

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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FRIDAY
AUGUST 17, 2007

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The Special Public Meeting
convened in Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 10:00 a.m., Ruthanne G. Miller,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER Chair
CURTIS ETHERLY, JR. Vice Chair
JOHN A. MANN, II Board Member (NCPC)

OFFICE OF ZONING ADJUSTMENT STAFF PRESENT:

CLIFFORD MOY Secretary

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALAN BERGSTEIN, ESQ.
SHERRY GLAZER, ESQ.

The transcript constitutes the
minutes from the Special Public Meeting held
on August 17, 2007.

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Board of Zoning Adjustment
District of Columbia
CASE NO.18241
EXHIBIT NO.26B26

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P R O C E E D I N G S

10:22 A.M.

CHAIRPERSON MILLER: This meeting
will please come to order.

Good morning, ladies and
gentlemen. This is the August 17th Special
Public Meeting of the Board of Zoning
Adjustment of the District of Columbia. My
name is Ruthanne Miller. I'm the Chair of the
BZA. Joining me today to my right is the Vice
Chair, Mr. Curtis Etherly and to my left is
Mr. John Mann representing NCPC. Mr. Clifford
Moy is also here from the Office of Zoning and
Alan Bergstein from the Office of Attorney
General.

Copies of today's meeting agenda
are available to you and are located to my
left in the wall bin near the door. We will
not take any public testimony at our meeting
unless the Board asks someone to come forward.

Please be advised that this
proceeding is being recorded by a court
reporter and is also webcast live.

1 Accordingly, we must ask you to refrain from
2 any disruptive noises or actions in the
3 hearing room. Please turn off all beepers and
4 cell phones.

5 I just want to make a few
6 preliminary statements. This Board has come
7 out of recess which is very unusual for a
8 meeting and I just want to let the public know
9 the reason for that and that is because Mr.
10 John Mann who is representing NCPC will be
11 rotating off the Board, unfortunately. And
12 today is his last day to participate in the
13 deliberations and he is an integral Member of
14 the Board on two cases that are ripe for
15 decisionmaking. So I want to take a moment to
16 thank him for his service on the Board. He
17 has been an incredible asset with his
18 knowledge and astuteness and dedication.
19 Anyway, I just want to wish him luck. And
20 that's the way it works on the Board of Zoning
21 Adjustment, people come and go. And NCPC, in
22 particular, rotates its representative.

23 Second, I want to just address a

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1 can't just go in and arbitrarily decide that
2 we think something should have been when it is
3 not written that way.

4 CHAIRPERSON MILLER: Yes, I
5 actually did struggle with this one until I
6 realized, until I went back and looked at the
7 cases and statutory construction and etcetera,
8 you use intent or you look to intent only when
9 you have an ambiguous regulation or statute.
10 You can't figure out what it means and then
11 you look at the whole intent to try to help
12 you figure it out.

13 In this case, we knew what each
14 regulation meant and so did the Chair of the
15 Zoning Commission who sat here and said oh,
16 okay, we need to take more legislative action.

17 Okay, so I think we concur on that
18 and we will move onto the next issue I have
19 identified is that an objection that there
20 were findings of fact that weren't presented
21 before at the hearing.

22 Findings of fact actually are
23 addressed in 3121 of our regulations, and

1 3121.2 says that there should be submitted
2 within such time as the presiding officer may
3 direct, which in any event shall not be less
4 than seven days after the transcript is
5 delivered to the Office of Zoning.

6 So findings of facts are not ever
7 presented at the hearing, but I think that the
8 ANC objected to the fact that in the finding,
9 in these findings of fact was a fact that
10 wasn't addressed at the hearing per se. They
11 ask -- they said that we should have a re-
12 hearing so they could have the opportunity to
13 dispute it and the facts that proceeded from
14 it in our finding of facts.

15 Okay, basically the findings of
16 fact dealt with the parking regulations that
17 were in effect I believe in 1973. It was a
18 public record what this was and the appellants
19 submitted in their proposed finding of fact,
20 as we had been discussing at the hearing, what
21 were the prior uses, what were the regs that
22 were applied, and they later put this fact in.
23 I don't see any grounds for a re-hearing on

1 this. I think in a motion for a
2 reconsideration, if the appellant wanted to
3 dispute this fact that this was in fact not
4 so, this was the opportunity to do it in their
5 motion for reconsideration that there was an
6 error and then bring it to our attention and
7 then we could decide whether we needed a
8 hearing.

