

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

NORTHEAST NEIGHBORS FOR
RESPONSIBLE GROWTH, INC., et al.,

Plaintiffs,

v.

APPLETREE INSTITUTE FOR
EDUCATION INNOVATION, INC., et al.,

Defendants.

Civil Action No. 0001942-11

Judge Judith N. Macaluso

Next Court Event: TRO Hrg. before Judge-
in-Chambers on 3/29/11 at 9:30 a.m.

**DEFENDANT APPLETREE'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION TO DISMISS**

Dated: March 25, 2011

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AppleTree Institute for Education Innovation, Inc. respectfully moves to dismiss the complaint with prejudice pursuant to Rules 12(b)(1) and 12(b)(6) of the D.C. Superior Court Rules of Civil Procedure.

I. INTRODUCTION

This lawsuit is the latest tactic in a protracted campaign to derail the construction of a single preschool for disadvantaged three- and four-year-olds in Northeast Washington, D.C. Plaintiffs and their cohorts have twice attempted to change the zoning regulations to stop this project; they have advocated against the project in three proceedings before the District of Columbia's Board of Zoning Adjustment ("BZA"); they have appealed a BZA decision to the D.C. Court of Appeals (and later dismissed that appeal voluntarily); they have intervened in an administrative action before the Office of Administrative Hearings ("OAH") to support the revocation of a permit for the project; and they have filed an earlier lawsuit in this Court to stop the project. Each of these efforts has met with defeat. BZA has twice confirmed that the project satisfies all applicable zoning regulations and denied an emergency stay, not unlike the injunction requested now. The District's Department of Consumer and Regulatory Affairs ("DCRA"), which is responsible for construction permits, has three times confirmed the validity of the permit for the project. And Judge Morin dismissed the civil complaint filed in this Court.

Having failed in all their previous efforts to scuttle this worthy and needed preschool project, Plaintiffs have now returned to this Court with a successive and duplicative complaint, repeating their earlier demand to enjoin the project. The new complaint, like the last one, should be dismissed—and for much the same reasons. It was filed by the same attorney and one of the same plaintiffs. Although it contains allegations based on events that occurred after the first suit was dismissed, the defects that compelled dismissal the first time have not changed at all:

(1) There is no subject-matter jurisdiction over the claims because they challenge administrative decisions that may be reviewed only by the Court of Appeals; (2) Plaintiffs failed to exhaust administrative remedies through the relevant administrative agencies; and (3) the claims are not ripe because they rest wholly on speculation about future harms. Since these dispositive procedural issues were fully and fairly litigated, Plaintiffs have no basis to re-litigate them now.

Although Judge Morin found that he could dismiss the first complaint without reaching its other defects, it bears emphasis that those and other defects in the current complaint provide independent grounds for dismissal. First, Plaintiffs lack standing to sue because they pleaded no injuries that are legally cognizable. Second, Plaintiffs' collateral attacks on agency action are time-barred. Third, Plaintiffs misconstrue the statutory and regulatory provisions on which they rely.

For all of these reasons, Plaintiffs' last-ditch effort to further delay the construction of the preschool should be rejected and their complaint dismissed with prejudice. This project has all necessary regulatory approvals, the needed financing, and the support of the District of Columbia government and the Advisory Neighborhood Council. The objections of these neighbors—who are decidedly in the minority—have been fully aired, and rejected, by the responsible officials. There is simply nothing for this Court to do at this late stage of the proceedings, with the construction crews on site and school scheduled to begin in the fall of 2011.

II. ALLEGATIONS OF THE COMPLAINT

Plaintiffs are two individuals—Ilene Blinick and Joseph Jorgens—and one corporation—Northeast Neighbors for Responsible Growth, Inc. (“NNRG”), which apparently believes that the construction of neighborhood preschools for needy children is not responsible. Compl. ¶¶ 2-4. Plaintiffs Blinick and Jorgens claim to own property in the neighborhood where the preschool is

being built. *Id.* ¶¶ 3-4. NNRG claims that it “represents the interest of the neighbors” in that area. *Id.* ¶ 2. NNRG previously filed an unsuccessful lawsuit in this Court to stop the same preschool construction project. *See Ne. Neighbors for Responsible Growth v. District of Columbia*, No. 06-CA-685, at 1 (D.C. Super. Ct., June 6, 2006).

Defendants are the District of Columbia, Mayor Vincent Gray, DCRA and its director, and AppleTree Institute for Education Innovation, Inc. (“AppleTree”). Compl. ¶¶ 5-9. AppleTree is a non-profit corporation (*id.* ¶ 4) devoted to providing free, early language and pre-literacy education to underprivileged three- and four-year-old children in the District of Columbia. AppleTree owns property located at 138 12th Street, N.E., Washington, D.C. (the “Property”), where it has labored for more than five years to improve an existing commercial structure for use as a public charter preschool. *Id.* ¶¶ 11, 18.

