

Before the
**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

NORTHEAST NEIGHBORS FOR
RESPONSIBLE GROWTH, INC.
144 12th Street, N.E.
Washington, D.C. 20002

Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF
CONSUMER & REGULATORY AFFAIRS
1100 4th Street, S.W.
Washington, D.C. 20024

Respondent.

BZA Appeal No. 18241

Hearing Date: September 20, 2011
1:00 p.m.

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MEMORANDUM OF FACTS AND LAW IN SUPPORT OF APPEAL

Northeast Neighbors for Responsible Growth (“NNRG”) hereby files this Memorandum of Facts and Law in support of its appeal of the administrative decision to withdraw the revocation of Building Permit No. 1010205, relating to construction upon real property located at 138 12th Street, N.E., which may also be known as Square: 0988, Lot: 0104 in the District of Columbia (“the Property”).

I. BACKGROUND INFORMATION RELATING TO THE PROPERTY

In February of 2006, AppleTree Institute for Education Innovation (“Appletree”) sought a building permit for construction of an addition onto the Property, for the purposes of operation of a charter school. The Property has an area of approximately 4,230 square feet, with an approximate lot width of 36 feet. As a result, at the time the application was submitted it was denied as the Property did not meet the minimum lot area requirement of 9,000 square feet, did not meet the minimum lot width requirement of 120 feet, and did not maintain 10 parking spaces.

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See 11 D.C.M.R. § 401.3. The denial was appealed by AppleTree to the Board of Zoning Adjustment (“BZA”) on the basis that the non-conforming use was permitted as an exception as the building was in existence prior to 1958, pursuant to 11 D.C.M.R. §401.1. On July 25, 2007, the BZA determined that the property was exempt due to the listed exemption. That Order became effective on August 6, 2007. See BZA Appeal No. 17532.

On September 14, 2007 the Zoning Commission amended 11 D.C.M.R. § 401.1 to eliminate the exemption utilized by AppleTree. On September 18, 2007, a hold was placed on the application for a permit but a permit was nonetheless issued on October 26, 2007, with a Notice of Revocation thereafter issuing on November 15, 2007. See Exhibit A, Permit No. 89587, Exhibit B, Notice of Revocation. Additionally, the issuance of the permit was appealed by the ANC 6A on the basis that a permit could no longer issue as a result of the amendment. On December 18, 2008, a second determination was made that the application only had to comply with regulations in effect on the date of the Order approving the permit, August 6, 2007. See BZA Appeal No. 17769. On April 28, 2008, the Notice of Revocation was withdrawn and the validity of the permit was approved, *nunc pro tunc*, to August 6, 2007.

AppleTree then secured a series of extensions. On October 21, 2008, one year after the August 6, 2007 effective date of the initial Order, AppleTree obtained a year long extension with an expiration date of October 21, 2009. See Exhibit C, Permit No. 0900498. On September 21, 2009, nine months after entry of the second BZA Order, AppleTree obtained a second year long extension of the permit with an expiration date of September 21, 2010. See Exhibit D, Permit No. 0909377. On September 17, 2010, AppleTree obtained a third year long extension of the permit with an expiration date of September 21, 2011. See Exhibit E, Permit No. 1010205. The permit was revoked on December 3, 2010, on the basis that it could only be extended eighteen

(18) months from the original permit date of October 26, 2007. *See* Exhibit F, Notice of Revocation. On February 24, 2011, the revocation of the permit was withdrawn. *See* Exhibit G, Withdrawal of Notice of Revocation.

II. STATEMENT OF APPLICABLE REGULATIONS

a. 11 D.C.M.R. § 3130

Pursuant to 11 D.C.M.R. § 3130, any construction based upon approval by the BZA shall be started “within six (6) months after the date of issuance of the permit . . . [and] [i]f the work is not started within such period, the permit shall expire and shall not be renewed. The final Order issued relating to construction on the Property had an effective date of December 18, 2008. *See* Appeal No. 17769. In the six months following the December 18, 2008 Order of the BZA, no work was initiated on the Property, rather, construction did not begin on the property until approximately February 24, 2011. Further, (i) no written request to extend the deadline was submitted, and if so, (ii) no written request was served upon the parties to the application of AppleTree, and (iii) no written Order issued extending the deadline to institute construction. As a result, because the permit was issued in accordance with 11 D.C.M.R. §§ 3202.4 – 3202.6, the permit cannot be renewed unless it is reprocessed in accordance with the Municipal Regulations as of the date of renewal. Therefore, the determination that the permit expired was correct and should not have been withdrawn.