9 I think it is unlikely, and this
10 is a matter of public record fact that we are
11 talking about. So I don't see any reason for
12 a re-hearing on this issue.

13 MEMBER MANN: I agree.

14 VICE CHAIRPERSON ETHLERLY: I also
15 agree, Madam Chair.

16 CHAIRPERSON MILLER: Okay, the
17 next issue I have identified is that the
18 subsequent Zoning Commission case has rendered
19 this decision moot. They are referring to the
20 proposed action that is being taken by the
21 Zoning Commission to actually, I guess, amend
22 or clarify or whatever the problem that arose
23 in this case, that was spotted in this case

1 with respect to the regulation. In any event,
2 the regulation isn't in effect yet and it is
3 not law.

4 Our regs say that no regulation is
5 in effect until published in the D.C.Register.
6 That's 11 DCMR 3028.9. Therefore, the current
7 regulation is still in effect and therefore
8 the case is not moot.

9 Let's see. Finally, I think that
10 they alleged that there is a new fact that
11 Apple Tree is not a public charter school.

12 Do you want to address that?

13 MEMBER MANN: Well, I am sure that
14 you will have perhaps a different framework to
15 put this in, but it just seems to me that that
16 is not much different than many cases that we
17 see under a lot of different circumstances
18 where there is a lot of parallel processes,
19 regulatory and review processes that
20 applicants have to go through. Typically, we
21 would see, for example, historic preservation
22 review that may or may not precede before a
23 hearing before the Board of Zoning Adjustment.

1 But I mean there is a lot of
2 different regulatory processes that applicants
3 have to go through and there is no definitive
4 information given regarding which one they
5 have to go through first. So if you are, I
6 don't know, a restaurant for example, you
7 might require a liquor license. Where are you
8 going to get the liquor license before or
9 after you have gone to BZA and before you've
10 gotten various approvals.

11 So I don't see this as much
12 different than any other case where people
13 have to seek special or seek several different
14 permits or levels of review.

15 CHAIRPERSON MILLER: Yes, I think
16 in fact the Chairman of the Zoning Commission
17 also made that comment in their proceedings.
18 Also, I looked at our regs to the extent that
19 I could see what else is germane to this
20 question and I believe it was 3202 which
21 talked to proposed uses and compliance with
22 this title in order to get a building permit.
23 Because the ANC here were saying that they

1 couldn't get a building permit unless they had
2 authorization by PCSB for a charter school.

3 I don't believe that is really
4 true. I think you have to be the owner to get
5 a permit and then you present your proposed
6 uses and show your compliance with the title.
7 So I think you are right. You don't have to
8 show that you are a charter school, per se,
9 even though you may be seeking use as a
10 school. So I don't see any grounds for that
11 allegation.

12 So any other comments? I think we
13 have gone through them.

14 (Pause.)

15 At this point, I'm going to make a
16 motion to deny the motion for reconsideration
17 to Appeal Number 17532 of Apple Tree Institute
18 for Education Innovations, Inc., pursuant to
19 Section 3126, the regulations.

20 MEMBER MANN: Second.

21 CHAIRPERSON MILLER: Is there
22 further discussion?

23 VICE CHAIRPERSON ETHLERLY: Madam

1 Chair, just as we move towards dealing with
2 the motions, again I want to kind of emphasize
3 two points. One which is and this is not, I
4 can't think of what the informal phrasing is
5 for it. This is not a -- you hear the
6 expression crocodile tears, which are meant to
7 suggest that tears are not honest. And so I
8 don't want this to be viewed as a crocodile
9 compliment. I said it earlier and I will say
10 it again that I want to thank the ANC for the
11 excellent work they have done and continue to
12 do on planning and zoning issues.

13 And I mean that in all
14 seriousness. It would be very easy and I
15 recognize, of course, that there is quite the
16 level of public scrutiny with regard to this
17 particular case, and scrutiny that will extend
18 to members of the media, members of the press,
19 and I think it is very important that as
20 especially with respect to my participation in
21 this case, and I say and I say repeatedly that
22 I thank ANC for its work and for the questions
23 that they have raised here.