Plaintiffs concede that BZA confirmed that AppleTree’s project complied fully with applicable zoning regulations on July 25, 2007 (Compl. ¶ 15), that BZA’s approval was affirmed on August 23, 2007 (*id.* ¶ 16), and that BZA issued yet another order confirming its zoning approval on December 18, 2008 (*id.* ¶ 33). Plaintiffs also concede that DCRA issued a construction permit to AppleTree, allowing it to develop the Property for its preschool, on October 26, 2007. *Id.* ¶ 32. And they concede that DCRA confirmed the validity of that permit on two occasions since: once on August 6, 2007 (*id.* ¶ 34) and again as recently as February 24, 2011 (*id.* ¶ 39).

Despite these repeated administrative approvals of AppleTree’s permit—the latest of which was issued one month ago—Plaintiffs contend that the permit has expired. Compl. ¶¶ 61, 67, 69-70, 76. They also argue that AppleTree should have issued a notice that its construction

would affect adjoining property owners (*id.* ¶ 86), although the complaint is bereft of any allegations that the construction *did* affect such property owners.

Plaintiffs seek the same relief NNRG fruitlessly sought in its previous unsuccessful lawsuit: A judicial order precluding AppleTree from completing and operating its preschool, notwithstanding the approvals of all responsible organs of the District government. Plaintiffs urge that the preschool would have a “devastating effect” on their neighborhood, increasing noise and traffic, and threatening unspecified “residents” with “economic ruin.” Compl. ¶¶ 21-22. The complaint says nothing about the financial circumstances of Plaintiffs, and it is otherwise silent about any injury that Plaintiffs would incur by sharing their street—during school hours—with disadvantaged toddlers seeking pre-literacy education so that they can grow up to be responsible and adequately educated members of our community.

Also lacking from the complaint is any attempt to justify how this redundant suit could conceivably survive dismissal based on the same grounds that compelled the dismissal of NNRG’s first suit. The complaint fails to indicate how this Court, having declared that it lacks subject-matter jurisdiction over NNRG’s administrative challenges, could somehow be vested with authority to hear the same challenges now. It pleads no allegations to demonstrate that Plaintiffs exhausted their administrative remedies any more than NNRG did previously, when its complaint was tossed out of court. And it offers no explanation how the same insufficient claims of speculative and generalized injury could now be ripe and justiciable. In fact, although this lawsuit is brought by the same law firm on behalf of one of the same parties, neither the complaint nor the multiple other filings by Plaintiffs even informs the Court of the previous lawsuit, much less tries to explain why Judge Morin’s dismissal order is not equally applicable here. That is because they had no answer to these arguments then, and they have none now.

III. ARGUMENT

“Although for the purposes of a motion to dismiss [the Court] must take all the factual allegations in the complaint as true, [it] is not bound to accept as true a legal conclusion couched as a factual allegation.” *Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (quoting *Ashcroft v. Iqbal*, 566 U.S. ___, 129 S. Ct. 1937, 1949 (2009)). The complaint at bar is fatally flawed in numerous respects.

A. The Claims Should Be Dismissed For Lack Of Subject-Matter Jurisdiction.

Plaintiffs have filed their challenge to AppleTree’s permit with the wrong tribunal. DCRA is responsible for enforcing the Construction Codes provisions governing building permits. *See* D.C. Code § 6-1405.01; *see also J.C. & Assoc. v. District of Columbia Bd. of Appeals and Rev.*, 778 A.2d 296, 301 n.4 (D.C. 2001). “[A]ny person suffering a legal wrong, or adversely affected or aggrieved” by the “issuance of a building permit” must challenge that permit initially with DCRA. 12 D.C.M.R. § 112.1. When a challenge to a permit rests on alleged violations of the Zoning Regulations, it must be presented to BZA. *See* D.C. Code § 6-641.07; 11 D.C.M.R. § 3100.2 (stating that the BZA must “hear and decide appeals . . . in the administration or enforcement of the Zoning Regulations).

If a person is dissatisfied with the decision of DCRA or BZA, he may appeal to the D.C. Court of Appeals, which “maintains exclusive jurisdiction over challenges to administrative actions.” *Fair Care Found. v. District of Columbia Dep’t of Ins. & Sec. Reg.*, 716 A.2d 987, 997 (D.C. 1998); *see also* D.C. Code § 2-510(a). “This exclusive administrative and appellate review process ‘precludes concurrent jurisdiction in the Superior Court.’” *Ne. Neighbors for Responsible Growth*, No. 06-CA-685, at 6 (quoting *Fair Care Found.*, 716 A.2d at 997).