b. 11 D.C.M.R. § 3202.4

Pursuant to 11 D.C.M.R. § 3202.4, construction authorized by a permit can be completed pursuant to the provisions in effect on the date of issuance subject to the condition that “(a) The permit holder shall begin construction work within two (2) years of the date on which the permit is issued, and (b) any amendment of the permit shall comply with the provisions of this title in

effect on the date the permit is amended.” In this proceeding, AppleTree was issued a permit in 2007, which was subject to a series of proceedings that ultimately concluded in December of 2008. As a result, tolling all deadlines to the conclusion of those proceedings would have required all construction to be completed by December of 2010. As construction was not completed within that deadline, any construction on the Property must comply with the Municipal Regulations presently in effect.¹

Further, assuming construction had been completed within that deadline, which it has not, AppleTree would still be required to comply with the present version of the Municipal Regulations as the permit upon which AppleTree relied was subject to an amendment through its having been repeatedly extended. As a result, withdrawal of the revocation of the permit without making any analysis to determine whether the construction is compliant with the present regulations was in error.

c. 12 D.C.M.R. § 105.5

Pursuant to 12 D.C.M.R. § 105.5, any permit issued becomes invalid if the authorized work is not initiated within one year of issuance unless a permit extension is obtained. However, requested extensions must be made in writing, be based upon a showing of good cause, and cannot extend a time period of six (6) months per extension. Further, no more than three (3) extensions of time are to be granted to any permit. Notwithstanding the foregoing bases set forth above, in accordance with Title 12, as the two subsequent extensions obtained are invalid, the permit lapsed pursuant to 12 D.C.M.R. § 105.5. As a result, the initial revocation was correct, and its withdrawal in February of 2011 was in error.

¹ Construction is actually going on as of the date of this Memorandum.

d. 11 D.C.M.R. § 401.3

As set forth above, the permit upon which AppleTree relies has expired due to, *inter alia*, (i) the failure to initiate construction within six (6) months of the Order authorizing the permit, in December of 2008, (ii) the failure to complete construction within two years of the December 2008 Order, and (iii) the invalid year-long extensions obtained. As a result, in order for AppleTree to complete construction at the Property, the construction must be in compliance with the present version of 11 D.C.M.R. § 401.1 and § 401.3.

Pursuant to 11 D.C.M.R. § 401.1, regardless of the exemption for buildings in existence on or before May 12, 1958, the lot area requirements of § 401.3 “must be met when the building is converted to building intended to house a use that would require more lot area or width than that presently on the building’s lot.” Pursuant to 11 D.C.M.R. § 401.3, a charter school can only be built, in an R-4 Zone, on a lot which has a minimum area of 9,000 square feet and a minimum width of 120 feet. As the Property does not meet these dimensions, it cannot take advantage of the exemption under 11 D.C.M.R. § 401.1 regardless of its use in 1958. Absent use of that exemption, the construction is unable to comply with the municipal regulations and the determination to withdraw the revocation of the permit was in error.

e. 11 D.C.M.R. § 401.3 and 11 D.C.M.R. § 206

At the time that the initial permit was issued on February 9, 2006 “Charter Schools” were not included in the definition of “public schools”. They were not defined as public schools for the purposes of zoning until February 13, 2006 by Emergency Rule, renewed on June 12, 2006, and permanently adopted on September 25, 2006.² Therefore, at the time of the issuance of the initial permit, AppleTree had to be treated as a private school for zoning purposes. As such, it

² See Section 199 of the Zoning Regulations.

had to seek special exception relief from the Board of Zoning Adjustment before locating within an R-4 district and meet the requirements of Section 206. It did not. The determination to withdraw the revocation of the permit was thus in error.

III. CONCLUSION

Therefore, pursuant to the above cited regulations and for the above reasons, the original decision to revoke the permit was correct, and the withdrawal of that revocation was in error. It is respectfully requested that the Board grant this appeal, and remand to the Department of Consumer and Regulatory Affairs with instructions to reinstate the revocation of the permit effective the date of the original revocation.

Respectfully Submitted,



Ashley C. Haun, Esq.
Donald R. Dinan, Esq.
Roetzel & Andress, LPA
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Suite 400
Washington, D.C. 20005
Telephone: (202) 216.8302
Facsimile: (202) 338.6340
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ahaun@ralaw.com
ddinan@ralaw.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served, via first class mail, postage prepaid, upon the following persons on the 6th day of September, 2011:

D.C. Department of Consumer & Regulatory Affairs
Zoning Administrator – Matt LeGrant
1100 4th Street, SW
Washington, D.C. 20024

Advisory Neighborhood Commission 6A
c/o Mr. Nicholas Alberti
1330 North Carolina Avenue, N.E.
Washington, D.C. 20002

Attorney General of the District of Columbia
c/o Irvin B. Nathan
941 North Capitol Street, N.W.
Suite 9401
Washington, D.C. 20001



Donald R. Dinan, Esq.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS



Office of the Director

**By Personal Service or
Certified Mail, Return Receipt Requested, and
First Class Mail**

Mr. Russ Williams
Managing Director
AppleTree Institute for Education Innovation
400 7th Street, S.E.
Washington, D.C. 20003

NOTICE OF REVOCATION
BUILDING PERMIT NO. 89587

This is an official Order from the Department of Consumer and Regulatory Affairs ("DCRA") revoking Building Permit No. 89587 (the "Permit"), pursuant to 12A DCMR §105.6(6). The Permit is being revoked because DCRA issued the Permit in error, prior to completion of reviews by all of the disciplines required to approve the application, specifically environmental and zoning.