1 Clearly, my position on the
2 outcome of all of these counts are contrary to
3 what the ANC believes the record and the facts
4 and the law to dictate. But I believe on all
5 of these counts as it relates to the concerns
6 that have been raised by the ANC, I think we
7 have dealt with them in extraordinary detail
8 and rightfully so. So I want to again make
9 that compliment.

10 Secondly, I'm going to simply
11 close on the issue of recusal again, because
12 I think it again is so important that at the
13 end of the day there was perhaps one bit of
14 language that I found which I think very
15 adequately sums up how I have tried to
16 approach this question and resolve it as it
17 relates to my participation both in the past
18 with respect to this case as well as going
19 forward. I would like to just share that in
20 the record as we kind of close and then I want
21 to be done.

22 It comes from a slip opinion in a
23 case out of Pennsylvania. Again, it speaks

1 ultimately to how one from Federal Judge
2 standpoint, but the principles are all very,
3 very transferable and applicable here. It
4 wraps up a discussion of 144 and 455. Again,
5 Section 144 of 28 USC deals with personal
6 bias. Section 451 of 28 USC deals with the
7 appearance of impropriety. And it reads as
8 follows: it says "one additional point needs
9 to be made in the interest of wise judicial
10 administration.

11 Both sections describe a process
12 designed to ensure not only the fact, but also
13 the appearance of impartiality in our Courts.
14 Section 144, in particular, is quite powerful
15 requiring recusal on the basis of bare
16 allegations and unadjudicated facts. When
17 used in good faith, these provisions serve to
18 strengthen the public's confidence in the
19 administration of justice.

20 When misused or used for improper
21 purpose, they can cause great harm."

22 Let me pause here in the reading
23 in that and say that I am not in any respects

1 suggesting that they were misused or used for
2 improper purposes here. It continues to read
3 that "in the final analysis, it is the
4 willingness of the Judge so accused to make
5 time in the judicial calendar to work through
6 the allegations, dispassionately about the
7 facts and fairly as to the law that best
8 protects the system of justice from the
9 corrosive effects of Judge shopping by
10 litigants."

11 Again, I am not suggesting that
12 that is what we have here. "Although at times
13 it may seem appealing or even wise to yield to
14 another Court on the premise that the
15 allegations of impartiality are a distraction
16 to the main event, to do so while a short-term
17 expedient will reward the culprit, punish the
18 other parties to the litigation, and encourage
19 the tactic of Judge shopping. It is thus
20 'vital to the integrity of the system of
21 justice that a Judge not recuse himself on
22 unsupported, irrational, or highly tenuous
23 speculation.'" Those quotes from this

1 opinion are coming from a 10 Circuit Case,
2 Hinman v. Rogers.

3 I offer that final word on the
4 issue of recusal again, not to put the ANC's
5 considerations in the context of any of those
6 questionable motives. There is no belief on
7 my part that the ANC is motivated by anything
8 other than the concern for making sure this
9 Board's decision in this particular instance,
10 as it should be in all instances, rises above
11 reproach and question.

12 But I think what those final words
13 in that particular case highlight is that
14 there are two sides to this coin, both in
15 terms of the commitment to ensuring that
16 decisions are without partiality and without
17 bias and favor, but also in ensuring that when
18 we raise these critical and very important
19 questions, that we delve into them with the
20 utmost of care and concern and attention to
21 detail. That is the motivation, that is the
22 approach, and that is the framework that I
23 would try to apply and suggest to my

1 cclleagues as we've looked at the question of
2 refusal.

3 So I simply wanted to offer that
4 final closing snapshot with regard to my
5 perspective on how we have tried to approach
6 these issues. Clearly, we are coming to a
7 different outcome, not only on that count but
8 all of the accounts that are raised by the
9 ANC. But I think it is important to have that
10 added perspective because the issue of
11 impartiality is so absolutely critical to what
12 this Board and any Board or Commission in this
13 city does moving forward.