Plaintiffs' claims rest entirely on challenges brought under the Construction Codes and Zoning Regulations, challenges that fall within the "special competence" of DCRA and BZA. *District of Columbia v. L. G. Indus.*, 758 A.2d 950, 956 (D.C. 2000). Original jurisdiction over Plaintiffs' claims thus lies with those agencies, and any appellate jurisdiction lies with the D.C. Court of Appeals. Therefore, as Judge Morin held when he dismissed NNRG's last complaint, the Court lacks subject-matter jurisdiction to hear this case. *See Ne. Neighbors for Responsible Growth*, No. 06-CA-685, at 5-7.¹

This surely can come as no surprise to Plaintiffs Jorgens and Blinick, who previously petitioned the D.C. Court of Appeals to review a ruling that BZA issued in favor of AppleTree on July 25, 2007. *See* Pet. of Joseph Jorgens III, et al., No. 07-AA-943 (D.C. Aug. 24, 2007) (Ex. C).² Jorgens and Blinick ultimately decided to move to dismiss their own appeal. *See* Mot. of Joseph Jorgens III, No. 07-AA-943 (D.C. Oct. 31, 2007) (Ex. G). AppleTree filed a response to that motion, emphasizing that "[i]f the Court grants Petitioners' motion and dismisses this appeal, Petitioners will have forfeited any opportunity to obtain judicial review of the BZA's order

¹ Although the Superior Court has a limited judicial power to grant temporary injunctive relief pending its review of a matter, it may not exercise that power with respect to permit and zoning disputes. *See District of Columbia v. Greene*, 806 A.2d 216, 219 (D.C. 2002) (*per curiam*). The power to issue temporary relief is "merely incidental" to the Court's jurisdiction to review cases "where, *in the first instance*, review would lie in the Superior Court." *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 15 (D.C. 1993) (emphasis added). Because review of agency decisions regarding building permits "lies exclusively with the Court of Appeals and not th[e] Superior] Court," the Superior Court's power to grant temporary injunctive relief cannot apply to permit and zoning disputes. *Ne. Neighbors for Responsible Growth*, No. 06-CA-685, at 6 n.1.

² This Court is "allowed to take judicial notice of matters in the general public record, including records and reports of administrative bodies and records of prior litigation, without triggering the conversion requirement" that would treat a motion to dismiss as a motion for summary judgment. *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010) (quoting *Wise v. Glickman*, 257 F. Supp. 2d 123, 130 n.5 (D.D.C. 2003)).

authorizing issuance of the permit.” Interv’r’s Res. to Pet’s’ Mot. to Dismiss, No. 07-AA-943 (D.C. Nov. 5, 2007) (Ex. H). Yet that is precisely what happened. *See* Order Dismissing Pet. for Rev., No. 07-AA-943 (D.C. Nov. 8, 2007) (Ex. I). Plaintiffs may not now seek from the wrong tribunal the recourse that they deliberately abandoned in the only correct tribunal.

B. Plaintiffs’ Failure To Exhaust Administrative Remedies Compels Dismissal.

“[N]o one is entitled to judicial relief for a supposed threatened injury until the prescribed administrative remedy has been exhausted.” *Fisher v. District of Columbia*, 803 A.2d 962, 964 (D.C. 2002) (citations omitted); *see also* *Burton v. District of Columbia*, 835 A.2d 1076, 1079 (D.C. 2003). “The basic policy of the law is that administrative remedies should be exhausted so long as the agency clearly has jurisdiction over the case and so long as resort to the agency is not obviously futile.” *Artis-Bey v. District of Columbia*, 884 A.2d 626, 636 n.17 (D.C. 2005) (quotations omitted). “The exhaustion requirement is intended to maintain proper relationships between courts and the agencies that have been given regulatory responsibility in certain specialized areas.” *Davis & Assoc. v. Williams*, 892 A.2d 1144, 1149 (D.C. 2006) (citing *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)). “Application of the doctrine affords the courts the benefit of the agency’s expertise and promotes judicial efficiency by development of the factual record before the agency, thereby at times, eliminating the need for judicial review.” *Id.*

Plaintiffs “ha[ve] failed to exhaust [their] available administrative remedies before filing this action.” *Ne. Neighbors for Responsible Growth*, No. 06-CA-685, at 10. Rather than seeking redress from DCRA or BZA, which have original jurisdiction over the permit and zoning claims raised in their complaint, *see* 12 D.C.M.R. § 112.1; 11 D.C.M.R. § 3100.2, Plaintiffs have come directly to this Court seeking an injunction that would turn the exhaustion doctrine on its head. The Court should not entertain this improper request. *See* *Genstar Stone Prods. Co. v. District of*

Columbia DOES, 777 A.2d 270, 272 (D.C. 2001) (“[T]his court will not attempt to interpret the agency’s statute until the agency itself has done so . . .”).