Building Permit No. 89587 was issued at approximately 11:00 a.m. on October 29, 2007. Within an hour of the permit grant, DCRA staff requested that the permit be surrendered voluntarily for cancellation, since the permit had been issued in error. In addition, your attorney, Mr. Mark Perry of Gibson, Dunn & Crutcher, was contacted by DCRA's counsel on October 29, 2007, and asked to surrender the permit voluntarily for cancellation. Mr. Perry was also advised, verbally and by email, that unless the permit was surrendered voluntarily, DCRA would initiate proceedings to revoke the permit. Your attorney was also advised that any construction pursuant to the erroneously-issued permit would be at your own risk.

At the time of issuance, at least two disciplines, environmental and zoning, still needed to clear the application for grant. Reflecting this processing status, DCRA had placed a "hold" on the granting of the application subject to clearances by two senior managers, the Zoning Administrator and the Acting Deputy Director, Permit Operations. This application status was noted in three internal tracking databases maintained by DCRA in connection with construction permit processing. On October 29, 2007, a DCRA employee exceeded his authority by removing the "hold" on the application, and authorizing the granting of the application. DCRA has determined that the DCRA employee erred in authorizing the granting of the permit prior to the application receiving the required approvals and in

Mr. Russ Williams
Managing Director
AppleTree Institute for Education Innovation
400 7th Street, S.E.
Washington, D.C. 20003
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direct contravention of his superiors' directives.¹

The permit is being revoked so that DCRA can complete the reviews required as part of its processing procedures, reviews which were truncated by the erroneous issuance of the permit on October 29, 2007. One of the issues to be considered by the Zoning Administrator was the impact of an amendment of the Zoning Regulations pursuant to Zoning Commission Order 06-33, published in the District of Columbia Register on September 14, 2007. This zoning review could not be completed until the District Department of the Environment (DDOE) returned the permit application and plans to DCRA.³ The application and plans were not returned by DDOE until October 25, 2007. Before the zoning review could be completed, and contrary to the computer "hold" on the application to enable such review, the permit was granted. Moreover, even though DDOE returned the plans to DCRA on October 25, 2007, it is DCRA's understanding that DDOE had not, and still has not, completed its investigation with respect to the toxic waste issue.

Pursuant to 12A DCMR §105.6(6), DCRA is authorized to revoke a building permit if the permit was issued in error. Accordingly, DCRA hereby revokes Building Permit No. 89587.

RIGHT TO APPEAL

You have the right to appeal the revocation of your building permit. To appeal, your appeal must be mailed to the Office of Administrative Hearings at P.O. Box 77718, Washington, DC 20002. Alternatively, you may hand-deliver your appeal or request to the Office of Administrative Hearings at 941 North Capitol Street, NE, Suite 9100, Washington, DC 20002. The deadline for such an appeal or request is ten (10) business days following your receipt of this Notice.

Any questions about this Notice may be directed to the Permit Operations at (202) 442-4541.

Nov. 15, 2007
Date

Linda K. Argo
Linda K. Argo, Director

CC: Mark Perry, Esq.

¹ Following an internal investigation, your permit expeditor was cleared of any wrongdoing in connection with the permit issuance.

³ The application and plans had been sent to DDOE for review on or about September 1, 2007, for DDOE to determine if the construction site was contaminated by hazardous chemicals as had been alleged. In an August 30, 2007 letter and email from Advisory Neighborhood Commission 6A Commissioner David Holmes, Mr. Holmes raised the concerns of his constituents that the site contained hazardous chemicals, stemming from when the site had been operated as a distribution site for oil and other petroleum distillates.

