an appeal or even to have an appeal or a
18 submission dismissed for lack of jurisdiction is not a
19 ruling on the merits, as Your Honor well knows, unless
20 it's with prejudice, and to argue that the plaintiffs in
21 this case are somehow barred by issue preclusion much less
22 res judicata, which requires the same parties, I think is
23 unrealistic approach.

24 THE COURT: Okay. Thank you. If you all want
25 to wait about a half an hour I might have a decision for

1 you, so I'll let you know. I want to think about this a
2 little.

3 MR. MENDRO: Thank you, Your Honor.

4 THE COURT: Thank you folks.

5 MR. SAINDON: Thank you, Your Honor.

6 MR. DINAN: Thank you, Your Honor.

7 (Case passed.)

8 DEPUTY CLERK: Your Honor, recalling the matter
9 of Case No. 2011-CA-1942 in the matter of the Northeast
10 Neighbors for Responsible Growth, Incorporated, et al.,
11 versus AppleTree Institute for Education and Innovation,
12 Incorporated, et al.

13 THE COURT: All right. All the parties are
14 present.

15 **RULING OF THE COURT**

16 THE COURT: I don't have to tell you that there
17 are certain criteria that we've had for decades that
18 control issuance of a temporary restraining order or any
19 injunctive relief. I won't identify them. They've been
20 identified in the papers. I concluded that there is no or
21 insufficient immediate irreparable injury to any party or
22 to any plaintiff. If any does develop as has been
23 described as possible here in these proceedings, I do
24 think that there would be an adequate remedy at law
25 available to that plaintiff.

1 I don't agree with Mr. Dinan that there is a
2 substantial likelihood of success on the merits for the
3 plaintiffs. The issues that we have in this case have
4 been presented to appropriate administrative agencies over
5 the years and they have consistently decided, or at least
6 decided, I guess I can't say consistently, against the
7 plaintiffs, most recently last month on February 24th,
8 2011 when the DCRA withdrew its notice of revocation of
9 the permit.

10 The public interest in this case does not weigh
11 in favor of a temporary restraining. It's at best in
12 balance, but actually I think it weighs on behalf of the
13 proposed construction of this school, and finally there
14 would be significant harm to the defendants. I do accept
15 the argument made by Mr. Mendro on that issue. So, I
16 don't think the plaintiffs have persuaded the Court on any
17 of the key issues that have to be considered and decided
18 whenever injunctive relief is considered, and therefore I
19 will deny the motion for temporary restraining order. I
20 suspect that doesn't come as a shock to very many people
21 in this room. There's a proposed order that the
22 defendants submitted and I will sign that in a few
23 minutes.

24 MR. MENDRO: Is it necessary to say without
25 prejudice, Your Honor?

1 THE COURT: I'm denying the TRO. You can say
2 what you like.

3 MR. MENDRO: All right.

4 DEPUTY CLERK: Your Honor, do you need a status
5 date for this?

6 THE COURT: This is going to Judge Macaluso I
7 believe, right?

8 MR. MENDRO: That's correct.

9 MR. SAINDON: That's correct.

10 MR. DINAN: That's correct.

11 MR. MENDRO: Yes, Your Honor.

12 THE COURT: Do you have a date from her? We
13 should get one for you.

14 DEPUTY CLERK: I can give you one, just hold on
15 one second.

16 THE COURT: It's for planning or scheduling
17 purposes and we'll get you one shortly.

18 DEPUTY CLERK: Her first available is April
19 22nd, does that work for everyone, and the next after that
20 would be May 13th, both at 10:30 a.m? So, which works
21 best?

22 MR. MENDRO: The 22nd would work better for me.

23 MR. GOODBREAD: Agreed.

24 MR. DINAN: April 22nd's fine.

25 THE COURT: April 22nd is that --

1 MR. SAINDON: I'm actually out that day but I
2 can probably have someone stand in.

3 DEPUTY CLERK: Is that okay? Okay, then I'll go
4 ahead and schedule that on her calendar for April 22nd at
5 10:30 a.m., and that's in courtroom 415.

6 THE COURT: This proposed order would deny the
7 application for a TRO as well as the motion for
8 preliminary injunction. I considered only the TRO
9 question. I do believe the issues are the same, but
10 that's all I was considering. So, I'm going to cross that
11 out and deny the TRO at this point. Is there anything
12 else this morning? We'll have copies of this, I assume,
13 maybe we'll mail them. I don't know how they do it here,
14 shortly.

15 DEPUTY CLERK: Yes, in about 10, as soon as I
16 get it back.

17 (Pause.)

18 DEPUTY CLERK: Thank you, Your Honor.

19 THE COURT: Thank you folks.

20 (Thereupon the hearing was concluded.)
21
22
23
24
25

✓ Digitally signed by Tami Pare

ELECTRONIC CERTIFICATE

I, Tami Pare, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of NORTHEAST NEIGHBORS FOR RESPONSIBLE GROWTH V. APPLETREE INSTITUTE FOR EDUCATION AND INNOVATION, Case No. CAB-1942-11 in said Court, on the 29th day of March, 2011.

I further certify that the foregoing 44 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 7th day of April, 2011.

Tami Pare

Transcriber