The Court, as Judge Morin did before, should dismiss the complaint and allow the administrative process to run its course. *Cf. Black v. District of Columbia*, No. 03-1639 (D.C. Super. Ct. Apr. 8, 2003) (denying preliminary injunction request and requiring neighbors objecting to zoning and operation of halfway house to exhaust administrative remedies).

C. The Claims Are Not Ripe.

“A claim is not ripe for judicial decision if it is predicated solely on harm that might occur in the future.” *Ne. Neighbors for Responsible Growth*, No. 06-CA-685, at 9 (citing *Metro. Baptist Church v. District of Columbia Dep’t of Consumer and Reg. Affairs*, 718 A.2d 119, 130 (D.C. 1998)); *see also Texas v. United States*, 523 U.S. 296, 300 (1998). “Ripeness is peculiarly a question of timing, and [a court] should consider whether [it] would benefit from deferring review until the question arises in some more concrete and final form.” *Metro. Baptist Church*, 718 A.2d at 131.

Plaintiffs’ claims are not ripe. Plaintiffs assert that AppleTree’s planned preschool will have some “negative impact” on the “character” of their neighborhood or that it will somehow devalue their homes. Compl. ¶¶ 10, 21-22. But AppleTree has not yet built the preschool, nor has it even applied for or received a certificate of occupancy. *See* D.C. Code § 6-641.09; 11 D.C.M.R. § 3203.1 (regarding certificates of occupancy). Students are not enrolled. Teaching activities at the Property will not commence until late in the fall. Thus, the harms Plaintiffs predict are not only ill-defined, but also contingent on a series of future events.

Plaintiffs’ claims regarding the validity of AppleTree’s permit also are premature because Plaintiffs have not yet sought or received a final agency decision on their claims. *See District Intown Properties, Ltd. v. DCRA*, 680 A.2d 1373, 1377 (D.C. 1996) (holding that a permitting

dispute was not ripe because it did not represent “a consummation of the administrative process”); *Ne. Neighbors for Responsible Growth*, No. 06-CA-685, at 9 (“The filing of this action before a final decision by the administrative agencies is manifestly premature”).

D. Plaintiffs Lack Standing.

Before adjudicating the merits of a dispute, the Court must ensure that the constitutional requirement of a “case and controversy” and the prerequisite of a party with standing exist. *See Grayson v. AT&T Corp.*, No. 07-CV-1296, ___ A.3d ___ (D.C. Jan. 20, 2011) (noting that D.C. Courts follow “Supreme Court developments in constitutional standing jurisprudence”); *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002). To establish standing, a party must demonstrate (1) that it has suffered a concrete “injury in fact” that is not conjectural or hypothetical, (2) a causal connection between the injury and the complained of defendant’s action, and (3) that the injury likely will be redressed by a favorable decision. *See Mallof v. Bd. of Elections and Ethics*, 1 A.3d 383, 394-95 (D.C. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). A party may not litigate a “generalized grievance” that is “shared in substantially equal measure by all or a large class of citizens.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Plaintiffs fail to meet their burden to allege standing because they plead nothing but generalized grievances and hypothetical injuries. *Lujan*, 504 U.S. at 560. Plaintiffs baselessly assert that “increased noise, traffic and congestion” from AppleTree’s preschool “will have a devastating effect on the residential and historical character of the neighborhood.” Compl. ¶ 21. This claim is too speculative and too generalized to plead an injury in fact. It is well-settled that individuals cannot challenge a zoning or permit decision that merely “affects what [they] see and hear out their windows” or concerns “the livability of their neighborhood.” *York Apartments Tenants Ass’n v. District of Columbia Zoning Comm’n*, 856 A.2d 1079, 1085 (D.C. 2004)

("[Plaintiffs'] close proximity to the [subject] property alone does not make every use, or change in use, of the subject property injurious to [them]."). Furthermore, Plaintiffs' speculative fears about the planned school's lack of "historical character" contrasts with the Historic Preservation Review Board's conclusion that the school's design is "consistent with the purposes of the preservation act." Historic Pres. Rev. Bd. Rep., No. 05-522, at 3 (Dec. 15, 2005) (Ex. A).³

Plaintiffs also claim that construction of AppleTree's preschool "will greatly depreciate the economic value of their homes, causing severe economic harm and threatening many with economic ruin should they go into a negative equity position on their property." Compl. ¶ 22. This hypothetical and hyperbolic claim is not an injury sufficient to establish standing. *See Friends of Tilden Park*, 806 A.2d at 1204-12. For all Plaintiffs know, AppleTree's renovation of the Property—which is now shabby and vacant—will *increase* the value of their homes. The school certainly will make the neighborhood more attractive to families, and it likely will result in a greater police presence. These factors are just as likely to improve property values as other school-associated factors are to depreciate them. Any suggestion otherwise is rank speculation.

