

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17532-B of AppleTree Institute for Education Innovation, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to require BZA special exception approval for a proposed addition to an existing building to accommodate a public charter school use. Appellant alleges that the Zoning Administrator erroneously relied upon the Zoning Commission's February 13, 2006 emergency rulemaking to require additional on-site parking spaces. The subject property is located in the R-4 district at premises 138 12th Street, N.E. (Square 988, Lot 820).

HEARING DATE: November 21, 2006
DECISION DATE: January 9, 2007
RECONSIDERATION DATE: August 17, 2007
STAY DECISION DATE: October 23, 2007

ORDER DENYING STAY

By order issued July 25, 2007, the Board of Zoning Adjustment ("Board" or "BZA") granted an appeal by AppleTree Institute for Education Innovation, Inc. ("Appellant" or "AppleTree"), finding that the Zoning Administrator erred in denying AppleTree's application for a building permit on the grounds that the proposed use of the subject property as a public school failed to meet minimum requirements for lot area, lot width, and number of parking spaces. Parties in this proceeding were the Appellant, Advisory Neighborhood Commission 6A, and Northeast Neighbors for Responsible Growth.

By motion dated September 7, 2007, several individuals who were members of Northeast Neighbors for Responsible Growth requested a stay of the Board's order pending the outcome of their appeal of the order to the District of Columbia Court of Appeals.¹ The motion alleges that petitioners will suffer immediate and irreparable harm "if the building permits are issued" to AppleTree as a result of the Board's ruling on the appeal. The petitioners argue that a stay will

¹ Petitioners also filed a motion for stay of the order with the District of Columbia Court of Appeals. The Court of Appeals denied the motion on the basis of *Barry v. Washington Post Co.*, 529 A.2d 319 (D.C. 1987). See *Jorgen et al. v. D.C. Bd. of Zoning Adjustment*, 07-AA-943 (D.C. September 21, 2007). The Board also relies on the *Barry* case as set forth in this order.

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not cause undue hardship to AppleTree, as the school year has already begun and thus AppleTree cannot commence its proposed charter school at the subject property for at least a year. The motion also asserts that a zoning text amendment, under consideration by the Zoning Commission in Z.C. Case No. 07-03, will render the Board's ruling moot and will require AppleTree to seek a special exception for its proposed additions to the building at the subject property.

CONCLUSIONS OF LAW

To prevail on a motion for stay, the party seeking the stay must demonstrate that (i) it is likely to prevail on the merits, (ii) irreparable injury will result if the stay is denied, (iii) the opposing party will not be harmed by a stay, and (iv) the public interest favors the granting of a stay. *See Kufлом v. District of Columbia Bureau of Motor Vehicle Services*, 543 A.2d 340, 344 (D.C. 1988) (administrative agency required to consider the four specified factors in considering a motion for stay). Where the last three factors strongly favor temporary relief, only a "substantial" showing of likelihood of success, not a "mathematical probability," is necessary for the grant of a stay. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

The Board concludes that the motion for stay fails to satisfy any of the four prongs of the test required for the granting of a stay. The motion does not address the likelihood that the petitioners will prevail on the merits of their appeal of the Board's order in this proceeding. The motion alleges, without any description or elaboration, that the petitioners will suffer immediate and irreparable harm if AppleTree receives building permits as a result of the Board decision to grant AppleTree's appeal. Petitioners argue that such permits would allow construction and that it would be an extraordinary remedy for the Court to order AppleTree to tear down such building should the Court rule against AppleTree. However, a landowner who proceeds to erect a building while the issuance of a building permit is on appeal does so at his own risk. *See Coneen v. Speedy Muffler King, Inc./Bloor Automotive, Inc.*, 568 A.2d 700 (Pa. Commw. Ct. 1989). Nor is the Board persuaded by the petitioners' unsubstantiated claim that additional delay arising from a stay will not cause undue hardship to AppleTree simply because a new school year has begun. The petitioners argue that denial of a stay would frustrate the public purpose by allowing AppleTree to avoid having to seek a special exception, consistent with amendments approved by the Zoning Commission in Case No. 07-03. However, the Board's decision to grant AppleTree's appeal became effective prior to the effective date of the Zoning Commission's final rulemaking in Case No. 07-03.

For the reasons stated above, the Board concludes that the petitioners did not meet the burden of proof with respect to their motion to stay the effect of the Board's order issued in this proceeding. It is hereby **ORDERED** that the motion for stay is **DENIED**.

VOTE: **3-0-2** (Ruthanne G. Miller, Curtis L. Etherly, Jr., and Marc D. Loud
voting to deny; Zoning Commission member and one Board

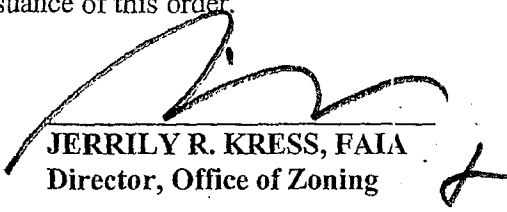
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member not participating, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring Board member approved the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: SEP 05 2008

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9 THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
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As Director of the Office of Zoning, I hereby certify and attest that on **SEPTEMBER 5, 2008**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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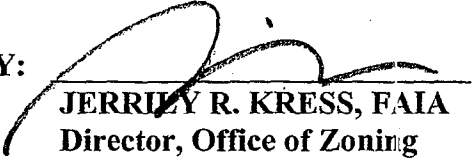
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TWR