14 Thank you, Madam Chair.

15 CHAIRPERSON MILLER: Thank you. I
16 guess I just want to make a philosophical
17 comment as well. I would like to say that I
18 recognize the hard work that the ANC has done
19 and their great concern with this issue and
20 their obvious frustration with the process.
21 What I want to clarify is that we don't make
22 decisions on the basis of what we would like
23 the outcome to be. We, as a Board, are

1 obliged to apply the law as we understand it
2 and in the long run, I think it is adherence
3 to the law is what is in the public interest.

4 I will just say that for the most
5 part, for the ANC's benefit, because I want
6 them to realize that that's what we're doing.
7 We're interpretating the regulations the way
8 we truly believe we are required to do under
9 the legal standards.

10 Okay, are we ready for a vote? Do
11 we have anymore comments? Okay, all those in
12 favor say aye.

13 (Chorus of ayes.)

14 All those opposed? All those
15 abstaining?

16 Mr. Moy?

17 MR. MOY: Yes, ma'am. The staff
18 would record the vote as 3-0-2. This is on
19 the motion of the Chair, Ms. Miller, to deny
20 the motion to appeal Number 17532 of Apple
21 Tree. Seconding the motion, Mr. Mann and in
22 support of the motion Mr. Etherly. We have
23 Carol Mitten not present, not voting and

1 another Board Member not participating.

2 CHAIRPERSON MILLER: Okay, thank
3 you. Anything else on the agenda for this
4 public meeting?

5 VICE CHAIRPERSON ETHLERLY: Madam
6 Chair, if I may, I want to come back to one of
7 the comments that you made at the outset and
8 that is the impending departure of our
9 esteemed colleague Mr. Mann. I want to say
10 not only as Vice-Chair, not only as a
11 colleague on this Board, but I hope after what
12 has been a dynamic and oftentimes challenging
13 experience on a daily basis here, as we all
14 grapple with the issues, I hope I speak as a
15 friend when I say to Mr. Mann that he will be
16 sorely, sorely missed, that his loss is indeed
17 a loss for this body.

18 It is indeed, as the Chair
19 indicated, a rotation and it is one that
20 happens on a regular basis. But there are
21 times when you have the opportunity to work
22 with someone whom you have come to enjoy and
23 respect and appreciate, personally and

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1 professionally, and Mr. Mann and I haven't
2 seen eye-to-eye all the time. More times than
3 not, we find ourselves in the same posture on
4 the same outcome. But his perspective, his
5 ability to look at our cases and to argue his
6 positions passionately, as well as
7 dispassionately, has been greatly, greatly
8 appreciated.

9 I am happy to say that he
10 continues to be a Ward 6 resident and one who
11 fortunately doesn't live too far from me, so
12 I hope to from time-to-time find him out and
13 about enjoying all there is to enjoy about
14 Ward 6, especially in our Southeast/Southwest
15 waterfront area. I also understand he will
16 not be going too far from what he is currently
17 doing and will continue to bring his expertise
18 to bear on behalf of the residents of the
19 District of Columbia and his continued service
20 with the Federal Government.

21 So with all of that, that's a
22 beautiful long-winded way of saying Mr. Mann,
23 I'm going to miss you. I am going to miss

1 your presence on Tuesdays, your perspective,
2 your laughter, your cheesy jokes from time to
3 time. But you most certainly sorely, sorely
4 be missed. But we are going to continue to
5 look out for you and we look forward to
6 working with you in the future in all of your
7 endeavors, which continue to inure to the
8 benefit of the residents of the District of
9 Columbia. So Mr. Mann, you got to speak.

10 MEMBER MANN: Thank you for your
11 comments, Mr. Etherly, and thank you for your
12 comments earlier Madam Chair. It has been
13 really a pleasure and an honor to serve on the
14 Board and it certainly has been a tremendous
15 learning experience. It has been terrific to
16 work with both my fellow Board members, the
17 Zoning Commission Members and the staff of
18 Office of Planning, Office of Zoning, and I
19 certainly look forward to crossing paths with
20 you in the future. Thanks.

21 CHAIRPERSON MILLER: Okay, well I
22 think we can continue our good-byes property
23 in executive session.

1 (Laughter.)

2 CHAIRPERSON MILLER: But thanks
3 again. Yes, you will definitely be sorely
4 missed but I know that you will do great
5 things where you put your energies. So okay,
6 I am going to adjourn this meeting.

7 (Whereupon, at 12:16 p.m., the
8 meeting was concluded.)

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11
12