Plaintiffs seem to claim injury as well from the failure of DCRA and BZA to enforce the Construction Codes and Zoning Regulations as they think proper. *See* Compl. ¶¶ 44-45, 49, 59. This claim is insufficient to demonstrate standing. "[A]n injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable because assertion of a right to a particular kind of Government conduct . . . cannot alone

³ The Court may take judicial notice of the records and reports of administrative bodies, like the Historic Preservation Review Board Report, when considering a motion to dismiss. *See supra* Note 2.

satisfy the [standing] requirements” *York Apartments*, 856 A.2d at 1085 (quoting *Lujan*, 504 U.S. at 575-76).

Accordingly, Plaintiffs fail to allege any concrete injury sufficient to establish standing.

E. Plaintiffs Are Barred From Re-Litigating The Issues That Disposed Of ENRG’s Prior Duplicative, Complaint.

Issue preclusion “prohibits the relitigation of factual or legal issues decided in a previous proceeding and essential to the prior judgment.” *Franco v. District of Columbia*, 3 A.3d 300, 305 (D.C. 2010). Identical issues are barred from re-litigation even if framed as different claims. *See Smith v. Jenkins*, 582 A.2d 610, 617 (D.C. 1989). Issue preclusion applies when: “(1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum.” *Franco*, 3 A.3d at 305 (quoting *Davis v. Davis*, 663 A.2d 499, 501 (D.C. 1995)).

A party is deemed a privy to a prior proceeding, and thereby bound by the judgment in that proceeding, where he or she is “so identified in interest with a party to the former litigation that he or she represents precisely the same legal right in respect to the subject matter of the case.” *Id.* (quoting *Smith*, 582 A.2d at 615). A non-party to a prior proceeding also is bound by a judgment in that proceeding where, among other things, “certain legal relationships exist between the non-party and party to the prior judgment,” or “there was representation in the prior suit by a party with the same interest,” or “the non-party assumed control over the prior litigation.” *Id.* (citing *Taylor v. Sturgell*, 553 U.S. 880, 893-95 (2008)).

Under the doctrine of issue preclusion, Plaintiffs are bound by Judge Morin’s prior determinations that (1) the Court lacks subject-matter jurisdiction, (2) Plaintiffs are required to exhaust administrative remedies, and (3) Plaintiffs’ claims are not ripe. *See Ne. Neighbors for Re-*

sponsible Growth, No. 06-CA-685, at 5-10. NNRG was the plaintiff in the prior proceeding before Judge Morin, and Plaintiffs Blinick and Jorgens, who assert precisely the same legal rights as NNRG, are in privity with it. Indeed, NNRG purports to represent the interests of Plaintiffs Blinick and Jorgens and purported to represent them before. *See id.* at 1 (“[NNRG] asserts that it represents the neighbors of 138 12th Street”); Compl. ¶ 2 (same). The issues in the prior proceeding also were litigated in a full and fair manner, and Judge Morin determined them by a valid and final judgment. *See Ne. Neighbors for Responsible Growth*, No. 06-CA-685, at 10. Plaintiffs are barred from re-litigating those same dispositive issues. Their complaint should thus be dismissed.

F. The Claims Are Time-Barred.

Even if Plaintiffs had filed their challenge with the correct tribunal, their claims would be time-barred. A person adversely affected by a DCRA decision under the Construction Codes may appeal to OAH within 15 days after receiving notice of the decision. *See* 12 D.C.M.R. § 112.1; OAH R. Pro. § 2901.5. A person aggrieved by an agency decision under the Zoning Regulations may file an appeal to BZA within 60 days from the date that person knew, or should have known, of the decision. *See* 11 D.C.M.R. § 3112.2; *Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 363-68 (D.C. 2008). A person also may appeal an agency decision to the D.C. Court of Appeals or, if permitted, to the Superior Court “within 30 days after notice is given.” D.C. Ct. App. R. 15(a)(2); D.C. Sup. Ct. Agency Review R. 1(a).

Plaintiffs allege that AppleTree’s permit lapsed on various dates. *See* Compl. ¶¶ 58-73 (suggesting AppleTree’s permit expired six months, one year, and two years after December 18, 2008). But they maintain, at the very minimum, that DCRA violated the Construction Codes and Zoning Regulations by renewing AppleTree’s permit on September 17, 2010. *See id.* ¶¶ 37, 48-49, 66-67. Assuming *arguendo* that Plaintiffs’ deadline to sue ran from this latest date, their

claims expired long before their March 2011 complaint was filed. Their claims should be dismissed as untimely.