[illegible]

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Department of Consumer and Regulatory Affairs

Permit Operations Division

941 North Capitol Street NE Room 2100

Washington DC 20002

Tel. (202) 442 - 4589 Fax (202) 442 - 4862

B

BUILDING PERMIT

THIS PERMIT MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS OF WORK
UNTIL WORK IS COMPLETED AND APPROVED

Issue Date: 09/17/2010

Expiration Date: 09/17/2011

PERMIT NO. B1010205

Address of Project: 138 12TH ST NE		Zone: R-4	Ward: 6	Square: 0988	Suffix:	Lot: 0104
Description Of Work: RENEWAL OF EXISTING BUILDING PERMIT.						
Permission Is Hereby Granted To: Appletree Institute For Education Innovation Inc		Owner Address: 400 7TH ST SE WASHINGTON, DC 20003-2707		PERMIT FEE: \$36.30		
Permit Type: Alteration and Repair	Existing Use:		Proposed Use:		Plans:	
Agent Name: Quinten Washington	Agent Address: 1025 CONN AVE #1000 WASHINGTON, DC	Existing Dwell Units:	Proposed Dwell Units:	No. of Stories:	Floor(s) Involved:	
Conditions/ Restrictions: This Permit Expires If no Construction is Started Within 1 Year or if the Inspection is Over 1 Year. All Construction Done According To The Current Building Codes And Zoning Regulations; As a condition precedent to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all work authorized by this permit and to require any change in construction which may be necessary to ensure compliance with the permit and with all the applicable regulations of the District of Columbia. Work authorized under this Permit must start within one(1) year of the date appearing on this permit or the permit is automatically void. If work is started, any application for partial refund must be made within six months of the date appearing on this permit.						
Director: Linda K. Argo		Permit Clerk Doris Minor				
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557.						

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs



Permit Operations Division

**VIA PERSONAL SERVICE or
U.S. FIRST CLASS MAIL**

Appletree Institute for Education
Innovation, Inc.
400 7th Street, S.E.
Washington, DC 20003-2707

Appletree Institute for Education
Innovation, Inc.
c/o Quinten Washington
1025 Connecticut Avenue, N.W.
#1000
Washington, DC 20036

Re: Building Permit B1010205 (138 12th Street, N.E.)

NOTICE TO REVOKE BUILDING PERMIT NO. B1010205

This is official notice ("Notice") from the Department of Consumer and Regulatory Affairs ("DCRA") that Building Permit No. B1010205 is revoked effective ten (10) business days from the mailing of this Notice. This action is taken pursuant to District of Columbia Municipal Regulations ("DCMR") Title 12A § 105.6, which authorizes the code official to revoke a building permit when the permit was issued in error. Here, the Construction Code does not allow an extension of the existing building permit beyond a total of eighteen months from the original building permit, B89587, which was issued on October 26, 2007. Therefore, the last building permit extension ended on 4/26/10. Building Permit B1010205 erroneously extended the building permit beyond the maximum eighteen months of extensions and must be revoked.

Under the District of Columbia Municipal Regulations § 12A-105.6, DCRA has the authority to revoke building permits. Based upon the District's review and analysis of the building permit that was issued, DCRA is revoking Building Permit No. B101025. This revocation will be effective ten (10) business days from the mailing of this Notice.

1100 4th Street, SW Third Floor Washington, DC 20024
Phone: (202) 442-4589 Fax: (202) 442-4863

RIGHT TO APPEAL

You have the right to appeal the revocation of your building permit within ten (10) days (excluding Saturdays, Sundays and legal holidays) of receipt of this Notice to the Office of Administrative Hearings. 12A DCMR § 105.6.4. Should you appeal DCRA's decision, your appeal must be mailed to the Office of Administrative Hearings at 441 4th Street, N.W., 10th Floor, Washington, D.C. 20001. Alternatively, you may hand-deliver your appeal for a hearing to the Office of Administrative Hearings at 441 4th Street, N.W., 10th Floor, Washington, D.C. 20001. If you do not request a hearing within the time and manner specified in this notice (or fail to appear at a scheduled hearing), your permit will be immediately revoked without any further written notice.

Any questions about this notice may be directed to the Permitting Operations Division on 442-4542.

Date: 12-3-10


Rabbiah Sabbakhan, Acting Chief
Permit Operations Division

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs

Inspections and Compliance
Administration



February 24, 2011

To: Jack McCarthy
Managing Director
AppleTree Institute for Education Innovation, Inc.
415 Michigan Ave., NE
Washington, DC 20017

Mark A. Perry, Esq.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., NW
Washington, DC 20036

Re: 138 12th Street, NE

WITHDRAWAL OF NOTICE TO REVOKE BUILDING PERMIT NO. B1010205

This is official notice from the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") that the Notice to Revoke Building Permit No. B1010205, issued on December 3, 2010, is hereby withdrawn. By this letter, DCRA confirms that Building Permit No. B1010205, issued on September 17, 2010, is valid and has not lapsed, *nunc pro tunc*.

Any questions about this letter may be directed to the Permit Operations Division at (202) 442-4542.

Date: 2-24-11


Rabbiah Sabbakhan, Acting Chief
Permit Operations Division