G. Plaintiffs Fail To State A Claim For Any Violation Of The Construction Codes Or Zoning Regulations.

As a threshold matter, none of the zoning or construction regulations on which Plaintiffs rely provide a private cause of action. Counts I through III should be dismissed for that reason alone. As explained below, each of the Counts fails for a host of additional reasons.

I. AppleTree's Permit Is Valid Under 11 D.C.M.R. § 3130 (Count I).

Count I seeks declaratory relief under Section 3130 of the Zoning Regulations. *See* Compl. ¶¶ 56-61; 11 D.C.M.R. § 3130, *et. seq.* Section 3130 governs the expiration of *BZA orders*. It does not provide the expiration date of construction permits issued by DCRA, which is controlled instead by Section 105.5 of the Construction Codes. AppleTree's lengthy struggle to build its preschool has resulted in three BZA orders—none of which granted a permit to AppleTree or raises issues under Section 3130.

The first BZA order became final on July 25, 2007 (and took effect ten days later). It reversed the Zoning Administrator's decision to deny zoning approval from AppleTree. *See* Appeal of AppleTree Instit. for Educ. Innovation, Inc., No. 17532, at 10 (D.C. BZA July 25, 2007) (Ex. B). This order did not grant a permit to AppleTree; indeed, AppleTree had not yet completed the process for obtaining a permit. The sole effect of the order was to confirm AppleTree's compliance with the Zoning Regulations so that it could proceed to seek additional, unrelated approvals from DCRA. After granting those approvals, it was *DCRA* that issued AppleTree's construction permit on October 26, 2007. *See* Ex. F, Bldg. Permit.

The second BZA order became final on September 5, 2008 (and took effect on the 15th). It denied the request of NNRG and others to stay the BZA's first order pending appeal. *See* Ap-

peal of AppleTree Instit. for Educ. Innovation, Inc., No. 17532-B, at 3 (D.C. BZA Sept. 5, 2008) (Ex. K). This order did not grant a permit to AppleTree either.

The third BZA order became final on December 18, 2008 (and took effect on the 28th). It denied challenges to DCRA's issuance of the construction permit. *See* Appeal of Advisory Neighborhood Comm'n 6A, No. 17769, at 8 (D.C. BZA Dec. 18, 2008) (Compl. Ex. D). In upholding AppleTree's permit again, BZA declined to consider challenges to environmental approvals AppleTree obtained for its project. *See id.* at 2 n.1. BZA "has jurisdiction," it explained, "to consider only claims of error in the administration of [the] Zoning Regulations." *Id.* *see also id.* at 6 ("[T]he Zoning Regulations do not require environmental compliance as a prerequisite to the issuance of a building permit. Only compliance with the zoning regulations must be found." (citing 11 D.C.M.R. § 3202.1)). This third order did not grant a permit to AppleTree, and it expressly acknowledged that the permit was granted *by DCRA* based on considerations that are outside BZA's jurisdiction.

In sum, none of the BZA orders granted a permit to AppleTree. Indeed, none of them so much as mentioned the deadlines set forth in Section 3130 of the Zoning Regulations, although BZA orders routinely cite those deadlines if they apply. *See, e.g.,* Application of William Basiliko, No. 18034, at 3 (D.C. BZA Mar. 11, 2010) (showing one of hundreds of examples of the BZA stating specifically that Section 3130.3 applies to an ordered permit). Therefore, the Zoning Regulations that control the "time limits on the validity of Board Orders," 11 D.C.M.R. § 3130, are inapplicable here and do not supersede the controlling deadlines specified for construction permits in the Construction Codes. Count I fails for this reason alone.

DCRA's exercise of its discretion to confirm the validity of AppleTree's permit also forecloses Count I. The Construction Codes vest DCRA with the power to determine whether or

not to revoke permits. According to Section 105.6 of the Construction Codes, a code official is “authorized,” but not required, “to revoke a permit” that does not comply with the Construction Codes or Zoning Regulations. 12 D.C.M.R. § 105.6. DCRA has previously exercised its discretion to uphold a permit that did not comply entirely with the requirements of the Zoning Regulations. *See Basken*, 946 A.2d at 359-60 (noting that a code official refused to revoke a permit that failed to comply with the Zoning Regulations because revocation would work an injustice on the permit holder). Thus, even if Plaintiffs’ interpretation of AppleTree’s construction deadline were correct—and it is not—DCRA has statutory authority to uphold the permit nonetheless.

DCRA has explicitly upheld AppleTree’s permit here and as recently as last month. AppleTree’s opponents prompted DCRA to undertake further review of AppleTree’s permit, resulting in its revocation (for the second time) in December 2010. As Plaintiffs admit, on February 24, 2011, DCRA withdrew its revocation and confirmed for the third time that AppleTree’s permit is valid. *See* Compl. ¶ 39; Compl. Ex. I, Revocation Withdrawal. Regardless of what Plaintiffs may argue about what DCRA was *authorized* to do as a result of AppleTree’s inability to commence construction earlier, Plaintiffs do not—and cannot—deny what DCRA *decided* to do: uphold the permit. Nor can they dispute DCRA’s unambiguous statutory discretion to do just that.

2. AppleTree’s Permit Is Valid Under 12 D.C.M.R. § 105.5 (Count II).

Count II seeks declaratory relief under Section 105.5 of the Construction Codes, which provides that “[a]ny permit issued shall become invalid if the *authorized work* is not begun within one year after the permit is issued” 12 D.C.M.R. § 105.5 (emphasis added). On its face, this deadline applies only to “*authorized work*.” The section further provides that “the code official” may “grant extensions of time not to exceed six (6) months per extension,” with “[n]ot more than three (3) extensions of time” granted to any permit. *Id.* § 105.5.1. Even after a permit

has expired, it may be extended, provided that the “extension is approved in writing by the code official.” *Id.* § 105.5.2. Count II fails to state a claim for two reasons.

First, AppleTree’s permit has not lapsed under Section 105.5 because the applicable timeframes never expired while AppleTree was legally permitted to pursue “authorized work.”⁴ Although AppleTree purchased the property in mid-2005, its opponents delayed AppleTree from obtaining a construction permit until October 26, 2007. Compl. ¶ 30; Ex. F, Bldg. Permit. AppleTree’s work was “authorized” for a period of about *two weeks*, after which its opponents succeeded in persuading DCRA to revoke the permit on November 15, 2007. It was not until April 28, 2008 that DCRA withdrew its revocation and confirmed once again that the permit was valid. Compl. ¶ 34.

In the meantime, AppleTree’s opponents pursued other means of forestalling AppleTree’s authorization to commence work. Shortly before the permit was granted, Mr. Jorgens and Ms. Blinick (both Plaintiffs in this case), together with others, petitioned the D.C. Court of Appeals to review BZA’s July 25, 2007 order confirming that AppleTree satisfied the Zoning Regulations. *See* Pet. of Joseph Jorgens III, et al., No. 07-AA-943 (D.C. Aug. 24, 2007) (Ex. C). They also moved to stay the BZA’s decision to prevent AppleTree’s work. *See* Mot. of Joseph Jorgens III, et al., No. 17532 (D.C. BZA Sept. 7, 2007) (Ex. D). The D.C. Court of Appeals denied the motion to stay on September 21, 2007, *see* Order Denying Mot. To Stay, No. 07-AA-943 (D.C. Sept. 21, 2007) (Ex. E), and dismissed the appeal on November 8, 2007, *see* Order

⁴ Equitable principles firmly reinforce this regulatory policy that a property owner’s “time within which to comply with” building requirements “should be tolled” when the property owner is “prevented from satisfying the named conditions by the legal intervention of third-party adversaries.” *Cardinale v. Ottawa Reg’l Planning Comm’n*, 89 Ohio App. 3d 747, 753-54 (Ohio Ct. App. 1993); *see also Caranston v. Carpionato*, 340 A.2d 134, 137 (R.I. 1975); *Perseault v. Wheel*, 315 A.2d 244, 247-48 (Vt. 1974).

Dismissing Pet. for Rev., No. 07-AA-943 (D.C. Nov. 8, 2007) (Ex. I). The very next month, AppleTree's opponents initiated yet another challenge to the permit before BZA, arguing that DCRA erred in concluding that AppleTree's project satisfied certain environmental regulations and the same zoning regulations that BZA had just reviewed. *See* Appeal of Advisory Neighborhood Comm'n 6A at 1, No. 17769 (D.C. BZA Dec. 24, 2007) (Ex. J). That duplicative BZA action further delayed AppleTree's construction until December 18, 2008, when BZA issued an order confirming again that AppleTree satisfied all requirements within the BZA's jurisdiction. *See* Appeal of Advisory Neighborhood Comm'n 6A, No. 17769, at 8 (D.C. BZA Dec. 18, 2008) (Compl. Ex. D). That order took effect on December 28, 2008—the first date on which AppleTree was *authorized* to begin work and able to pursue needed financing.

Although its permit never expired, AppleTree sought extensions out of an abundance of caution to ensure that it would not lose the opportunity to build its preschool after years of dilatory litigation. On September 17, 2010, AppleTree obtained its most recent extension, which was approved in writing by the code official and which confirms that AppleTree is entitled to begin construction by September 17, 2011. *See* Compl. Ex. G, Permit Ext'n. Plaintiffs concede that AppleTree began construction well within that deadline. *See* Compl. ¶ 54.⁵ That admission demolishes Count II.

⁵ As a factual matter, Plaintiffs are incorrect that construction began “only within the past several days” of their complaint, which is dated March 15, 2011. Compl. ¶ 54. Even taking the allegations as true for purposes of this motion, however, AppleTree *concededly* began construction within the deadline specified on the face of its permit extension. The complaint also makes clear that AppleTree began construction within six months of receiving the extension—*i.e.*, before March 17.

Second, as explained above, DCRA exercised discretion vested in it to confirm the permit's validity. *See supra* Part III.G.1. Plaintiffs cite no basis for overturning that discretion, and they cannot. Count II fails for this independent reason.

3. BZA Has Repeatedly Confirmed AppleTree's Compliance With Applicable Zoning Regulations (Count III).

Count III seeks declaratory relief under Section 401 of the Zoning Regulations, which sets forth the minimum lot dimensions required for the replacement or enlargement of certain structures in various locations throughout the District. *See* 11 D.C.M.R. § 401.3. As explained above, BZA is the agency with primary jurisdiction for applying the Zoning Regulations. *See supra* Part III.A. And BZA has repeatedly confirmed that AppleTree complies with those regulations, including Section 401. *See* Appeal of AppleTree Instit. for Educ. Innovation, Inc., No. 17532, at 10 (D.C. BZA July 25, 2007) (Ex. B); Appeal of Advisory Neighborhood Comm'n 6A, No. 17769, at 8 (D.C. BZA Dec. 18, 2008) (Compl. Ex. D). This Court lacks jurisdiction to review those decisions and should dismiss Count III.

4. AppleTree's Construction Is Lawful And Plaintiffs Lack Statutory Standing Under D.C. Code § 6-641.09 (Counts IV and V).

Counts IV and V seek injunctive relief under Section 6-641.09 of the D.C. Code, which permits a "neighboring property owner . . . who would be specially damaged" by another party's construction to seek an injunction to prevent that construction if it is being conducted without a permit or in violation of the Zoning Regulations. D.C. Code § 6-641.09. Count IV seeks an injunction based on Plaintiffs' contention that the permit is expired (Compl. ¶ 76), and Count V relies on the contention that AppleTree failed to provide a written notice of its construction to adjoining property owners, pursuant to the notice provisions of the Construction Codes (*Id.* ¶ 86). Counts IV and V are fatally flawed for a host of reasons.

First, Plaintiffs admit that AppleTree *does* have a construction permit. *See id.* ¶ 39.

Second, the administrative agencies that are vested with the authority to determine the validity of AppleTree's permit have confirmed it repeatedly. Challenges to those decisions (assuming they are timely and satisfy all other applicable procedural requirements) may be raised to the D.C. Court of Appeals, but not this Court. *See supra* Part III.A.

Third, Plaintiffs' arguments that the permit expired are defective for all the reasons discussed above. *See supra* Parts III.G.1-2.

Fourth, Plaintiffs' contention that AppleTree failed to provide notices is both belied by the pleadings and irrelevant to Section 6-641.09. An exhibit that Plaintiffs filed in support of their motion for emergency relief includes a notice sent by AppleTree to residents living near the Property. *See* Pls. Mem. in Supp. of Mot. for Prelim. Inj. Ex. B, Declr. of Ilene Blinick. This notice, dated March 7, 2011, states that AppleTree is beginning construction at the Property but will do "no work related to party walls" until April 13, 2011. *Id.* This notice satisfied the requirements of the Construction Codes. *See* 12 D.C.M.R. § 3307.2 (requiring thirty days' notice for work involving party walls). The complaint is devoid of any allegations that support the inference that AppleTree conducted any work that affected neighboring property owners, requiring additional notices of any kind. In any event, Section 6-641.09 is limited, on its face, to claims related to the Zoning Regulations. *See* D.C. Code § 6-641.09(a) (addressing compliance with the "provisions of this subchapter [*i.e.*, "Subchapter IV. Zoning Regulations; Board of Zoning Adjustment"] and of the regulations adopted under said regulations"). It provides no private cause of action for claims related to compliance with the notice requirements of Title 12, which codifies the Construction Codes.

Fifth, Plaintiffs fail to plead, as is required under Section 6-641.09, that they are "neighboring property owner[s] . . . who would be specially damaged" by AppleTree's lawful

construction. The complaint does not so much as hint that NNRG is a “property owner.” Compl. ¶ 2. Mr. Jorgens is alleged to own property at 130th 12th Street, N.W., which is not adjacent to AppleTree’s Property. And none of the Plaintiffs have alleged that they would be “specially damaged” by the construction. They have merely asserted vague and generalized grievances that are insufficient to confer Article III standing, much less plead a special injury. *See supra* Part III.D.

IV. CONCLUSION

The complaint should be dismissed with prejudice.

Respectfully submitted

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/s/ Mark A. Perry

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